Date and Time: Wednesday, September 27, 2023 2:46:00 PM CST

Job Number: 206717966

Documents (100)

1. G. Heileman Brewing Co. v. Anheuser-Busch, Inc., 676 F. Supp. 1436

   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: Dec 01, 1984 to Dec 31, 2022

2. Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173

   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: Dec 01, 1984 to Dec 31, 2022

3. Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc., 136 A.D.2d 461

   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: Dec 01, 1984 to Dec 31, 2022

4. Ford Piano Supply Co. v. Steinway & Sons, 1988 U.S. Dist. LEXIS 523

   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: Dec 01, 1984 to Dec 31, 2022

5. Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053

   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: Dec 01, 1984 to Dec 31, 2022

6. *Anitora Travel, Inc. v. Lapian, 677 F. Supp. 209*

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: Dec 01, 1984 to Dec 31, 2022

7. *United States v. Seville Industrial Machinery Corp., 696 F. Supp. 986*

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: Dec 01, 1984 to Dec 31, 2022

8. *In re Super Premium Ice Cream Distribution Antitrust Litigation, 1988 U.S. Dist. LEXIS 7366*

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: Dec 01, 1984 to Dec 31, 2022

9. *Stead v. GTE Directories Corp., 1988 U.S. Dist. LEXIS 18323*

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: Dec 01, 1984 to Dec 31, 2022

10. *Boise Cascade Corp. v. FTC, 837 F.2d 1127*

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: Dec 01, 1984 to Dec 31, 2022

11. Cemar, Inc. v. Nissan Motor Corp., 678 F. Supp. 1091

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: Dec 01, 1984 to Dec 31, 2022

12. Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360

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: Dec 01, 1984 to Dec 31, 2022

13. McElderry v. Cathay Pacific Airways, Ltd., 678 F. Supp. 1071

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: Dec 01, 1984 to Dec 31, 2022

14. North Cent. Watt Count, Inc. v. Watt Count Engineering Systems, Inc., 678 F. Supp. 1305

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: Dec 01, 1984 to Dec 31, 2022

15. Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445

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: Dec 01, 1984 to Dec 31, 2022

16. *Chanute v. Williams Natural Gas Co., 678 F. Supp. 1517*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

17. *Federal Paper Bd. Co. v. Amata, 693 F. Supp. 1376*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

18. *Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327*

Client/Matter: -None-

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Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

19. *America West Airlines, Inc. v. Burnley, 838 F.2d 1343*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

20. *Puckett v. Cook, 1988 U.S. Dist. LEXIS 15156*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

21. *Boyd International, Ltd. v. Honeywell, Inc., 837 F.2d 1312*

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

22. *H & W Industries, Inc. v. Formosa Plastics Corp., 687 F. Supp. 271*

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: Dec 01, 1984 to Dec 31, 2022

23. *Phototron Corp. v. Eastman Kodak Co., 687 F. Supp. 1061*

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

24. *United Air Lines, Inc. v. Austin Travel Corp., 681 F. Supp. 176*

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

25. *Indiana Grocery Co. v. Super Valu Stores, Inc., 684 F. Supp. 561*

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: Dec 01, 1984 to Dec 31, 2022

26. *Boone v. Redevelopment Agency of San Jose, 841 F.2d 886*

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: Dec 01, 1984 to Dec 31, 2022

27. Jaffee v. Horton Memorial Hospital, 680 F. Supp. 125

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

28. Lancaster Community Hosp. v. Antelope Valley Hosp. Medical Center, 1988 U.S. Dist. LEXIS 12689

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: Dec 01, 1984 to Dec 31, 2022

29. United States v. Western Elec. Co., 714 F. Supp. 1

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

30. State v. Thompson, 751 P.2d 805

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

31. United States Football League v. National Football League, 842 F.2d 1335

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: Dec 01, 1984 to Dec 31, 2022

32. *Nurse Midwifery Associates v. Hibbett, 689 F. Supp. 799*

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

33. *Bobrowicz v. Chicago, 168 Ill. App. 3d 227*

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

34. *Ford Motor Co. v. Insurance Comm'r of Pennsylvania, 1988 U.S. Dist. LEXIS 2489*

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: Dec 01, 1984 to Dec 31, 2022

35. *Outlet Communications, Inc. v. King World Productions, Inc., 685 F. Supp. 1570*

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: Dec 01, 1984 to Dec 31, 2022

36. *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 1988 U.S. Dist. LEXIS 19634*

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: Dec 01, 1984 to Dec 31, 2022

37. Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

38. Burchett v. General Tel. Co. of South, 699 F. Supp. 114

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

39. Flip Side Prods. v. Jam Prods., 843 F.2d 1024

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

40. Pope v. Mississippi Real Estate Com., 695 F. Supp. 253

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

41. Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477

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: Dec 01, 1984 to Dec 31, 2022

42. Tominaga v. Shepherd, 682 F. Supp. 1489

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

43. [Vannelli v. National Collegiate Athletic Asso., 1988 Minn. App. LEXIS 361]

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

44. [Local 210, Laborers' International Union v. Labor Relations Div. Associated General Contractors, etc., 844 F.2d 69]

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

45. [Collins v. Associated Pathologists, 844 F.2d 473]

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

46. [Kelco Disposal, Inc. v. Browning-Ferris Industries of Vermont, Inc., 845 F.2d 404]

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

47. [McGlinchy v. Shell Chemical Co., 845 F.2d 802]

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

48. Redwood Theatres v. Festival Enters., 200 Cal. App. 3d 687

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

49. GWC Restaurants, Inc. v. Hawaiian Flour Mills, Inc., 691 F. Supp. 247

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: Dec 01, 1984 to Dec 31, 2022

50. In re Baker, 86 B.R. 234

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

51. Gene Cope & Associates, Inc. v. Aura Promotions, Ltd., 692 F. Supp. 724

Client/Matter: -None-

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

52. New York v. Cedar Park Concrete Corp., 684 F. Supp. 1229

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: Dec 01, 1984 to Dec 31, 2022

53. *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717*

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: Dec 01, 1984 to Dec 31, 2022

54. *Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052*

Client/Matter: -None-

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Content Type	Narrowed by
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55. *Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148*

Client/Matter: -None-

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Content Type	Narrowed by
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56. *Federal Paper Bd. Co. v. Commissioner, 90 T.C. 1011*

Client/Matter: -None-

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

57. *Seven Gables Corp. v. Sterling Recreation Organization Co., 686 F. Supp. 1418*

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: Dec 01, 1984 to Dec 31, 2022

58. *Volvo North America Corp. v. Men's International Professional Tennis Council, 687 F. Supp. 800*

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: Dec 01, 1984 to Dec 31, 2022

59. *Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832*

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: Dec 01, 1984 to Dec 31, 2022

60. *Byrd v. Salvation Army, 1988 U.S. Dist. LEXIS 5576*

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: Dec 01, 1984 to Dec 31, 2022

61. *Sorisio v. Lenox, Inc., 701 F. Supp. 950*

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: Dec 01, 1984 to Dec 31, 2022

62. *Disher v. Information Resources, Inc., 691 F. Supp. 75*

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: Dec 01, 1984 to Dec 31, 2022

63. *United States v. BNS, Inc., 848 F.2d 945*

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: Dec 01, 1984 to Dec 31, 2022

64. *Consolidated Metal Products, Inc. v. American Petroleum Institute, 846 F.2d 284*

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

65. *Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976*

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: Dec 01, 1984 to Dec 31, 2022

66. *C & W Constr. Co. v. Brotherhood of Carpenters & Joiners, Local 745, 687 F. Supp. 1453*

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

67. *Fischer v. NWA, Inc., 1988 U.S. Dist. LEXIS 12590*

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: Dec 01, 1984 to Dec 31, 2022

68. *Telerate Sys., Inc. v. Caro, 689 F. Supp. 221*

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

69. [Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492]

Client/Matter: -None-

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70. [Beer Wholesalers, Inc. v. Miller Brewing Co., 426 N.W.2d 438]

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
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71. [McLaughlin v. Liu, 849 F.2d 1205]

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

72. [R.C. Bigelow, Inc. v. Unilever N.V., 689 F. Supp. 76]

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: Dec 01, 1984 to Dec 31, 2022

73. [Christianson v. Colt Indus. Operating Corp., 486 U.S. 800]

Client/Matter: -None-

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

74. Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

75. In re Super Premium Ice Cream Distribution Antitrust Litigation, 691 F. Supp. 1262

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: Dec 01, 1984 to Dec 31, 2022

76. Health Care Equalization Committee of Iowa Chiropractic Soc. v. Iowa Medical Soc., 851 F.2d 1020

Client/Matter: -None-

Search Terms: "antitrust law"

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Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

77. Drabbant Enterprises, Inc. v. Great Atlantic & Pacific Tea Co., 688 F. Supp. 1567

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: Dec 01, 1984 to Dec 31, 2022

78. Lease Lights, Inc. v. Public Service Co., 849 F.2d 1330

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: Dec 01, 1984 to Dec 31, 2022

79. [Dreiling v. Peugeot Motors of America, Inc., 850 F.2d 1373]()

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: Dec 01, 1984 to Dec 31, 2022

80. [Gould v. Sacred Heart Hosp., 1988 U.S. Dist. LEXIS 17434]()

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: Dec 01, 1984 to Dec 31, 2022

81. [Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478]()

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: Dec 01, 1984 to Dec 31, 2022

82. [United States v. Seluk, 691 F. Supp. 525]()

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: Dec 01, 1984 to Dec 31, 2022

83. [Genetic Systems Corp. v. Abbott Laboratories, 691 F. Supp. 407]()

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: Dec 01, 1984 to Dec 31, 2022

84. *West Allis Memorial Hospital, Inc. v. Bowen, 852 F.2d 251*

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: Dec 01, 1984 to Dec 31, 2022

85. *FTC v. Illinois Cereal Mills, Inc., 691 F. Supp. 1131*

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: Dec 01, 1984 to Dec 31, 2022

86. *Corrosion Resistant Materials Co. v. Steelite, Inc., 692 F. Supp. 407*

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: Dec 01, 1984 to Dec 31, 2022

87. *Winter Hill Frozen Foods & Services, Inc. v. Haagen-Dazs Co., 691 F. Supp. 539*

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: Dec 01, 1984 to Dec 31, 2022

88. *Allen-Myland, Inc. v. International Business Machines Corp., 693 F. Supp. 262*

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: Dec 01, 1984 to Dec 31, 2022

89. *Kowalski v. Chicago Tribune Co., 854 F.2d 168*

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: Dec 01, 1984 to Dec 31, 2022

90. *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 692 F. Supp. 52*

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: Dec 01, 1984 to Dec 31, 2022

91. *New York Public Interest Research Group, Inc. v. Insurance Information Institute, 140 Misc. 2d 920*

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: Dec 01, 1984 to Dec 31, 2022

92. *Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

93. *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802*

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: Dec 01, 1984 to Dec 31, 2022

94. *Bolt v. Halifax Hosp. Medical Ctr., 851 F.2d 1273*

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: Dec 01, 1984 to Dec 31, 2022

95. *Colonial Penn Group, Inc. v. American Asso. of Retired Persons, 698 F. Supp. 69*

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: Dec 01, 1984 to Dec 31, 2022

96. *Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital System, Inc., 853 F.2d 1139*

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: Dec 01, 1984 to Dec 31, 2022

97. *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135*

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: Dec 01, 1984 to Dec 31, 2022

98. *Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Dec 01, 1984 to Dec 31, 2022

99. *Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417*

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: Dec 01, 1984 to Dec 31, 2022

100. *Williams Elec. Co. v. Honeywell, Inc., 854 F.2d 389*

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: Dec 01, 1984 to Dec 31, 2022

G. Heileman Brewing Co. v. Anheuser-Busch, Inc.

United States District Court for the Eastern District of Wisconsin

December 31, 1987, Decided ; December 31, 1987, Filed

Nos. 84-C-738, 84-C-511

Reporter

676 F. Supp. 1436 *; 1987 U.S. Dist. LEXIS 12343 **; 6 U.S.P.Q.2D (BNA) 1481 ***; 1988-1 Trade Cas. (CCH) P67,881

G. Heileman Brewing Company, Inc., Plaintiff-Counterdefendant, v. Anheuser-Busch Incorporated, Defendant-Counterclaimant; Miller Brewing Company, Plaintiff-Counterdefendant, v. Anheuser-Busch Incorporated, Defendant-Counterclaimant

Core Terms

beer, alcohol, trademark, consumers, Brewing, advertising, labels, Exhibits, unfair competition, counterclaimant's, marketing, generic, parties, secondary meaning, brand, burden of proof, brand name, competitors, Display, time of trial, infringement, monopolize, initials, register, preponderance of evidence, trademark infringement, plaintiffs', user, surveys, marks

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN1[] **Infringement Actions, Determinations**

See *15 U.S.C.S. § 1125(a)*.

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Trademark Law > Subject Matter of Trademarks > General Overview

HN2[] **Particular Subject Matter, Names**

The term "trademark" includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. *15 U.S.C.S. § 1127*.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN3[] **Infringement Actions, Determinations**

Section 43(a) of the Lanham Trademark Act, *15 U.S.C.S. § 1125(a)*, and the common law of unfair competition encompass causes of action for trademark infringement as well as a wide range of causes of action for deceitful practices involving the misuse of trademarks.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

HN4[] **Eligibility for Trademark Protection, Evidence of Secondary Meaning**

To prevail on a claim of unfair competition under § 43(a) of the Lanham Trademark Act, *15 U.S.C.S. § 1125(a)*, based on an unregistered trademark, the claimant must prove: (a.) that it was the first to adopt and use the mark in commerce; (b.) that the trademark is valid, in other words, distinctive enough to warrant protection; the trademark must be found to be arbitrary or suggestive or it may be merely descriptive, if it has developed a secondary meaning linking the product with its source in the minds of the consuming public; and (c.) that there is likelihood of confusion on the part of the consuming public.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN5[] **Infringement Actions, Determinations**

The quantum of proof necessary to establish a claim of unfair competition is a preponderance of the evidence.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

HN6[] **Infringement Actions, Determinations**

In the case of a claimant seeking relief for the alleged infringement of an unregistered mark, the burden is upon the claimant to establish its right to the exclusive use of the mark. This burden is carried by showing that the claimant has acquired the ownership of the unregistered mark by the appropriation and use of the mark in commerce prior in time to the occurrence of the use of the mark by the claimed infringer.

Trademark Law > Trademark Cancellation & Establishment > Priority > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

HN7[] **Trademark Cancellation & Establishment, Priority**

The common-law right to a trademark is based upon prior use, that is, the first use of the mark in connection with a peculiar line of business. Registration does not create the underlying right in a trademark. That right which accrues from the use of a particular name or symbol is essentially a common-law property right.

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Registration Procedures > Federal Registration

HN8[] **Registration Procedures, Federal Registration**

Refusal by the United States Patent and Trademark Office to register a mark does not preclude the owner of the mark from its right to use it.

Trademark Law > Trademark Cancellation & Establishment > Priority > General Overview

HN9[] **Trademark Cancellation & Establishment, Priority**

Common-law trademark rights are acquired on a state-by-state basis.

Trademark Law > Trademark Cancellation & Establishment > Commercial Use > General Overview

HN10[] Trademark Cancellation & Establishment, Commercial Use

When a mark is not registered, there is no presumption of the mark's validity and the claimant has the burden of proving by a preponderance of the evidence that its mark is protectible.

Trademark Law > ... > Eligibility for Trademark Protection > Distinctiveness > General Overview

Trademark Law > Subject Matter of Trademarks > Eligibility for Trademark Protection > Strength of Trademark

HN11[] Eligibility for Trademark Protection, Distinctiveness

Courts have identified four categories of trademark distinctiveness or strength. Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are: (1) generic or common descriptive, (2) merely descriptive, (3) suggestive, and (4) arbitrary or fanciful.

Trademark Law > ... > Names > Generic Names > General Overview

HN12[] Names, Generic Names

A generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species.

Trademark Law > ... > Names > Generic Names > General Overview

HN13[] Names, Generic Names

The test for whether a term is generic is whether its primary significance in the minds of the consuming public is a product category or genus rather than a product's source or producer.

Trademark Law > ... > Terms Requiring Secondary Meaning > Descriptive & Laudatory Terms > General Overview

HN14[] Terms Requiring Secondary Meaning, Descriptive & Laudatory Terms

A merely descriptive term specifically describes a characteristic, quality or ingredient of an article of trade, as, for example, its color, odor, function, dimension, or ingredients.

Trademark Law > ... > Terms Requiring Secondary Meaning > Descriptive & Laudatory Terms > General Overview

HN15[] Terms Requiring Secondary Meaning, Descriptive & Laudatory Terms

The descriptiveness of a mark, when applied to the goods involved, is to be determined from the standpoint of the average prospective purchaser.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Trademark Law > ... > Terms Requiring Secondary Meaning > Descriptive & Laudatory Terms > General Overview

HN16[] **Eligibility for Trademark Protection, Evidence of Secondary Meaning**

A mark which is merely descriptive can, by acquiring a secondary meaning, become a valid trademark.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

HN17[] **Eligibility for Trademark Protection, Evidence of Secondary Meaning**

A mark has acquired secondary meaning when it has been used so long and so exclusively by one producer with reference to its article that, in that trade and to that branch of the purchasing public, the word or phrase has come to mean that the article was the first producer's trademark.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

HN18[] **Eligibility for Trademark Protection, Evidence of Secondary Meaning**

Proof of secondary meaning entails rigorous evidentiary requirements, and the party seeking to prove secondary meaning has a heavy burden of showing that the efforts undertaken to associate the product with one source have been effective.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

HN19[] **Eligibility for Trademark Protection, Evidence of Secondary Meaning**

Secondary meaning can be proved by direct or circumstantial evidence. The variables to be considered in determining whether a mark has secondary meaning include: 1. the duration, continuity, and exclusive use of the mark; 2. the efforts made in the direction of promoting a conscious connection, in the public's mind, between the mark and a particular source of origin, including the extent of advertising and promotion and the amount of money spent thereon; 3. the volume of sales, including figures showing sales of the claimant's product or the number of people who have consumed it; 4. identification of the parties' respective markets; and 5. direct evidence of public recognition in the form of consumer testimony and consumer surveys.

Trademark Law > Subject Matter of Trademarks > Terms With Inherent Distinctiveness > Suggestive Terms

HN20[] **Terms With Inherent Distinctiveness, Suggestive Terms**

A suggestive term suggests rather than describes an ingredient or characteristic of the goods and requires the observer or listener to use imagination and perception to determine the nature of the goods. Such a term can be protected without proof of a secondary meaning.

Trademark Law > Subject Matter of Trademarks > Eligibility for Trademark Protection > Strength of Trademark

HN21[] **Eligibility for Trademark Protection, Strength of Trademark**

Arbitrary or fanciful marks are designated as strong marks. They may be coined words or words that are common in linguistic usage but which, when used with the products they represent, neither suggest nor describe any characteristic of those goods. Arbitrary or fanciful marks are entitled to protection against all users and are not vulnerable to possible attack as being merely descriptive.

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Abbreviations, Acronyms & Monograms

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

HN22[] **Particular Subject Matter, Abbreviations, Acronyms & Monograms**

Under trademark law an abbreviation, like any other unregistered mark, will only be protected if it has acquired secondary meaning.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > Trademark Cancellation & Establishment > Priority > General Overview

HN23[] **False Designation of Origin, Elements of False Designation of Origin**

If a senior user of a mark cannot demonstrate that the mark is distinctive enough to warrant protection, the senior user can still maintain a claim under § 43(a) of the Lanham Trademark Act, *15 U.S.C.S. § 1125(a)* if there is a likelihood of consumer confusion due to the failure of the junior user to identify itself adequately as the source of the product.

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN24[] **Likelihood of Confusion, Consumer Confusion**

The claimant has the burden of proving likelihood of confusion by a preponderance of the evidence.

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN25[] Likelihood of Confusion, Consumer Confusion

When a mark is recently adopted and is not registered, doubts about the likelihood of confusion are resolved against the party claiming exclusive rights to the mark.

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

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN26[] Similarity of Marks, Appearance, Meaning & Sound

Likelihood of confusion exists when consumers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark.

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN27[] Likelihood of Confusion, Consumer Confusion

Whether or not a likelihood of confusion exists must be determined from the viewpoint of the general public and without regard to any particular geographic area.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN28[] Eligibility for Trademark Protection, Evidence of Secondary Meaning

Although secondary meaning must be shown to exist at the time the second user commences using the allegedly infringing mark, there is no such limitation on proving likelihood of confusion.

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

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

Trademark Law > ... > Factors for Determining Confusion > Intent of Defendant to Confuse > General Overview

HN29[] Similarity of Marks, Appearance, Meaning & Sound

The factors to be considered in determining whether there is a likelihood of confusion are: 1. the degree of similarity between the owner's mark and the alleged infringing mark; 2. the strength of the owner's mark; 3. whether the goods are marketed through the same channels of trade and advertised through the same media; 4. the extent to which the targets of the parties' sales efforts are the same; 5. the relationship of the goods in the minds of the public because of the similarity of function; 6. the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase; 7. the intent of the defendant in adopting the mark; 8. the length of time the defendant has used the mark without evidence of actual confusion arising; 9. the evidence of actual confusion; 10. other facts suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant's market.

Trademark Law > Trademark Cancellation & Establishment > Priority > General Overview

HN30[] **Trademark Cancellation & Establishment, Priority**

Knowledge of prior use alone does not in itself constitute a showing of bad faith.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

Torts > Business Torts > General Overview

Trademark Law > Special Marks > Trade Names > Infringement Actions

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

HN31[] **Consumer Protection, Likelihood of Confusion**

One infringes a trademark if without a privilege to do so, he uses on or in connection with his goods, services or business a designation which so resembles the other's previously used mark or trade name as to be likely to (a) cause confusion, mistake or deception, or (b) cause prospective purchasers to believe that (i) the actor's goods or services are those of the other, or (ii) the actor's goods or services emanate from the same source as the other's goods or services, or (iii) the actor's goods or services are approved or sponsored by the other, or (iv) the actor's business is the business of, or is in some manner associated or connected with, the other, even though the actor does not use the designation with a purpose to deceive.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN32[] **Infringement Actions, Determinations**

A claimant can show infringement without showing that the trademark has previously been identified with a product. It is sufficient to show that the trademark was one used to identify the claimant's product and that the use of the name by another caused confusion or mistake in respect to the sponsorship of the goods.

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

Trademark Law > ... > Infringement Actions > Jurisdiction > General Overview

Trademark Law > ... > Remedies > Equitable Relief > General Overview

Trademark Law > Special Marks > Trade Names > General Overview

HN33[] **Similarity of Marks, Appearance, Meaning & Sound**

See Ill. Rev. Stat. ch. 140, § 22.

Trademark Law > ... > Eligibility for Trademark Protection > Distinctiveness > Evidence of Distinctiveness

Trademark Law > ... > Eligibility for Trademark Protection > Distinctiveness > General Overview

HN34[] **Distinctiveness, Evidence of Distinctiveness**

In determining the distinctiveness of a trademark, the court looks to whether the mark is arbitrary, the length of time the first user has employed the mark, the scope of the first user's advertising, the nature and extent of the first user's business, and the scope of the first user's reputation.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

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

HN35[] **Infringement Actions, Determinations**

In determining whether a subsequent user has diluted an alleged mark, the court should look to the similarity of the marks and the extent of the subsequent user's marketing efforts.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN36[] **Antitrust & Trade Law, Sherman Act**

Under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, no person may monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.

Antitrust & Trade Law > Sherman Act > General Overview

HN37[] **Antitrust & Trade Law, Sherman Act**

A company attempts to monopolize in violation of *15 U.S.C.S. § 2* when it engages in a course of conduct which would, if successful, accomplish monopolization, and which, though falling short, so closely approaches monopolization as to create a dangerous probability of it.

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

HN38[] **Monopolies & Monopolization, Actual Monopolization**

In order to prove an attempt to monopolize, a plaintiff must prove by a preponderance of the evidence: (1) a specific intent to achieve a monopoly in a relevant market; (2) predatory or anticompetitive conduct in furtherance of the purpose to monopolize; and (3) a dangerous probability of success in the relevant market.

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

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

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

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

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

HN39[] **Monopolies & Monopolization, Actual Monopolization**

The test to be applied in determining whether a trademark is being unlawfully used to confer a monopoly in a certain product is the same as in any other case wherein an unlawful monopoly, or attempt to monopolize, is alleged under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*. There is a violation of that provision only if the defendant's actions have led to or resulted in a dangerous probability that it will gain a monopoly over the relevant market.

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

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

HN40[] **Monopolies & Monopolization, Attempts to Monopolize**

In the context of an attempted monopoly claim, specific intent refers not to the defendant's general intent to do a particular act, but to an overall anticompetitive intent expressed through its actions to destroy competition and to build monopoly.

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

HN41[] **Monopolies & Monopolization, Attempts to Monopolize**

The specific intent element requires proof that the defendant acted with the purpose of achieving monopoly power in the relevant market. Specific intent does not merely mean intent to prevail over one's rivals; it goes beyond that to include an intent to control prices or to restrain competition unreasonably.

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

HN42[] **Monopolies & Monopolization, Attempts to Monopolize**

A manifestation of intent to triumph in the competitive market, or to exclude competition and to expand one's own business, in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish an antitrust violation.

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN43[] Actual Monopolization, Anticompetitive & Predatory Practices

To be labeled anticompetitive or predatory, the conduct involved must be such that its anticipated benefits are dependent upon its tendency to frustrate or eliminate competition and thereby enhance the defendant's long term ability to reap the benefits of monopoly power. Such conduct leads to the acquisition of monopoly power by means other than superior product or business acumen.

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

HN44[] Monopolies & Monopolization, Attempts to Monopolize

In proving whether the defendant possessed sufficient power to come dangerously close to achieving monopoly power, the plaintiffs must prove the relevant geographic and product markets within which that dangerous probability occurred.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN45[] Exemptions & Immunities, Noerr-Pennington Doctrine

The invocation of the judicial process is protected from antitrust scrutiny by the Noerr-Pennington doctrine which holds that the *U.S. Const. amend. I* immunizes from antitrust liability bona fide lobbying and litigation efforts, regardless of any anticompetitive motive behind those efforts. The Noerr-Pennington doctrine does not immunize sham lawsuits brought for the purpose of harming one's competitors, not by the result, but by the process of the litigation.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Discretionary Jurisdiction

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

HN46[] Federal Declaratory Judgments, Discretionary Jurisdiction

Declaratory relief is available at the discretion of the district court. *28 U.S.C.S. § 2201*.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN47[] **Justiciability, Case & Controversy Requirements**

The test for an actual case or controversy is an objective one. Reasonable apprehension and the other jurisdictional prerequisites must exist at the time suit is filed.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN48[] **Infringement Actions, Determinations**

See *15 U.S.C.S. § 1125(a)*.

Counsel: [1]** Laurence C. Hammond, Jr., Allan Leiser, George Whyte, Jr., Wayne Babler, Quarles & Brady, Attorneys for Plaintiff-Counterdefendant, Miller Brewing Company.

David E. Beckwith, Michael Lechter, Mark Foley, Foley & Lardner, Attorneys for Plaintiff-Counterdefendant, G. Heileman Brewing Company, Inc.

Beverly Pattishall, Pattishall, McAuliffe & Hofstetter, George Solveson, Glenn O. Starke, Andrus, Sceales, Starke & Sawall, Peter E. Moll, Howrey & Simon, Attorneys for Defendant Anheuser-Busch Incorporated.

Judges: Thomas J. Curran, United States District Judge.

Opinion by: CURRAN

Opinion

[*1483] [*1446] MEMORANDUM OF DECISION**

Thomas J. Curran, United States District Judge.

The G. Heileman Brewing Company, Inc. and the Miller Brewing Company, plaintiffs in the above-captioned consolidated cases, compete with defendant Anheuser-Busch, Inc. in the business of brewing and selling beer. Hoping to repeat Miller's success in marketing low calorie LITE beer, Anheuser-Busch developed and began to market a beer with low alcohol content which it **[*1447]** called "LA." [1] When Heileman announced plans to use the LA name on its own low alcohol beer, Anheuser-Busch demanded that it cease and desist. Shortly thereafter, Heileman, later joined by Miller, filed suit asking this court to declare that, **[**2]** by using the LA mark, they are not engaging in trademark infringement or unfair trade practices. The plaintiffs claim that Anheuser-Busch, by attempting to prevent competitors from using the LA name, has engaged in unfair trade practices and has attempted to monopolize the low alcohol beer market.

I. PRETRIAL PROCEEDINGS

Several days after filing **[**3]** its complaint, Heileman brought a motion for a temporary restraining order asking this court to enjoin all proceedings in a mirror-image lawsuit which Anheuser-Busch had filed against Heileman in the United States District Court for the Southern District of Illinois. In part, because the Illinois case was filed several hours after Heileman's action, the court granted Heileman's motion. *See* Temporary Restraining Order of April 24, 1984. Heileman then moved for a preliminary injunction, while Anheuser-Busch moved to vacate the restraining order and to dismiss the complaint. On May 12, 1984, following a hearing, the court denied Anheuser-Busch's motion, but granted Heileman preliminary relief, ordering that:

> Defendant is hereby ENJOINED from proceeding with its claims against Heileman in the United States District Court for the Southern District of Illinois and from commencing any other action involving the same claims or arising out of the same transactions or occurrences, pending final judgment, including any appeal, in this action.

Order of May 12, 1984, at 6.

After the preliminary injunction was in effect, the defendant moved for an order temporarily restraining Heileman from using **[**4]** the term "LA" in its advertising until after the issuance of a decision in a related case pending in the Eastern District of Missouri in which Anheuser-Busch was suing to enjoin another competitor, the Stroh Brewery Company, from using the LA mark. *See Anheuser-Busch, Inc. v. Stroh Brewery Company, 587 F. Supp. 330* (E.D. Mo.), *aff'd*, *750 F.2d 631 (8th Cir. 1984)*. After a hearing, this court denied the Anheuser-Busch motion on May 21, 1984. [2]

With its preliminary motions denied, Anheuser-Busch filed its answer and asserted a counterclaim for trademark infringement, **[***1484]** unfair competition and trademark dilution. The defendant also moved for a preliminary injunction preventing Heileman from using the name "LA" during the pendency of this action. This motion was held open until trial. Meanwhile, on June 4, 1984, the Miller Brewing Company filed a parallel action against Anheuser-Busch which was consolidated with **[**5]** Heileman's case for all purposes. *See* Decision and Order of August 21, 1984.

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[1] Depending upon their positions at the time, the parties to these lawsuits have used the letters "L" and "A" with or without periods. Whether or not periods are used, the name is always pronounced in two syllables, as two letters. Yet, throughout these proceedings, Anheuser-Busch has maintained that the two letters are not initials for anything. In attempting to explain why Anheuser-Busch at one time used periods after the letters, Michael Roarty, spokesperson for the Anheuser-Busch LA project, testified that:

> L period A period was simply an effort to get people to pronounce these two letters L A as opposed to La, which we were afraid that some people might misinterpret.

Transcript at 1131. *See also* Transcript at 1141, 1145-47.

For convenience, the court will use the term "LA" without periods throughout this opinion.

[2] Four days later the Missouri district court issued an order permanently enjoining Stroh from using the "LA" mark throughout the United States. *See Anheuser-Busch, Inc. v. Stroh Brewery Company, 587 F. Supp. 330* (E.D. Mo.), *aff'd*, *750 F.2d 631 (8th Cir. 1984)*.

II. CLAIMS AND ISSUES

By the time the pleadings closed, Heileman, asserting jurisdiction under *15 U.S.C. §§ 15* and *26* and *28 U.S.C. §§ 1332(a)*, *1337* and *1338*, had alleged four causes of action against Anheuser-Busch:

[*1448] *Count I*: seeking injunctive relief and a declaratory judgment of noninfringement under the trademark laws;

Count II: seeking injunctive relief and a declaratory judgment that it is not unfairly competing with Anheuser-Busch under federal law, Wisconsin statutory law, or the common law;

Count III: seeking damages, claiming that Anheuser-Busch is engaging in unfair competition under *15 U.S.C. § 1125(a)* and the common law;

Count IV: seeking treble damages, claiming that Anheuser-Busch is attempting to monopolize the low alcohol beer market in the United States in violation of *15 U.S.C. § 2*.

Based on these claims, Heileman seeks a declaration and judgment as follows:

1. Declaring:

(a) Plaintiff's use of "BLATZ L.A.", "CARLING BLACK LABEL L.A.", "OLD STYLE L.A.", "SCHMIDT L.A.", "LONE * L.A.", and "RANIER L.A." on its low alcohol beers does not infringe any rights of or **[**6]** constitute unfair competition with defendant;
(b) Plaintiff's use of the description [sic] and generic terms "low alcohol", "LA" or "L.A." is not in violation of any right of defendant;
(c) The term "L.A." is a generic and descriptive term properly denominating and describing beers, particularly those beers having a low alcohol or lesser alcoholic content than regular beer; and
(d) Plaintiff's use of the term "BLATZ L.A.", "CARLING BLACK LABEL L.A.", "OLD STYLE L.A.", "SCHMIDT L.A.", "LONE * L.A.", or "RANIER L.A." is not confusingly similar to, or in conflict with, the use of the word "L.A." and/or "LA" as asserted to be the mark(s) of defendant.

2. Ordering:

(a) In accordance with *15 U.S.C. §§ 1119* and *1056*, that defendant disclaim the descriptive and generic term "L.A." and/or "LA" as forming any part of its registration to issue on said application Serial No. 461,853 filed January 20, 1984 and Serial No. 462,371 filed January 23, 1984;
(b) That all or a portion of the trademark registration applications Serial No. 461,853 filed January 20, 1983 and Serial No. 462,371 filed January 23, 1984 be cancelled; and

(c) That defendant advise the trade that it no longer will threaten **[**7]** suit or make demands against persons using the generic and descriptive term "L.A." and/or "LA" to denominate and describe low alcohol beer, or otherwise assert purported rights to the terms "low alcohol", "LA" or "L.A." for low alcohol beer.

3. Preliminarily and permanently enjoining defendant, its officers, agents, servants, employees, representatives, successors and assigns, and all persons in active concern or participation with them, and any and all persons acting by, through or under authority from defendant, either separately or jointly, from:
(a) in any way interfering or threatening to interfere with use by plaintiff or its distributors or retailers of the generic and descriptive term "L.A." to denominate and describe low alcohol beer, particularly its beer sold in association with the labels illustrated herein as "BLATZ", "CARLING BLACK LABEL", "OLD STYLE", "SCHMIDT", "LONE *" and "RANIER" labels;
(c) interfering with plaintiff's use of the abbreviation "L.A." to describe its low alcohol beers, or from otherwise engaging in unlawful acts complained of herein.

4. Awarding to Plaintiff:

(a) any and all damages it has or will sustain by reason of defendant's aforesaid unfair **[**8]** competition;
(b) the sum of $ 500,000 as punitive damages for defendant's deliberate and willful unfair competition;

(c) the costs of this action, including reasonable attorneys' fees pursuant to 15 U.S.C. § 1117;

(d) treble the amount of damages sustained by plaintiff as the proximate result of defendant's aforesaid violations of the antitrust laws, including costs and **[*1449]** reasonable attorneys' fees incurred by plaintiff; and

(e) such other and further relief as this court may deem just and equitable. **[***1485]**

Amended Complaint [of G. Heileman Brewing Company, Inc.] at 12-15.

Miller Brewing Company's complaint raises similar claims and asks for the following relief:

(a) For a declaration that "LA," or its equivalents, as used for low alcohol beer, is an unprotectable designation, that A-B has no protectable rights therein, and that Miller is free to use the same as it sees fit.

(b) For an order permanently enjoining A-B, and any person or party in privity or concert with it, from claiming, seeking (by registration or otherwise), asserting, or attempting to enforce any rights in "LA," or its equivalents, as against Miller or its customers, or otherwise engaging in the unlawful acts complained **[**9]** of.

(c) For an award to Miller of its damages, trebled, all profits of A-B attributable to its unlawful acts, costs and attorneys' fees.

(d) For such other and further relief as this court may deem just or equitable.

Complaint [of Miller Brewing Company] at 5.

Anheuser-Busch answered both complaints and filed counterclaims against both plaintiffs. Alleging jurisdiction under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1332 and 1338, the counterclaimant asserts causes of action for trademark infringement and unfair competition, arising under 15 U.S.C. § 1125(a) and the common law, and for trademark dilution, arising under the laws of Illinois and "various other states," asking that:

1. Counterdefendant, its officers, agents, servants, employees, attorneys and all others in active concert or participation with counterdefendant, be enjoined and restrained, during the pendency of this action and permanently thereafter, from:

(a) using, in the advertising, promotion or sale of counterdefendant's beer, counterclaimant's LA trademark or any colorable imitation thereof which is likely to dilute the distinctiveness of counterclaimant's LA trademark, or counterclaimant's distinctive advertising for **[**10]** its LA beer;

(b) using, in the advertising, promotion or sale of counterdefendant's beer, counterclaimant's LA trademark or any colorable imitation thereof which is likely to be mistaken or confused with counterclaimant's LA trademark; and

(c) doing any other acts that are likely to cause confusion, mistake or deception with counterclaimant or counterclaimant's business, or that are likely to cause counterclaimant's LA trademark to lose its distinctiveness by becoming a generic designation for a type of beer, or that are likely to destroy the commercial value of counterclaimant's LA trademark or the business and good will represented and symbolized by said trademark.

2. Counterdefendant be required to deliver up for destruction, in accordance with the court's directions, all labels, signs, prints, packages, wrappers, displays and advertisements bearing the LA trademark, and all plates, molds, matrices and other means of making the same.

3. Counterdefendant be required to account for and pay to counterclaimant all profits derived by counterdefendant from its aforesaid wrongful use of LA.

4. Counterdefendant be required to pay counterclaimant any and all damages it has or will sustain **[**11]** by reason of counterdefendant's aforesaid acts.

5. Counterdefendant be required to pay to counterclaimant a sum of money sufficient to enable counterclaimant to have effective corrective advertising to overcome the dilution of counterclaimant's LA trademark and distinctive advertising in each market in which counterdefendant has used LA or has advertised that LA is a generic or descriptive term for low alcohol beer.

6. Counterdefendant be required to pay to counterclaimant punitive damages in an amount sufficient to deter counterdefendant from further unfair competition, infringement or dilution of counterclaimant's LA trademark in the future.

[*1450] 7. Counterdefendant be required to pay to counterclaimant the costs of this action, together with counterclaimant's reasonable attorneys' fees.

8. Counterclaimant have such other and further relief as this court deems just and equitable.

Answer to Amended Complaint and Amended Counterclaim at 13-15.

III. TRIAL

A trial on the merits of these two cases was heard by the court, sitting without a jury, for nine days, with the following witnesses testifying:

Mortimer Brenner: plaintiffs' expert witness; consultant to the brewing industry; **[**12]**

Michael J. Roarty: executive vice president of Anheuser-Busch, Inc.; director of marketing; spokesperson for Anheuser-Busch's LA beer;

Russell G. Cleary: president and chairman of the board of the G. Heileman Brewing Company, Inc.; **[***1486]**

John S. Isherwood: senior executive vice president of operations for the G. Heileman Brewing Company, Inc.;

John S. Pedace: executive vice president of marketing for the G. Heileman Brewing Company, Inc.;

Henry Ostberg: plaintiffs' expert witness; president of Admar Research Company, Inc.;

John A. Bunge: plaintiffs' expert witness; president of Legal Marketing Research, Inc.;

John R. Nevin: plaintiffs' expert witness; professor of business at the University of Wisconsin Graduate School of Business;

Victor F. Imbimbo, Jr.: brand manager of new products for the Miller Brewing Company;

Dennis P. Long: at the time of trial, president and chief operating officer of Anheuser-Busch, Inc.;

Arch M. Ahern: associate general counsel of Anheuser-Busch Companies, Inc.; [3]

Yoram Wind: defendant's expert witness; Lauder Professor and Professor of Marketing and Management at the Wharton School, University of Pennsylvania.

[13]** The following three witnesses did not appear at trial, but portions of their deposition testimony were read during trial:

James R. Buell, Jr.: Anheuser-Busch director of new product planning and development;

Mark C. Lamping: Anheuser-Busch product manager for LA;

David R. Wood: president of Interbrand Corporation, a company which developed brand names for Anheuser-Busch's low alcohol beer.

In addition, almost 700 exhibits were offered by the parties and, after the close of testimony, the parties designated for inclusion in the transcript several sets of interrogatory responses plus 250 pages of deposition testimony from the following additional witnesses [4] who did not appear at trial:

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[3] Anheuser-Busch Companies, Inc. is the holding company of Anheuser-Busch, Inc. *See* Transcript at 239, 1324.

[4] Some of these witnesses were not identified in the parties' final pretrial report and were not otherwise identified by the party offering the testimony. Therefore, the court was left to guess the identity of the witnesses from the portions of deposition testimony offered.

Robert A. Toledo: vice president, brand management, Miller Brewing Company;

Jon B. Reynolds: marketing services manager, G. Heileman Brewing Company, Inc.;

Donald R. O'Brien: director of advertising, G. Heileman Brewing Company, Inc.;

Thomas Godwin: director of brand development, G. Heileman Brewing Company, Inc.;

Thomas J. Myers: vice president, brand **[**14]** management, G. Heileman Brewing Company, Inc.;

James G. Martin: vice president of marketing, Ranier Brewing Company;

[*1451] *Donald S. McDonald*: vice president and senior counsel, Anheuser-Busch;

Charles W. Wirtel: head of beer planning department, Anheuser-Busch;

John F. Bruemmer: senior vice president of D'Arcy MacManus Masius, an advertising agency retained by Anheuser-Busch;

Paul J. Siemer: executive vice president of Fleishman-Hillard, Inc., a public relations firm retained by Anheuser-Busch;

Alvin L. Kacin: former chairman of D'Arcy MacManus Masius, an advertising agency retained by Anheuser-Busch;

August A. Busch III: president and chairman of Anheuser-Busch Companies, Inc.

Finally, the plaintiffs offered additional deposition excerpts which are not included in the transcript. Besides eleven witnesses already identified above, the plaintiffs' deposition witnesses include:

William ***[**15]*** *J. Morgan*: account executive for D'Arcy MacManus Masius, an advertising agency retained by Anheuser-Busch;

James L. Morice: executive vice-president of Fleishman-Hillard, Inc., a public relations firm retained by Anheuser-Busch;

James M. Palumbo: employee of D'Arcy MacManus Masius, an advertising agency retained by Anheuser-Busch;

Zanvel A. Zack: director of creative services within the merchandising department of Anheuser-Busch.

Having now considered the testimony and exhibits received at trial as well as the posttrial submissions, the court sets forth its Findings of Fact separately from its Conclusions of Law pursuant to *Federal Rule of Civil Procedure 52*.

IV. UNCONTESTED FACTS

In their final pretrial report the parties stipulated to the following facts, which the court adopts and incorporates into this decision:

1. Plaintiff G. Heileman Brewing Company, Inc. ("Heileman") is a corporation organized and existing under the laws of the **[***1487]** State of Wisconsin, having its principal place of business at 100 Harborview Plaza, LaCrosse, Wisconsin 54601.

2. Plaintiff Miller Brewing Company ("Miller") is a Wisconsin corporation with its principal place of business at 3939 West **[**16]** Highland Boulevard, Milwaukee, Wisconsin.

3. Defendant, Anheuser-Busch, Inc. ("Busch") is a corporation organized and existing under the laws of the State of Missouri, having its principal place of business at 1 Busch Place, St. Louis, Missouri 63118. Defendant is registered to do business and conducts business in Wisconsin and in the Eastern District of Wisconsin.

. . . . [5]

6. Busch, Miller and Heileman have for many years been engaged in the business of brewing, packaging, marketing, distributing and selling brewed fermented malt beverages, including beer, and are direct competitors in that business throughout the United States.

7. The Bureau of Alcohol, Tobacco and Firearms (BATF) of the U.S. Government regulates labeling of alcoholic malt beverages pursuant to 27 CFR Part 7.

8. Early in 1981, August A. Busch III ("Mr. Busch"), Busch's Chairman and Chief Executive Officer, toured various breweries in Australia, including the Tooth brewery, and learned of the success of its low alcohol beer.

9. At a meeting in September 1983, Busch's Beer Planning Group presented a Phase II New Venture Analysis recommending that Busch produce a 1.7% alcohol beer.

10. On November 21, 1983, Busch filed **[**17]** applications with BATF for approval **[*1452]** of three beer labels having the letters "L.A.", L.A.B.", "L.A.D.", respectively.

. . . . [6]

12. Busch's President and Chief Operating Officer, Dennis P. Long, and its Executive Vice President, Michael J. Roarty, were selected as spokespersons within Busch to handle media inquiries and to be available for interviews regarding its new product.

13. On February 16, 1984, Busch filed applications with BATF for approval of four beer labels having the letters "R.A.," "X.L.A.," "U.L.A., " and "N.A."

14. On March 16, 1984 Busch conducted a kickoff meeting at the Clarion Hotel in St. Louis, Missouri for those wholesalers who would be participating in the test marketing of Busch's new beer.

15. On March 29, 1984, Heileman issued a press release announcing its intent to introduce two low alcohol beers in April 1984, called "BLATZ" L.A. and "BLACK LABEL" L.A.

16. On April 18, 1984 Busch filed separate suits against The Stroh Brewery Company and Heileman for an injunction against their use of "LA" or "L.A." on beer. Earlier that same day, Heileman brought this action for, *inter alia*, a declaratory judgment that the letters "LA" were a generic description for **[**18]** a type or category of beer and inherently not protectible as a trademark.

17. On May 11, 1984, Busch conducted a teleconference via satellite originating from the Chase Hotel in St. Louis, Missouri in which Busch announced the rollout of its new product to all Busch's U.S. wholesalers and distributors.

18. Busch is the largest brewer in the United States, with annual revenues in excess of $ 5 billion. In 1983, Busch sold approximately 60.5 million barrels of beer. Miller, the second largest brewer in the U.S., sold approximately 37.7 million barrels of beer that year. Heileman sold approximately 17.5 million barrels of beer in 1983, making it the fourth largest U.S. brewer. U.S. beer sales totalled 180.5 million barrels in 1983.

19. The two names initially presented to Miller as brand names for its 1.7% alcohol beer product were SHARP's and BARKING DOG.

20. In March, 1984, Miller decided to use Sharp's LA for its 1.7% alcohol beer.

21. On August 13, 1984, Miller began marketing a 1.7% alcohol beer with LA and the "Sharp's" name in test markets in Atlanta, Georgia, Columbus, Ohio, Houston, Texas, Springfield, Illinois and San Diego, California. Presently Miller is not marketing **[**19]** Sharp's L.A. in any other markets.

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[5] In paragraphs 4 and 5 the parties attempted to stipulate to jurisdiction and venue, which are not "facts" but conclusions of law. Parties may not stipulate to conclusions of law or confer jurisdiction by consent. *See* *Kanzelberger v. Kanzelberger, 782 F.2d 774, 776-77 (7th Cir. 1986)*.

[6] Anheuser-Busch later withdrew its agreement to paragraph 11. *See* Defendant-Counterclaimant's Supplement to the Joint Pretrial Report at 2.

V. FINDINGS OF FACT

In addition to the foregoing uncontroverted facts, the following facts [7] have been established by a preponderance of the evidence or a higher burden, where applicable. **[***1488]**

A. Parties

1. Plaintiff and counterclaim defendant G. Heileman Brewing Company, Inc. is a corporation organized and existing under the laws of the State of Wisconsin. It has its principal place of business at 100 Harborview Plaza, LaCrosse, Wisconsin 54601.

2. Plaintiff and counterclaim defendant Miller Brewing Company **[**20]** is a corporation organized and existing under the laws of the State of Wisconsin. It has its principal place of business at 3939 Highland Boulevard, Milwaukee, Wisconsin.

3. Defendant and counterclaimant Anheuser-Busch, Inc. is a corporation organized and existing under the laws of the State of Missouri. It has its principal place of business at 1 Busch Place, St. Louis, Missouri 63118. The defendant is registered to do business and conducts business **[*1453]** in Wisconsin and in the Eastern District of Wisconsin.

4. For many years the parties have been engaged in the business of brewing, packaging, marketing, distributing and selling brewed fermented malt beverages, including beer, and are direct competitors in that business throughout the United States.

B. Low Alcohol Beer

5. Low alcohol beer was launched in Australia in 1979. Among the low alcohol beers sold in Australia have been Tooth LA, South Australian LA, Courage LA, and Carling LA. *See* Trial Exhibits 74, 77, 100, 101, 102, 103, 400, 401, 426, 427. *See also* Transcript at 41-43, 68, 82-85, 109-10, 240, 944-48, 959, 2132-34.

6. The United States Bureau of Alcohol, Tobacco and Firearms (BATF) regulates the labeling and advertising **[**21]** of alcoholic malt beverages pursuant to the Federal Alcohol Administration Act (FAA), *27 U.S.C. §§ 201-211*, and the regulations implementing the FAA, particularly 7 C.F.R. § 7. [8] *See* Trial Exhibit 63. *See also* Transcript at 1357-59. Beer cannot be shipped in commerce unless the BATF has approved the label. *See* Transcript at 1358.

7. The BATF has defined low alcohol beer as a beer containing less than 2.5% alcohol by volume and less than 2% alcohol by weight. *See* Trial Exhibits 63, 762. *See also* Transcript at 49-50, 103, 245, 294, 2152. Regular malt beverages contain 3.5-5.0% alcohol by volume. *See* Trial Exhibits 63, 762.

8. Low alcohol beers contain less alcohol than regular malt beverages and they can also contain fewer calories. *See* Transcript at 49-50, 102, 245, 294, 332, 412, 435, 1311, 2063, 2073-74.

9. Low alcohol beer can be produced **[**22]** in a number of ways: (1) by diluting conventional beer with water; (2) by removing the alcohol through distillation, vacuum distillation, or reverse osmosis; or (3) by following the usual brewing process using a slightly reduced bill of materials and altering the time and temperatures to reduce the amount of fermentable sugars available to the yeast to use during the fermentation part of the process, thus limiting the formation of alcohol. *See* Transcript at 411. *See also* Transcript at 48-49, 1313.

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[7] Some of these findings of fact will duplicate, at least in part, certain of the uncontroverted facts set forth above. However, the court's findings will add essential detail to the stipulations.

[8] Laws and regulations governing alcoholic beverages are more properly the subject of judicial notice. However, this information has been included among the court's findings as background information and because the court found that one or more of the parties had actual knowledge of these laws and regulations.

10. Prior to April 27, 1984, the BATF, acting pursuant to its interpretation of the FAA, would not approve beer labeling or advertising describing a product as having a low or reduced alcoholic content. *See* Transcript at 58-59, 297-99, 434, 951, 984-85, 1226-35, 1294.

11. Under the *Twenty-First Amendment to the United States Constitution*, the states may choose to adopt the FAA or they may choose to enact their own regulations of alcoholic beverages. *See* Transcript at 2154-59.

12. Prior to April 27, 1984, seventeen states did not permit advertising the alcoholic strength or weakness of beer. *See*, *e.g.*, Trial Exhibit 65. *See also* Transcript at 370, 2155-59.

13. The **[**23]** laws of some states which did not adopt the FAA allowed advertising the alcoholic weakness of beer. *See* Transcript at 984-85, 2154. Thus, in 1983, the Hudepohl Brewery marketed reduced alcohol beer under the PACE trademark in Ohio and the Christian Schmidt Brewing Company marketed a reduced alcohol beer under the BREAK trademark in Pennsylvania. *See* Transcript at 294, 369-72, 385-86, 976-92, 2134-35, 2234. *See also* Trial Exhibit 24. The labels and advertising of these two beers used the description "reduced alcohol." *See* Trial Exhibits 701, 702, 702A, 704, 704A, 705 and 706. Neither brewery used the term "LA." *See* Transcript at 372, 991. No other brewers in the United States were marketing low alcohol beer prior to December of 1983. *See* Transcript at 369-76, 427-28, 495-96, 923, 976-92, **[*1454]** 1164, 1179-80, 1191, 1308, 1329, 2060, 2117, 2132, 2135, 2161, 2233-34. **[***1489]**

C. Unfair Competition

(1) *Adoption of LA Mark*

(a) Anheuser-Busch

14. In 1981, August A. Busch III, the president and chief executive officer of Anheuser-Busch Companies, studied the production and marketing of low alcohol beer while traveling in Australia. *See* Transcript at 240-42, 2212-13.

[24]** 15. Sometime after returning from Australia, Mr. Busch directed his company to begin research and development of a low alcohol beer. [9] *See* Transcript at 126, 129, 242, 1360-63. *See also* Trial Exhibit 300.

16. In September of 1983, Anheuser-Busch engaged the Interbrand Corporation to develop and test potential names for a low alcohol beer. *See* Transcript at 140, 262, 1095.

17. On November 21, 1983, Anheuser-Busch obtained BATF approval for beer labels using the names "L.A.," "L.A.B.," and "L.A.D." *See* Trial Exhibits 44, 55, 280, 760. *See also* Transcript at 169, 993-94, 1213, 1363-65, 1475-85. There is no evidence that the BATF was aware that these labels might be used on low **[**25]** alcohol beer products. *See* Transcript at 169-70, 1343-45, 1478-84, 2216. *See also* Trial Exhibit 526.

18. On November 28, 1983, Interbrand submitted a report recommending against marketing a low alcohol beer as a line extension [10] of an existing brand. Interbrand believed that, in the long run, a line extension would weaken the parent brand, particularly if the new product was not successful. The company also pointed out that a new "breakthrough" product, which would be heavily advertised in the hope that it would become the leading seller in its category, should not be presented as an extension of an existing brand. Instead, Interbrand recommended "power branding," using a single brand name stressing the unique quality of the product. *See* Trial Exhibits 20, 113, 114. *See* Transcript at 180-81, 2148-49.

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[9] Mr. Busch testified at his deposition that he first directed the development of a low alcohol beer in the summer or fall of 1983. *See* Transcript at 242. James Buell, director of new product planning and development for Anheuser-Busch, testified that development of a low alcohol beer was underway when he joined the company in April of 1982. *See* Transcript at 126, 129. *See also* Trial Exhibit 758 (trademark search for LA dated February 24, 1981); Transcript at 1360-63, 1456.

[10] According to David Wood, president of Interbrand, a "line extension" is "the extension of an existing names [sic] into new products," e.g., BUDWEISER LA. *See* Transcript at 235-36. *See also* Transcript at 281-83, 899-902.

19. On December 20, 1983, Interbrand submitted its final brand name report and recommendations. *See* Transcript at 179, 236-37, 2169. **[**26]** *See* Trial Exhibits 12, 116, 116A. Interbrand warned Anheuser-Busch that using "LA" as a brand name would lead to problems:

> Our problem with the use of L.A. as a stand-alone brand name is that it clearly and obviously stands for low alcohol, and as such has two major problems:
>
> * it would not, in all likelihood, be protectible since it clearly and obviously stands for low alcohol, and as such is clearly an abbreviation of the generic decriptor.
>
> * Since products in the segment can all claim low alcohol, it is reasonable to assume that the category will be known as, and referred to as, the low, low alcohol or L.A. category. And since A-B will not be the only entrant there would be ample opportunity for confusion, switching, etc.

Trial Exhibit 12.

20. Based on the Interbrand research, James Buell, director of new product planning and development, issued a report recommending rejection of the line extension [11] names and recommending a corporate source approach using the name "L.A. from Anheuser-Busch." *See* Trial Exhibits 18, 18A, 18B, 87. *See also* Transcript at 144-45, 151-52.

[27]** **[*1455]** 21. Within a month, Mr. Busch decided to adopt the name "LA from Anheuser-Busch." *See* Trial Exhibits 19, 304. *See also* Transcript at 170, 203, 249-50, 993, 995-96, 1140, 2179, 2215-18.

22. On January 20, 1984, Anheuser-Busch issued a press release announcing its new product. The release stated that:

> The new product, which will be called "L.A. from Anheuser-Busch," has an alcohol content of approximately half that of regular beer. "L.A. from Anheuser-Busch" will be covered by all laws regulating the sale of alcoholic beverages, offering customers of legal drinking age a light alcohol product with the full taste of beer.

Trial Exhibit 22. *See also* Transcript at 202-04, 264, 996, 1146-47, 1236-37; Trial Exhibit 303.

23. At the outset Anheuser-Busch encountered problems planning a marketing strategy for LA because, on one hand, it was trying to use LA as an arbitrary or suggestive **[***1490]** trademark, while, on the other hand, it needed to describe the unique low alcohol characteristic of the new type of beer to consumers without running afoul of state, federal and television **[**28]** network regulations forbidding the advertising of alcoholic weakness. *See* Transcript at 1102-03, 1139, 1216-35, 2152-59. *See also* Trial Exhibits 12, 50, 51, 52, 53, 64, 65, 244, 396.

24. Anheuser-Busch retained Fleischman-Hillard, Inc., a public relations firm, to develop public awareness of LA. *See* Transcript at 156, 203, 267-68, 1183-87, 1211-12, 1237, 1239-44, 253, 254, 256, 257, 259, 262, 264, 265, 268, 271, 272, 274, 275, 336, 337, 338, 343, 355.

25. Many of the popular news media (often aided by interviews or background briefings with employees of Fleischman-Hillard or Anheuser-Busch) reported that "LA" means "low," "less," or "light" alcohol. *See, e.g.*, Trial Exhibits 194, 246, 330, 332, 333, 457, 458, 460, 462, 463, 464, 465, 466, 470, 472, 473, 474, 477, 479; Transcript at 264-74, 996-1001, 1183-87.

26. Although Anheuser-Busch executives reviewed many of these articles for accuracy, there is no evidence that Anheuser-Busch took any steps to discourage or correct this publicity equating "LA" with "low alcohol." [12] *See* Transcript at 264-74, 1084-86, 1211-13, 1237-84, 2196-2204, 2218-19.

[29]** 27. On February 16, 1984, after beginning its efforts to publicize its LA beer, Anheuser-Busch filed applications for BATF approval of labels containing the names: "X.L.A.," "U.L.A.," "R.A.," and "N.A." On February

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[11] At his deposition Buell professed not to know the meaning of the term "line extension." *See* Transcript at 181.

[12] Michael Roarty, spokesperson for the Anheuser-Busch LA project, explained that consultants "advised that to make an issue out of these things would just confuse the marketplace." Transcript at 1259. *See also* Transcript at 1141.

22, 1984, the BATF approved these names "for trademark purposes only," meaning that the initials could not be used as labels for beer. *See* Trial Exhibits 55, 298, 529. *See also* Transcript at 171-72, 1213-15, 1487-1505.

28. Anheuser-Busch, through its attorney Donald S. McDonald, made an effort to persuade the BATF to change its interpretation of the FAA to permit labels and advertising to describe beer as being low in alcoholic content. *See* Transcript at 1228, 1294-1301, 2153-54. *See also* Trial Exhibits 59, 64.

29. On March 7, 1984, the Stroh Brewery Company obtained BATF approval for two beer labels: SCHAEFER LA and OLD MILWAUKEE LA. *See* Transcript at 301. *See also* *Anheuser-Busch, Inc. v. Stroh Brewery Company, 587 F. Supp. 330, 333* (E.D. Mo.), *aff'd*., *750 F.2d 631 (8th Cir. 1984)*. Shortly thereafter, Stroh announced plans to market a low alcohol beer labeled with the LA mark. *See* Transcript at 210, 434, 2111-12.

30. On March 13, 1984, Anheuser-Busch **[**30]** filed applications for BATF approval of labels for a beer can and beer bottle bearing the LA mark. These applications were approved on March 13, 1984. *See* Trial Exhibits 296, 761.

31. On March 16, 1984, Anheuser-Busch filed an application for BATF approval of a label for draught beer bearing **[*1456]** the LA mark. This label was approved on March 21, 1984. *See* Trial Exhibit 297.

32. On April 27, 1984, the BATF issued a circular announcing that it now interpreted *27 U.S.C. § 205(e)* and *(f)* as not prohibiting the labeling and advertising of alcoholic weakness. The circular provided that:

> . . . the Bureau has determined that statements of low or reduced alcohol content when used with malt beverage products containing less than 2.5 percent alcohol by volume are not misleading. Since the alcohol content of regular malt beverages falls within the range of 3.5 to 5.0 percent alcohol by volume, malt beverage products containing less than 2.5 percent content by volume have a substantially lower alcohol content and may accurately be described as low alcohol or reduced alcohol malt beverages.

Trial Exhibits 63, 762. *See also* Transcript at 58-59, 1300-03.

33. After the BATF issued this circular, **[**31]** affected states changed their laws and regulations to allow descriptive references to low alcohol on beer labeling and advertising. By the time of trial, all the states had made these revisions. *See* Transcript at 2156-59.

(b) Heileman

34. In early 1982, Heileman (aware of the Australian experience) began to develop a low alcohol beer. *See* Transcript at 291-93, 407-10, 2036, 2229.

35. In March of 1984, Heileman decided to use brand or line extensions, *e.g.*, BLATZ LA, BLATZ II, in positioning its low alcohol beer. *See* Transcript at 281-83, 325-28, 330-33, 344-46, 356-59, 2037-39, 2076, 2114-15.

36. With knowledge of the Anheuser-Busch LA product, of the Stroh Brewery Company's announced plans to market SCHAEFER LA, and of the BATF approval of the Anheuser-Busch and Stroh labels, Heileman announced on March 29, 1984, that it would market low alcohol beers under labels using its house marks with "L.A." as a **[***1491]** category descriptor, e.g., CARLING BLACK LABEL L.A. and BLATZ L.A. *See* Transcript at 291-309, 328-38, 343, 359-79, 385-91, 425-37, 493-96, 2037-55, 2057-64, 2076-81, 2108-17, 2229. *See also* Trial Exhibits 514, 515, 521.

(c) Miller

37. In March **[**32]** of 1984, Miller began to develop a low alcohol beer. Victor Imbimbo, brand manager of new products for the Miller Brewing Company, traveled to Australia to study the low alcohol beer market there. *See* Transcript at 931-39, 2010-13, 2126, 2132-34, 2237.

38. After consultation with its advertising agency, Leo Burnett, Miller adopted a single product mark, "Sharp's," combined with "L.A." as a category descriptor, as the name for its low alcohol beer. At the time this name was

selected, Miller was aware of Anheuser-Busch's low alcohol product and of the BATF labeling decisions. *See* Transcript at 940-48, 2012-20, 2024-25, 2124-41, 2232-42. *See also* Trial Exhibit 748.

(2) *Use of LA Mark*

39. On March 16, 1984, Anheuser-Busch began continuous use of the LA mark in commerce by shipping its low alcohol beer with LA labels affixed to wholesalers. [13] *See* Transcript at 1013-18, 1158, 1454-55.

[33] [*1457]** 40. On April 2, 1984, Anheuser-Busch began retail sales of its LA beer in twelve test markets in Arizona, California, Florida, Georgia, Iowa, Nebraska, North Carolina, Ohio, Oregon, Rhode Island, Washington and Wisconsin. *See* Transcript at 207-08, 1014, 1017-18, 1027, 1205, 1229, 1454-55. *See also* Trial Exhibits 713, 714, 767 (received except for first three pages).

41. On May 21, 1984, Anheuser-Busch began shipping LA beer to retail outlets in twenty additional states: Alabama, Arkansas, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, New Jersey, New York, Oklahoma, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia and the District of Columbia. *See* Transcript at 1018, 2174. *See* Trial Exhibit 714.

42. By the time of trial, Anheuser-Busch was selling LA beer in all states except Connecticut. *See* Transcript at 1043-44. *See also* Trial Exhibit 714.

43. In April of 1984, Heileman began to use the "LA" mark on beer shipped and sold in interstate commerce. On April 19, 1984, Heileman shipped two half-barrels of BLATZ LA from Illinois to LaCrosse, Wisconsin. On April 24, 1984, cans of Heileman's low alcohol **[**34]** beer, affixed with labels bearing the mark BLATZ LA, were shipped from a brewery in Belleville, Illinois and sold to retailers in Wisconsin. *See* Transcript at 334, 363-66, 392-93, 414, 438-41, 467-68. *See also* Trial Exhibit 379.

44. In May of 1984, Heileman began selling its low alcohol beer in California. By June of 1984, [14] Heileman was selling its low alcohol beers in Illinois, Maryland, Minnesota, Montana, North Dakota and Washington. *See* Transcript at 365-66, 467-79. *See also* Trial Exhibit 379.

45. By the time of trial, Heileman was using the LA mark on beer sold throughout "most of the United States." *See* Transcript at 446, 466.

46. Miller began to use the mark Sharp's LA on beer shipped and sold in interstate commerce on August 13, 1984. *See* Transcript at 2007.

47. By the time of trial, Miller **[**35]** was selling Sharp's LA at retail outlets in five test markets: Atlanta, Georgia; Houston, Texas; Columbus, Ohio; Springfield, Illinois; and San Diego, California. *See* Transcript at 2007.

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[13] Anheuser-Busch attempted to prove that it made token use of the L.A. (with periods) mark in interstate commerce on December 5, 1983, by offering into evidence a three-page document consisting of an Anheuser-Busch invoice and two cash receipts from a dealer, Illinois Distributing Company. *See* Transcript at 1366-1434. *See also* Trial Exhibit 764 (not received). Because of lack of foundation and lack of indicia of reliability, the court refused to receive the third page of the exhibit. *See* Transcript at 1408. Moreover, substantial doubts were raised about the reliability of the other two pages. For example, the invoice described the beer shipped as containing 5% alcohol, indicating that it was not a low alcohol beer, which would contain 1.8% alcohol. Arch Ahern, associate general counsel of Anheuser-Busch Companies, Inc., testified that this misdescription was made "to shield the fact that there were any shipments of low alcohol beer being made from other employees within the company . . . ." *Id.* at 1412. *See also* Transcript at 1426-34; Trial Exhibits 765, 766 (not received) (purported records of token shipment of beer labeled with LA (without periods) mark made on January 20, 1984).

[14] Russell Cleary, chief executive officer of the G. Heileman Brewing Company, testified that he thought Heileman's LA beers were being sold in Illinois and other midwestern states in April or May of 1984. *See* Transcript at 365-66, 467-68. However, this belief was not supported by the shipping documents received in evidence. *See* Trial Exhibit 379.

48. Anheuser-Busch has met its burden of proving by a preponderance of the evidence **[***1492]** that it was the first or senior user [15] of the "LA" mark on beer sold in Wisconsin and at least thirty-one other states.

(3) *Trademark Registration Applications*

49. On January 20, 1984, Anheuser-Busch filed application No. 461853 with the federal Patent and Trademark Office to register "LA" as a trademark. *See* Trial Exhibit 315. *See also* Transcript at 1485-87, 1508.

50. On January 23, 1984, Anheuser-Busch filed application No. 462371 with the federal Patent and Trademark Office to register "L.A." as a trademark. *See* Trial Exhibits 299, 387. **[**36]** *See also* Transcript at 1506.

51. On February 9, 1984, Anheuser-Busch filed an application with the federal Patent and Trademark Office to register "L.A.B." as a trademark. *See* Trial Exhibits 49, 388. *See also* Transcript at 1507.

52. On February 9, 1984, Anheuser-Busch filed an application with the federal Patent and Trademark Office to register **[*1458]** "L.A.D." as a trademark. *See* Trial Exhibit 389. *See also* Transcript at 1507.

53. On May 11, 1984, Anheuser-Busch filed an application with the federal Patent and Trademark Office to register "LA" and an accompanying trade dress design as a trademark. *See* Trial Exhibits 319, 530. *See also* Transcript at 1510-13.

54. On May 23, 1984, the federal Patent and Trademark Office rejected the applications to register "L.A." and "LA," on the ground that the initials designated "Los Angeles." *See* Trial Exhibits 316, 318, 387. *See also* Transcript at 1508-10.

55. At the time of trial Anheuser-Busch had not succeeded in obtaining a federal trademark registration for "L.A.B.," "L.A.D.," "L.A.," or "LA". Anheuser-Busch had not withdrawn any of the applications which had not yet been rejected by the Patent and Trademark Office. **[**37]** *See* Transcript at 1514.

56. There is no evidence in the record that Heileman attempted to obtain federal trademark registration for "L.A." or "LA."

57. There is no evidence in the record that Miller attempted to obtain federal trademark registration for "L.A.," "LA," or "Sharp's LA."

(4) *Strength of Mark*

58. Before Anheuser-Busch began to market its low alcohol beer in interstate commerce in 1984, this type of beer was not being produced or sold in the United States except in two local markets. *See* Transcript at 369-76, 427-28, 495-96, 923, 976-92, 1164, 1179-80, 1191, 1308, 1329, 2060, 2117, 2132, 2135, 2161, 2233-34.

59. Due to BATF policy in effect prior to April 27, 1984, consumers in most states had not been exposed to beer advertising or labels describing the alcoholic weakness of beer. *See* Transcript at 58-59, 297-99, 434, 984-85, 1226-35.

60. Prior to April of 1984, beer consumers used no generic or common descriptive name for low alcohol beer -- a product that did not exist, except in two local markets. *See* Transcript at 427-28, 488, 923, 1308-09, 1603, 1609-12, 1628-29, 2060-62, 2078-80, 2132, 2218. *See also* Trial Exhibits 773, 774.

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[15] As terms of art in the field of trademark law, "senior user" denotes "the first seller to adopt and use a mark in the United States," and "junior user" denotes "the second seller to adopt the mark, even though the junior user may be the first in time within a given remote territory." 1 J. McCarthy, *Trademarks and Unfair Competition* § 26:1 at 204 (1973).

61. Anheuser-Busch **[**38]** has met its burden of proving by a preponderance of the evidence that LA was not a generic name for a type of beer when it began to market LA; when its competitors Heileman and Miller began to market their low alcohol beers; or by the time of trial. *See* Transcript at 1515-1874. *See also* Trial Exhibits 773, 774.

62. Anheuser-Busch copied the name "LA" from Australian beers such as Tooth LA. *See* Transcript at 2214-15, 2217. In Australia, the name "LA" is used to signify low or light alcohol beers. *See* Transcript at 51-54, 68, 109-16, 240-42, 944-48, 959, 2212-13. *See also* Trial Exhibits 74, 77, 100, 101, 102, 103, 400, 401, 426, 427.

63. After adopting and using the LA mark, Anheuser-Busch made superficial efforts to avoid genericizing the name LA and to use the name LA as a trademark. *See* Transcript at 158, 1027, 1224, 1244, 2223.

64. Although Anheuser-Busch personnel equated "LA" with low alcohol in communiques within the company and in some advertising and point-of-sale materials, it later attempted to disclaim the initialism by removing the periods from the letters; by testifying that the letters have no meaning; by changing its advertising message from "low **[**39]** alcohol" to "half the alcohol"; and by trying to promote the term "reduced alcohol" as the category descriptor for the new beer. *See* Transcript at 64, 100, 158-65, 169-70, 236-39, 247, 491-502, 1072, 1089-91, 1096-98, 1110, 1116-17, 1131-33, 1141, 1161, 1183-89, 1191-96, 1198-99, 1202-03, 1213-15, 1236-44, 1283, 1287-88, 1293, 1306-09, 2165, 2218-21, 2224. *See also* Trial Exhibits 10, 12, 39, 43, 50, 52, 53, 73, 76, 156, 243, **[***1493]** 278, 301, 396, 397, 398, 442A, 442B, 442C, 442D, 521, 523, 723.

65. Anheuser-Busch was motivated to deny that "L" and "A" are initials for low alcohol because of BATF interpretation of advertising and labeling regulations prior to April 27, 1984, and because it was attempting to protect "LA" as a trademark. **[*1459]** *See* Transcript at 1166-67, 1213-15, 1226-35, 2216, 2223.

66. When introducing its new beer to consumers, Anheuser-Busch engaged in a publicity campaign in which it tacitly encouraged public relations and advertising agencies it had retained as well as media reporters and others unconnected with the company to describe LA to consumers as low, less or light in alcohol. *See* Transcript at 264-74 (and exhibits received therein), 432-33, 888-93 (and **[**40]** exhibits received therein), 1071-73 (and exhibits received therein), 1084-86, 1089-91, 1149-55, 1184, 1233-84 (and exhibits received therein), 2191, 2196-2204, 2206-07, 2218-19. *See also* Trial Exhibits 194, 278, 333, 456, 459, 463, 523.

67. Ordinary consumers, as well as secondary sources such as the news media, who have been exposed to LA beer in the context of its trade dress, packaging and advertising, perceive the initials "L" "A" as descriptive of beer containing low, light or less alcohol than regular beer. *See* Transcript at 334, 530-31, 673-74, 703-04, 708-12, 924, 1170-72, 1685, 2063, 2078, 2228, 2235, 2243. *See also* Trial Exhibits 194, 333, 435, 436, 456, 459, 463, 774.

68. Based on the evidence adduced at trial and having evaluated the credibility of the witnesses, the court finds that Anheuser-Busch's contention that the letters "L" "A" have no direct meaning when used in association with beer is not credible.

69. Regardless of whether the name LA is written with or without periods, it is pronounced as the initials "L" and "A". These initials directly denote the words "low alcohol" (or synonyms such as "less alcohol" or "light in alcohol") which describe the **[**41]** unique characteristic that distinguishes the beer at issue from other beers.

70. Because the "LA" mark conveys to the relevant public an immediate idea of the unique, low alcohol characteristic of the beer to which it is affixed, the court finds that "LA" is not an arbitrary or suggestive name as applied to beer.

71. "LA," the initials for words which describe the alcoholic weakness of beer, is a merely descriptive term for beer.

72. The court finds that Anheuser-Busch has failed to meet its heavy burden of proving that, by the time Heileman and Miller began to use the LA mark, it had used the LA name so long and so extensively in the same markets that significant numbers of consumers believed that the LA product emanated from a single source. In other words, based on the following subsidiary findings, the court finds that Anheuser-Busch has failed to prove that its merely descriptive LA mark had acquired secondary meaning at any time relevant to these actions:

(a) Anheuser-Busch had been continuously and exclusively [16] using the LA mark for beer for approximately one month when Heileman began to use the LA mark. *See* Transcript at 207-08, 334, 365, 392, 440-41, 467, 1014, 1017-18, **[**42]** 1027, 1229, 1454-55. *See also* Trial Exhibits 379, 713, 714, 767.

(b) Anheuser-Busch had been continuously, but not exclusively, using the LA mark on beer sold in commerce for approximately four and one-half months when Miller began to use the LA mark. *See* Transcript at 207-08, 1014, 1017-18, 1027, 1229, 1454-55, 2007. *See also* Trial Exhibits 713, 714, 767.

(c) Anheuser-Busch extensively advertised and publicized its LA beer in all media covering national, regional and local markets. Through August of 1984, Anheuser-Busch spent approximately $ 17,000,000.00 advertising its LA beer. In addition, Anheuser-Busch had committed $ 9,500,000.00 for permanent and paper point of sale materials. *See* Transcript at 1019-22, 1026-51, 1086-91. *See also* Trial Exhibits 723, 724, 725, 728, 729, 730, 733.

(d) By the time of trial Heileman had spent approximately **[**43]** $ 1,650,000.00 advertising its LA beers, plus an additional **[*1460]** $ 80,000.00 for point-of-sale displays. *See* Transcript at 444, 460-65, 2068. *See also* Trial Exhibit 399.

(e) By the time of trial Miller had spent approximately one and one half million dollars developing a market for its low alcohol beer. *See* Transcript at 950, 2006-10.

(f) At the time of trial Anheuser-Busch had sold approximately 200,000 barrels of its LA beer. One barrel is equivalent to 13,777 cases of twenty-four units of 12-ounce beers. **[***1494]** Through August of 1984, Anheuser-Busch's sales of LA grossed approximately $ 20,000,000.00. *See* Transcript at 1051-52. *See also* Trial Exhibit 714.

(g) At the time of trial Heileman had sold approximately 60,000 barrels of its LA beers. *See* Transcript at 2068.

(h) At the time of trial Anheuser-Busch was marketing its LA beer in all states except Connecticut. *See* Transcript at 1043-44. Heileman was marketing its LA beers under seven house marks in "most" states. *See Id*. at 446, 466. And Miller was marketing its Sharp's LA in five test markets in Georgia, Texas, Ohio, Illinois and California. *See Id*. at 2007. Within these markets the LA beers are all **[**44]** sold through the same channels. *See Id*. at 95, 342, 486, 1315.

(i) A majority of consumers who have been introduced to the LA mark on beer in the context of its trade dress, packaging and advertising recognize that LA describes the beer as containing low, light, or less alcohol. *See* Transcript at 334, 530-31, 673-74, 703-04, 708-12, 924, 1171, 1685, 2063, 2078, 2228, 2235, 2243. *See* Trial Exhibits 435, 436, 774.

73. Anheuser-Busch has failed to meet its burden of proving by a preponderance of the evidence that LA, as applied to beer, is a valid, legally protectible common-law trademark.

74. The court finds that "LA" is a merely descriptive mark for beer which had not acquired secondary meaning by the time Heileman or Miller began to use the mark on beer.

(5) *Likelihood of Confusion*

75. Based on the following factors, the court finds that there is no significant likelihood that consumers will confuse "LA" from Anheuser-Busch with the LA beers sold by Heileman and Miller:

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[16] Anheuser-Busch's use was exclusive with the exception of Stroh's use of the mark on SHAEFER LA which was briefly marketed in one town in Texas. *See* Transcript at 496, 2112. *See also* *Anheuser-Busch, Inc. v. Stroh Brewery Company, 587 F. Supp. 330, 338* (E.D. Mo.), *aff'd*, *750 F.2d 631 (8th Cir. 1984)*.

(a) The LA marks used by Anheuser-Busch, Heileman and Miller are virtually identical on the levels of sight, sound and meaning. The only differences are the type fonts of the initials and the use of **[**45]** periods by Heileman. *See, e.g.*, Trial Exhibits 210, 407, 410, 413, 416, 419, 422, 428, 429, 707, 708. *See also* Transcript at 1141.

(b) Heileman prominently displays its established house marks with L.A. as a category descriptor on all its low alcohol beers. *See* Trial Exhibits 407, 410, 413, 416, 419, 422. *See also* Transcript at 331.

(c) Miller prominently displays the single brand name "Sharp's" with LA as a category descriptor on its low alcohol beer. *See* Trial Exhibits 428, 429.

(d) Anheuser-Busch displays the corporate source designating phrase "from Anheuser-Busch" on its LA beer. *See* Trial Exhibits 210, 707.

(e) "LA" is a weak mark in that the court has found that it is merely descriptive and has not acquired secondary meaning.

(f) The LA beers of Anheuser-Busch, Heileman and Miller are marketed through the same channels of trade; advertised through the same media; compete for the same customers; and fulfill the same function. *See* Transcript at 61, 94-99, 103-04, 342, 420-22, 442-43, 484-86, 723-25, 728-30, 1311-19, 2084-85, 2116.

(g) Anheuser-Busch, Heileman and Miller positioned their LA beers in the premium price category. *See* Transcript at **[**46]** 96-98, 485, 1148, 1311, 1329.

(h) While beer is a low priced item, consumers use some degree of care and attention when making a beer purchase because of brand loyalty. *See* Transcript at 903, 1203.

[*1461] (i) Although Heileman and Miller adopted the name LA only after they learned that Anheuser-Busch had adopted the name and only after they learned that Anheuser-Busch had received BATF approval for its "L.A." label, Heileman and Miller did not copy the LA mark with the intent to deceive the public into falsely believing that their LA beers emanate from Anheuser-Busch. They adopted and used the LA mark to convey the purpose and unique, low alcohol characteristic of their beers. *See* Transcript at 325-33, 345-48, 433-37, 446-48, 2131, 2138-40, 2236, 2246.

(j) Anheuser-Busch produced no evidence of actual confusion among consumers after Heileman began to use the LA mark in April of 1984, or after Miller began to use the mark in August of 1984. *Cf*. Transcript at 346-48, 446, 904-09.

(k) Survey evidence indicates that fewer than five percent of consumers are likely to be confused about the source of the parties' LA beers. *See* Transcript at 717-34. *See also* Trial Exhibit 440.

(6) **[**47]** *Liability*

76. Anheuser-Busch Incorporated has not met its burden of proving by a preponderance of the evidence that the G. Heileman Brewing Company, Inc., by using the LA mark, has engaged in trademark infringement or any other acts of unfair competition.

77. Anheuser-Busch Incorporated has not met its burden of proving by a preponderance of the evidence that the Miller Brewing Company, by using the LA mark, has engaged **[***1495]** in trademark infringement or any other acts of unfair competition.

D. Trademark Dilution

78. As among the parties, Anheuser-Busch was the first to adopt and use the LA mark on beer sold in commerce in Illinois. *See* Trial Exhibits 379, 714. *See also* Transcript at 365-66, 467-79, 2007.

79. Based on the following factors, the court finds that the LA mark used by Anheuser-Busch on beer is not distinctive:

(a) The LA mark is not arbitrary. The court has found that LA is a merely descriptive mark which had not acquired secondary meaning in Illinois or any other state by the time the plaintiffs began to use it.

(b) Anheuser-Busch began to use the LA mark in Illinois in May of 1984, followed by Heileman in June of 1984, and by Miller in August of 1984. *See* **[**48]** Trial Exhibits 379, 714. *See also* Transcript at 365-66, 467-79, 2007.

(c) By the time of trial, Anheuser-Busch had spent approximately $ 27,000,000.00 advertising its LA beer. *See* Transcript at 1019-22, 1026-51, 1086-91. *See also* Trial Exhibits 723, 724, 725, 728, 729, 730, 733. However, there is no evidence showing what share of this advertising was directed toward Illinois.

(d) Anheuser-Busch, Heileman and Miller are all major brewers with national reputations.

80. The LA marks used by Heileman and Miller are virtually identical to the LA mark used by Anheuser-Busch. In addition, Heileman and Miller each spent over one and one half million dollars advertising their LA beers in states including Illinois. *See* Transcript at 444, 460-65, 950, 2006-10, 2068. *See also* Trial Exhibit 399. Nevertheless, LA is a weak mark, incapable of being diluted.

81. Anheuser-Busch, Heileman and Miller are competitors and their LA beers are directly competing products. *See* Transcript at 1203, 1313-18, 1327, 2032, 2086. The court has found that, by using the LA mark, Heileman and Miller did not engage in trademark infringement or unfair competition.

82. Anheuser-Busch Incorporated **[**49]** has not met its burden of proving by a preponderance of the evidence that the G. Heileman Brewing Company, Inc. diluted the LA mark used by Anheuser-Busch.

83. Anheuser-Busch Incorporated has not met its burden of proving by a preponderance of the evidence that the Miller Brewing Company diluted the LA mark used by Anheuser-Busch.

[*1462] E. Attempt to Monopolize

(1) *Elements of Claim*

SPECIFIC INTENT:

84. Although Anheuser-Busch personnel frequently spoke of plans to "preempt" the LA beer market, [17] the court finds that Heileman and Miller have failed to prove by a preponderance of the evidence that Anheuser-Busch had specific intent to control prices or to restrain competition unreasonably.

ANTICOMPETITIVE OR PREDATORY CONDUCT:

85. On April 2, 1984, Anheuser-Busch sent Heileman a letter stating **[**50]** that:

> The March 30, 1984 edition of THE WALL STREET JOURNAL reported an announcement by G. Heileman Brewing Company that in April it will begin producing two low-alcohol beers, to be marketed as Blatz L.A. and Black Label L.A.
>
> In 1983, our subsidiary, Anheuser-Busch, Inc., adopted and used, and is continuing to use, LA as its trademark for its new brand of beer.
>
> We therefore request that the G. Heileman Brewing Company refrain from any future use of LA in connection with any of its products.

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[17] *See e.g.*, Transcript at 168, 179, 1097, 1105-06, 1112-13, 1133, 1138, 1165, 1169, 1177-78, 1182, 1187-88, 1193, 1195, 1199, 1319-22, 1333, 1339, 2175, 2187, 2201-02, 2221-23. The court regards these preemption statements as little more than sales promotion bluster, even though Heileman and Miller attempted to endow them with a sinister connotation throughout the trial.

> Please know that if you fail to comply strictly with this request, we will take all legal steps necessary to protect our rights in the name of our new brand of beer.

Complaint [of G. Heileman Brewing Company, Inc.] at Exhibit J. *See also* Transcript at 2116-17.

86. Heileman filed the instant complaint against Anheuser-Busch at 10:26 A.M. on April 18, 1984, according to the file stamp on the complaint. [18] Later that same day Anheuser-Busch filed a mirror-image lawsuit against Heileman in the United States **[***1496]** District Court for the Southern District of Illinois. *See* Affidavit of Peggy L. Jones (April 26, 1984).

[51]** 87. Anheuser-Busch filed a counterclaim for trademark infringement against Heileman on May 24, 1984. *See* Answer and Counterclaim [of Anheuser-Busch Incorporated].

88. Anheuser-Busch made no oral or written demand to Miller to cease and desist or refrain from using or making plans to use the LA mark prior to the time Miller filed its lawsuit against Anheuser-Busch. *See* Transcript at 2029.

89. Anheuser-Busch filed a counterclaim for trademark infringement against Miller on August 24, 1984, after Miller had begun to use the LA mark on beer sold in commerce on August 13, 1984. *See* Answer and Counterclaim [of Anheuser-Busch Incorporated]. *See also* Transcript at 2007.

90. On April 18, 1984, Anheuser-Busch filed a trademark infringement action against another competitor, the Stroh Brewery Company, which had announced plans to use the LA mark. After finding that the LA mark was suggestive and deserving of trademark protection, the United States District Court for the Eastern District of Missouri enjoined Stroh from using the LA mark in the United States and its territories and possessions. *See* Transcript at 368, 1057, 1305-06. *See also* *Anheuser-Busch, Inc. v. Stroh* ***[**52]*** *Brewery Company, 587 F. Supp. 330* (E.D. Mo.), *aff'd*, *750 F.2d 631 (8th Cir. 1984)*.

91. Based on Anheuser-Busch's vigorous prosecution of its case against Stroh and of its counterclaims in the instant lawsuits, the court finds that Anheuser-Busch was primarily motivated by a desire to obtain court-ordered relief rather than by a desire to achieve anticompetitive goals merely through the filing and maintenance of lawsuits. *See* Transcript at 1306.

[*1463] 92. Heileman and Miller have failed to prove by clear and convincing evidence, or even by a preponderance of the evidence, that Anheuser-Busch made its cease and desist demand to Heileman in bad faith or that it engaged in any sham litigation over the LA mark.

93. Heileman and Miller have failed to prove by a preponderance of the evidence that Anheuser-Busch, by attempting to register LA as a trademark [19] or by using judicial process, engaged in anticompetitive or predatory conduct.

DANGEROUS PROBABILITY OF SUCCESS:

94. The court finds that the United States is the geographic market relevant to the plaintiffs' attempt to monopolize claims because, at the time of trial, **[**53]** Anheuser-Busch was distributing its LA beer in all states except Connecticut; Heileman was distributing its regional LA beers in most states; and Miller was planning to distribute its Sharp's LA nationally. Therefore, the United States is the market area in which the seller operates and purchasers can practicably turn to competitors for supplies. *See* Transcript at 88-89, 446, 1043. *See also* Trial Exhibits 379, 714.

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[18] The court notes that Heileman's Certificate of Interest and other forms usually filed simultaneously with the Complaint were filed at 4:12 P.M. on April 18, 1984.

[19] *See* Findings of Fact in Part III(C)(3), above.

95. Based upon the following factors, the court finds that Heileman and Miller have not met their burden of establishing the existence of a relevant product submarket in low alcohol beer:

(a) Although there is some evidence that the beer industry recognized low alcohol beer as a distinct economic subcategory or segment, *see, e.g.*, Transcript at 884, 2226, no consumer submarket in low alcohol beer had been established at the time of trial. A preponderance of the evidence shows that low alcohol beer was, at best, an emerging segment. *See* Transcript at 156-57, 280, 500, 881, 883-84, 1098-99, 1137, 1164, 1169, 1179-83, 1191-92, 1201, 1328, 1329, 1332, 1346, 2132, 2161-63, 2174-75, 2178, 2199-2202, 2221. *See also* Trial Exhibit 205.

(b) The production facilities, **[**54]** customers, pricing structure, and channels of distribution are the same for low alcohol beer as for many other types of beer. *See* Transcript at 61, 94-96, 103-04, 342, 420-22, 442-43, 484-86, 723-25, 728-30, 733, 1311-19, 2084-85, 2116. *See also* Trial Exhibit 835.

(c) Other beverages, which contain less alcohol than regular beer or no alcohol, are close substitutes for low alcohol beer. *See* Transcript at 99, 2034-35, 2117-20.

(d) Light beer [20] is reasonably interchangeable with LA beer. Light and LA are both sold at premium retail prices. *See* Transcript at 1311, 1329. Both products are intended to be used to reduce or moderate unwanted effects of drinking regular beer. **[***1497]** *See* Transcript at 293-94, 999-1001, 1111, 1157. Most, if not all, light beers contain less alcohol than regular beers, even though they may not contain as little alcohol as low alcohol beers. Most low alcohol beers contain fewer calories than regular beers. *See* Transcript at 50-51, 102, 245, 297, 411-12, 435, 533-34, 1329-30, 2063-69, 2073-74, 2122, 2152, 2178, 2193, 2228. *But see* Transcript at 297, 883. **[**55]**

(e) Low alcohol beer is not so unique or dominant in the market that there is no practical substitute for it. *See* Transcript at 99, 1318, 2034-35.

96. Based on the findings numbered 95(a)-(e) above, the court finds that, at a minimum, the relevant product market consists of all beers containing less alcohol than regular beer.

97. Based on the following factors, the court finds that it was not possible for Anheuser-Busch to achieve the monopoly power to control prices or exclude competition from the relevant market at the time **[*1464]** the alleged anticompetitive events occurred:

(a) At the time of trial Anheuser-Busch had sold approximately 200,000 barrels of LA beer, while Heileman has sold approximately 60,000 barrels of its L.A. beers. *See* Transcript at 1051-52, 2068. No sales figures were presented for Miller's low alcohol beer sales, however Miller had captured a 52-55% share of the light beer market. *See* Transcript at 2210. *See also* Transcript at 60, 286, 438. At the time of trial light beer sales comprised twenty percent of the total beer market. *See* Transcript at 286, 2199. Low alcohol beer sales were estimated to comprise less than one percent of total beer sales. **[**56]** *See* Transcript at 2199. Other competitors were selling beer with less alcohol than regular beer, but the record contains no evidence of their actual numbers or market shares. *See* Transcript at 380-85, 890-91, 1056-58. *See also* Trial Exhibits 734, 735.
(b) The record contains no evidence of Anheuser-Busch's capacity to control prices.
(c) Although the Stroh Brewing Company was enjoined from using the LA mark, there is no evidence that Stroh or any other competitor was excluded from the relevant market or from selling beer with a low alcoholic content.

(2) *Liability*

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[20] Light beer is a low calorie beer. *See* Transcript at 50-51, 157, 423. Light beer is a recognized segment of the beer industry among consumers. *See* Transcript at 51, 279, 435, 882, 1164. Heileman and Anheuser-Busch positioned their LA beers to compete with Miller LITE. *See* Transcript at 244-45, 2064-65, 2075, 2089-92, 2193. *See also* Trial Exhibit 301.

98. The G. Heileman Brewing Company, Inc. has not met its burden of proving by a preponderance of the evidence that it suffered an antitrust injury stemming from any predatory or anticompetitive conduct of Anheuser-Busch Incorporated or that Anheuser-Busch attempted to monopolize any relevant market of the beer industry by attempting to register trademarks or by filing or threatening to file lawsuits asserting trademark rights in the name "LA."

99. The Miller Brewing Company has not met its burden of proving by a preponderance of the evidence that it suffered an antitrust injury stemming from any predatory **[**57]** or anticompetitive conduct of Anheuser-Busch Incorporated or that Anheuser-Busch attempted to monopolize any relevant market of the beer industry by attempting to register trademarks or by filing or threatening to file lawsuits asserting rights in the name "LA."

F. Attorney Fees

100. Although Heileman and Miller have prevailed on their claims for declaratory relief, they have failed to meet their burden of proving by clear and convincing evidence or by a preponderance of the evidence that these cases involve exceptional circumstances. Anheuser-Busch has not engaged in misconduct during the course of these lawsuits, or fraud, or vexatious or frivolous litigation.

VI. CONCLUSIONS OF LAW

A. Jurisdiction

1. This court has diversity jurisdiction over the state statutory claims and the common-law claims in these consolidated cases in that the plaintiffs and the defendant are citizens of different states and the amounts in controversy are more than $ 10,000.00. *See* *28 U.S.C. § 1332(a)* & *(c)*.

2. The court has personal jurisdiction over the parties to these actions in that they have been served pursuant to Wisconsin law, have appeared, and have submitted to the jurisdiction **[**58]** of this court. *See* *U.S. Const. amends. V* & *XIV*; *Wis. Stat. § 801.05* (1985-1986).

3. This court has jurisdiction over the claims and counterclaims for unfair competition (including trademark infringement) arising under *15 U.S.C. § 1125(a)* and the common law. *See* *15 U.S.C.A. § 1121 (West Supp. 1987)*; *28 U.S.C. § 1332(a)* & *(c)*.

4. Because Heileman and Miller have established that they compete with Anheuser-Busch in the sale of beer and that, at the time they filed their complaints, they were likely to use the challenged LA mark, they have standing to raise their unfair competition claims under section 43 (a) of the Lanham Trademark Act, *15 U.S.C. § 1125(a)*, under **[***1498]** the test set forth in *Chromium Industries, Inc. v. Mirror Polishing* ***[*1465]*** *& Plating Company, Inc., 448 F. Supp. 544, 555 (N.D. Ill. 1978)*. *See also* *Exxon Corporation v. Humble Exploration Company, Inc., 695 F.2d 96, 103 n.10 (5th Cir. 1983)*; *Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186, 189 (2d Cir. 1980)*.

5. Because none of the parties have perfected federal registration of the LA mark, the parties do not have standing to seek relief under *sections 1111*, *1114*, *1116*, *1117*, *1118*, *1119* or *1120* of the Federal **[**59]** Trademark Act of 1946, as amended, *15 U.S.C. §§ 1051-1127*. [21]

6. The court has jurisdiction over the plaintiffs' claims for relief for violations of *section 2* of the Sherman Act, *15 U.S.C. § 2*. *See* *15 U.S.C. §§ 15* & *26*; *28 U.S.C. § 1337*.

B. UNFAIR COMPETITION

[21] The Federal Trademark Act of 1946 is popularly known as the Lanham Trademark Act. This is the name which will be used throughout this opinion.

7. Section 43 (a) of the Lanham Trademark Act, *15 U.S.C. § 1125(a)*, forbids the use of false designations of origin and false descriptions or representations in the advertising and sale of goods and services. The primary purpose of the Act is to eliminate deceitful practices in interstate commerce involving the misuse of trademarks. [22] Section 43 (a) provides in relevant part that:

> ***HN1***[] (a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, . . . a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, . . . shall be liable to a civil action by . . . any person who believes **[**60]** that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a).

8. ***HN3***[] Section 43 (a) of the Lanham Trademark Act and the common law of unfair competition encompass causes of action for trademark infringement as well as a wide range of causes of action for deceitful practices involving the misuse of trademarks. *See W.H. Brady Company v. Lem Products, Inc., 659 F. Supp. 1355, 1364 (N.D. Ill. 1987)*. The same legal standards are applied to all types of unfair competition claims brought under either federal or state law. *See A.J. Canfield Company v. Concord Beverage Company, 629 F. Supp. 200, 206 (E.D. Pa. 1985)*, *aff'd sub nom. A.J. Canfield Company v. Honickman, **[**61]** 808 F.2d 291 (3d Cir. 1986)*.

9. ***HN4***[] To prevail on a claim of unfair competition under section 43 (a) of the Lanham Trademark Act based on an unregistered trademark, the claimant must prove:

> (a.) that it was the first to adopt and use the mark in commerce;
> (b.) that the trademark is valid, in other words, distinctive enough to warrant protection; the trademark must be found to be arbitrary or suggestive or it may be merely descriptive, if it has developed a secondary meaning linking the product with its source in the minds of the consuming public;
> (c.) that there is likelihood of confusion on the part of the consuming public.

See W.H. Brady Company v. Lem Products, Inc., 659 F. Supp. 1355, 1364-65 (N.D. Ill. 1987); *Pedi-Care, Inc. v. Pedi-A-Care Nursing, Inc., 656 F. Supp. 449, 453 (D.N.J. 1987)*; *Brooks Shoe Manufacturing Company, Inc. v. Suave Shoe Corporation, 533 F. Supp. 75, 77 (S.D. Fla. 1981)*, *aff'd*, *716 F.2d 854 (11th Cir. 1983)*.

10. ***HN5***[] The quantum of proof necessary to establish a claim of unfair competition is a preponderance of the evidence. *See Keebler Company v. Rovira Biscuit Corporation, 624 F.2d 366, 373 (1st Cir. 1980)*; **[*1466]** *Big O Tire Dealers, Inc. v. **[**62]** Goodyear Tire & Rubber Company, 561 F.2d 1365, 1370 (10th Cir. 1977)*, *cert. denied*, *434 U.S. 1052, 54 L. Ed. 2d 805, 98 S. Ct. 905 (1978)*.

(1) *Appropriation and Use*

11. ***HN6***[] In the case of a claimant seeking relief for the alleged infringement of an unregistered mark, the burden is upon the claimant to establish its right to the exclusive use of the mark. *See Reese Publishing Company, **[***1499]** Inc. v. Hampton International Communications, Inc., 620 F.2d 7, 11 (2d Cir. 1980)*. This burden is carried by showing that the claimant has acquired the ownership of the unregistered mark by the appropriation and use of the mark in commerce prior in time to the occurrence of the use of the mark by the claimed infringer. *See United Drug Company v. Theodore Rectanus Company, 248 U.S. 90, 97, 63 L. Ed. 141, 39 S. Ct. 48 (1918)*; *Keebler Company v. Rovira Biscuit Corporation, 624 F.2d 366, 373 (1st Cir. 1980)*; *Kardex Systems, Inc. v. Sistemco N.V., 583 F. Supp. 803, 810 (D. Me. 1984)*.

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[22] ***HN2***[] The term "trademark" includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. *See 15 U.S.C.A. § 1127 (1982 West & Supp. 1987)*. *See also Eagle Snacks, Inc. v. Nabisco Brands, Inc., 625 F. Supp. 571, 579 (D.N.J. 1985)*.

12. ***HN7***[] The common-law right to a trademark is based upon prior use, that is, the first use of the mark in connection with a peculiar line of business. Registration does not create the underlying right in a trademark. That right which accrues from the use of a particular **[**63]** name or symbol is essentially a common-law property right. *See* *Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 815-16 (1st Cir. 1987)*; *Pedi-Care, Inc. v. Pedi-A-Care Nursing, Inc., 656 F. Supp. 449, 454 (D.N.J. 1987)*; *Caesars World, Inc. v. Caesars Palace, 490 F. Supp. 818, 822 (D.N.J. 1980)*.

13. ***HN8***[] Refusal by the United States Patent and Trademark Office to register a mark does not preclude the owner of the mark from its right to use it. *See* *Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 819 (1st Cir. 1987)*.

14. ***HN9***[] Common-law trademark rights are acquired on a state-by-state basis. *See* *SODIMA v. International Yogurt Company, Inc., 662 F. Supp. 839, 853 & n.8 (D.Or. 1987)*.

(2) *Strength of Mark*

15. ***HN10***[] When a mark is not registered, there is no presumption of the mark's validity and the claimant has the burden of proving by a preponderance of the evidence that its mark is protectible. *See* *Gimix, Inc. v. J S & A Group, Inc., 699 F.2d 901, 907-08 (7th Cir. 1983)*; *National Conference of Bar Examiners v. Multistate Legal Studies, Inc., 692 F.2d 478, 488 (7th Cir. 1982)*, *cert. denied*, *464 U.S. 814, 78 L. Ed. 2d 83, 104 S. Ct. 69 (1983)*; *Reese Publishing Company v.* ***[**64]*** *Hampton International Communications, Inc., 620 F.2d 7, 11 (2d Cir. 1980)*; *Merritt Forbes & Company, Inc. v. Newman Investment Securities, Inc., 604 F. Supp. 943, 954 (S.D.N.Y. 1985)*.

16. ***HN11***[] Courts have identified four categories of trademark distinctiveness or strength. Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are: (1) generic or common descriptive, (2) merely descriptive, (3) suggestive, and (4) arbitrary or fanciful. *See* *Abercrombie & Fitch Company v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976)*.

GENERIC OR COMMON DESCRIPTIVE:

17. ***HN12***[] A generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species. *See Park 'n* *Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 193-94, 83 L. Ed. 2d 582, 105 S. Ct. 658 (1985)*; *Abercrombie & Fitch Company v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976)*. A corollary verbal formulation of the meaning underlying the word "generic" is the phrase "the common descriptive name" as a designation for a product. Neither designation affords trademark protection. This is true even though the name **[**65]** acquires a secondary meaning by becoming identified with a particular producer. *See* *National Conference of Bar* ***[*1467]*** *Examiners v. Multistate Legal Studies, Inc., 692 F.2d 478, 487 (7th Cir. 1982)*, *cert. denied*, *464 U.S. 814, 78 L. Ed. 2d 83, 104 S. Ct. 69 (1983)*.

18. ***HN13***[] The test for whether a term is generic is whether its primary significance in the minds of the consuming public is a product category or genus rather than a product's source or producer. *See* *Kellogg Company v. National Biscuit Company, 305 U.S. 111, 118, 83 L. Ed. 73, 59 S. Ct. 109 (1938)*; *Surgicenters of America, Inc. v. Medical Dental Surgeries, Company, 601 F.2d 1011, 1016 (9th Cir. 1979)*; *Bayer Company, Inc. v. United Drug Company, 272 F. 505, 509 (S.D.N.Y. 1921)*.

19. Anheuser-Busch, as claimant to protection for an unregistered mark, bears the burden of proving that "LA" is not generic. *See* *Technical Publishing Company v. Lebhar-Friedman, Inc., 729 F.2d 1136, 1139 (7th Cir. 1984)*; *National Conference of Bar Examiners v. Multistate Legal Studies, Inc., 692 F.2d 478, 488 (7th Cir. 1982)*, *cert. denied*, *464 U.S. 814, 78 L. Ed. 2d 83, 104 S. Ct. 69 (1983)*. **[***1500]**

MERELY DESCRIPTIVE:

20. ***HN14***[] A merely descriptive term specifically describes a characteristic, quality or ingredient of an article **[**66]** of trade, as, for example, its color, odor, function, dimension, or ingredients. *See Park 'n* *Fly, Inc. v. Dollar*

Park and Fly, Inc., 469 U.S. 189, 193-94, 83 L. Ed. 2d 582, 105 S. Ct. 658 (1985); *Henri's Food Products Company, Inc. v. Tasty Snacks, Inc., 817 F.2d 1303, 1306 (7th Cir. 1987)*; *Soweco, Inc. v. Shell Oil Company, 617 F.2d 1178, 1183 (5th Cir. 1980)*, *cert. denied*, *450 U.S. 981, 67 L. Ed. 2d 816, 101 S. Ct. 1516 (1981)*; *Union Carbide Corporation v. Ever-Ready, Inc., 531 F.2d 366, 378* (7th Cir.), *cert. denied*, *429 U.S. 830, 97 S. Ct. 91, 50 L. Ed. 2d 94 (1976)*.

21. ***HN15***[] The descriptiveness of a mark, when applied to the goods involved, is to be determined from the standpoint of the average prospective purchaser. *See In re Omaha National Corporation, 819 F.2d 1117, 1119 (Fed. Cir. 1987)*; *Application of Abcor Development Corporation, 588 F.2d 811, 814 (C.C.P.A. 1978)*; *Bayer Company, Inc. v. United Drug Company, 272 F. 505, 509 (S.D.N.Y. 1921)*. What the designation means to those in the industry is not determinative. *See Big O Tire Dealers v. Goodyear Tire & Rubber Company, 561 F.2d 1365, 1369 (10th Cir. 1977)*, *cert. denied*, *434 U.S. 1052, 54 L. Ed. 2d 805, 98 S. Ct. 905 (1978)*.

22. Evidence of the public's understanding of a term may be obtained from any competent **[**67]** source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers, and other publications. *See In re Merrill Lynch, Pierce, Fenner and Smith, Inc., 828 F.2d 1567, 1570 (Fed. Cir. 1987)*. Evidence of the context in which a mark is used on labels, packages, or in advertising material directed to the goods is also probative of the reaction of prospective purchasers to the mark. *See Application of Abcor Development Corporation, 588 F.2d 811, 814 (C.C.P.A. 1978)*.

23. ***HN16***[] A mark which is merely descriptive can, by acquiring a secondary meaning, become a valid trademark. *See Miller Brewing Company v. G. Heileman Brewing Company, Inc., 561 F.2d 75, 79 (7th Cir. 1977)*, *cert. denied*, *434 U.S. 1025, 54 L. Ed. 2d 772, 98 S. Ct. 751 (1978)*; *Union Carbide Corporation v. Ever-Ready, Inc., 531 F.2d 366, 380* (7th Cir.), *cert. denied*, *429 U.S. 830, 97 S. Ct. 91, 50 L. Ed. 2d 94 (1976)*.

24. ***HN17***[] A mark has acquired secondary meaning when it has been used so long and so exclusively by one producer with reference to its article that, in that trade and to that branch of the purchasing public, the word or phrase has come to mean that the article was the first producer's trademark. *See G & C Merriam Company v. **[**68]** Saalfield, 198 F. 369 (6th Cir. 1912)*, *cert. denied*, *243 U.S. 651, 61 L. Ed. 947, 37 S. Ct. 478 (1917)*. *See also Gimix, Inc. v. JS & A Group, Inc., 699 F.2d 901, 907 (7th Cir. 1983)*; *Union Carbide Corporation v. Ever-Ready, Inc., 531 F.2d 366, 380* (7th Cir.), *cert. denied*, *429 U.S. 830, 97 S. Ct. 91, 50 L. Ed. 2d 94 (1976)*.

[*1468] 25. ***HN18***[] Proof of secondary meaning entails rigorous evidentiary requirements and the party seeking to prove secondary meaning has a "heavy" burden of showing that the efforts undertaken to associate the product with one source have been effective. *See 20 th Century Wear v. Sanmark-Stardust, Inc., 815 F.2d 8, 10 (2d Cir. 1987)*; *Eagle Snacks, Inc. v. Nabisco Brands, Inc., 625 F. Supp. 571, 582 (D.N.J. 1985)*.

26. ***HN19***[] Secondary meaning can be proved by direct or circumstantial evidence. The variables to be considered in determining whether a mark has secondary meaning include:

1. the duration, continuity, and exclusive use of the mark;

2. the efforts made in the direction of promoting a conscious connection, in the public's mind, between the mark and a particular source of origin, including the extent of advertising and promotion and the amount of money spent thereon;

3. the volume of sales, including figures **[**69]** showing sales of the claimant's product or the number of people who have consumed it;

4. identification of the parties' respective markets;

5. direct evidence of public recognition in the the form of consumer testimony and consumer surveys.

See Union Carbide Corporation v. Ever-Ready, Inc., 531 F.2d 366, 380 (7th Cir.), *cert. denied*, *429 U.S. 830, 97 S. Ct. 91, 50 L. Ed. 2d 94 (1976)*; *Sears, Roebuck and Company v. Sears Financial Network, 576 F. Supp. 857, 862*

(D.D.C. 1983); *Brooks Shoe Manufacturing Company, Inc. v. Suave Shoe Corporation, 533 F. Supp. 75, 78 (S.D. Fla. 1981)*, *aff'd*, *716 F.2d 854 (11th Cir. 1983)*. **[***1501]**

27. To establish secondary meaning it is not necessary for the public to be aware of the name of the manufacturer from which a product emanates. It is sufficient if the public is aware that the product comes from a single, though anonymous, source. *See* *Union Carbide Corporation v. Ever-Ready, Inc., 531 F.2d 366, 380* (7th Cir.), *cert. denied*, *429 U.S. 830, 97 S. Ct. 91, 50 L. Ed. 2d 94 (1976)*.

28. Anheuser-Busch has the burden of proving that secondary meaning existed at the time Heileman and Miller commenced using the LA mark in commerce. *See 20 th* *Century Wear, Inc. v. Sanmark-Stardust, Inc., 747* ***[**70]*** *F.2d 81, 90 (2d Cir. 1984)*, *cert. denied*, *470 U.S. 1052, 84 L. Ed. 2d 818, 105 S. Ct. 1755 (1985)*; *Scott Paper Company v. Scott's Liquid Gold, Inc., 589 F.2d 1225, 1231 (3d Cir. 1978)*.

SUGGESTIVE:

29. ***HN20***[] A suggestive term suggests rather than describes an ingredient or characteristic of the goods and requires the observer or listener to use imagination and perception to determine the nature of the goods. Such a term can be protected without proof of a secondary meaning. *See* *Miller Brewing Company v. G. Heileman Brewing Company, 561 F.2d 75, 79 (7th Cir. 1977)*, *cert. denied*, *434 U.S. 1025, 54 L. Ed. 2d 772, 98 S. Ct. 751 (1978)*; *Eagle Snacks, Inc. v. Nabisco Brands, Inc., 625 F. Supp. 571, 580 (D.N.J. 1985)*.

ARBITRARY OR FANCIFUL:

30. ***HN21***[] Arbitrary or fanciful marks are designated as "strong marks." They may be coined words or words that are common in linguistic usage but which, when used with the products they represent, neither suggest nor describe any characteristic of those goods. Arbitrary or fanciful marks are entitled to protection against all users and are not vulnerable to possible attack as being merely descriptive. *See* *Miller Brewing Company v. G. Heileman Brewing Company, 561 F.2d 75, 79 (7th Cir. 1977)*, *cert.* ***[**71]*** *denied*, *434 U.S. 1025, 98 S. Ct. 751, 54 L. Ed. 2d 772 (1978)*; *Tisch Hotels, Inc. v. Americana Inn, 350 F.2d 609, 611 (7th Cir. 1965)*; *Eagle Snacks, Inc. v. Nabisco Brands, Inc., 625 F. Supp. 571, 580 (D.N.J. 1985)*; *Exxon Corporation v. Humble Exploration Company, 524 F. Supp. 450, 459-60 (N.D. Tex. 1981)* (name "Humble" as applied to oil company found **[*1469]** to be "arbitrary"), *aff'd in relevant part*, *695 F.2d 96 (5th Cir. 1983)*.

31. In prior litigation in which Anheuser-Busch, Inc. was the plaintiff, the federal district court in the Eastern District of Missouri found that the mark "LA" is not an arbitrary or fanciful mark when affixed to a can or bottle of beer. *See* *Anheuser-Busch, Inc. v. Stroh Brewery Company, 587 F. Supp. 330, 335* (W.D. Mo.), *aff'd*, *750 F.2d 631 (8th Cir. 1984)*. Therefore, as a matter of law the doctrine of nonmutual collateral estoppel precludes Anheuser-Busch, Inc. from relitigating the issue of whether "LA" is an arbitrary or fanciful mark entitled to protection against all users. *See* *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 332-34, 28 L. Ed. 2d 788, 91 S. Ct. 1434 (1971)*; *Miller Brewing Company v. Falstaff Brewing Corporation, 655 F.2d 5, 9 (1st Cir.* ***[**72]*** *1981)*; *Miller Brewing Company v. Jos. Schlitz Brewing Company, 605 F.2d 990, 992-96 (7th Cir. 1979)*, *cert. denied*, *444 U.S. 1102, 62 L. Ed. 2d 787, 100 S. Ct. 1067 (1980)*.

VALIDITY:

32. ***HN22***[] Under trademark law an abbreviation, like any other unregistered mark, will only be protected if it has acquired secondary meaning. *See* *Continental Corrugated Container Corporation v. Continental Group, Inc., 462 F. Supp. 200, 204 (S.D.N.Y. 1978)*.

33. Letters may be valid trademarks if they are entirely fanciful and arbitrary, if they have no connection with the article or any of its features, or if they are designed solely, or at least primarily, to indicate origin. They are not valid if they describe or refer to the article or its characteristics. *See* *Nature's Bounty, Inc. v. Basic Organics, 432 F. Supp. 546, 551 (E.D.N.Y. 1977)* (term "B-100" held merely descriptive as applied to vitamins).

34. Having found that "LA" (or "L.A.") is a merely descriptive mark which has not acquired secondary meaning at any time relevant to the claims asserted in these actions, the court concludes as a matter of law that "LA" (with out without periods) is not a valid, legally protectible trademark.

(3) *Likelihood of Confusion*

[73]** 35. ***HN23***[] If a senior user of a mark cannot demonstrate that the mark is distinctive enough to warrant protection, the senior user **[***1502]** can still maintain a claim under section 43 (a) of the Lanham Trademark Act if there is a likelihood of consumer confusion due to the failure of the junior user to identify itself adequately as the source of the product. *See Miller Brewing Company v. Jos. Schlitz Brewing Company, 605 F.2d 990, 997 (7th Cir. 1979)*, *cert. denied*, *444 U.S. 1102, 62 L. Ed. 2d 787, 100 S. Ct. 1067 (1980)*. *See also Liquid Controls Corporation v. Liquid Control Corporation, 802 F.2d 934, 939-41 (7th Cir. 1986)*; *Blau Plumbing, Inc. v. S.0.S. Fix-It, Inc., 781 F.2d 604, 610 (7th Cir. 1986)*; *Technical Publishing Company v. Lebhar-Friedman, Inc., 729 F.2d 1136, 1142 (7th Cir. 1984)*; *W.H. Brady Company v. LEM Products, Inc., 659 F. Supp. 1355, 1365-55 (N.D. Ill. 1987)*.

36. ***HN24***[] The claimant has the burden of proving likelihood of confusion by a preponderance of the evidence. *See E.I. DuPont de Nemours and Company v. Yoshida International, Inc., 393 F. Supp. 502, 510 n.4 (E.D.N.Y. 1975)*. ***HN25***[] When a mark is recently adopted and is not registered, doubts about the likelihood of confusion are resolved against **[**74]** the party claiming exclusive rights to the mark. *See AMF Incorporated v. Sleekcraft Boats, 599 F.2d 341, 352 n.13 (9th Cir. 1979)*.

37. ***HN26***[] Likelihood of confusion exists when consumers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark. *See James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 275 (7th Cir. 1976)*.

38. ***HN27***[] Whether or not a likelihood of confusion exists must be determined from the viewpoint of the general public and without regard to any particular geographic **[*1470]** area. *See Tisch Hotels, Inc. v. Americana Inn, 350 F.2d 609, 614 n.6 (7th Cir. 1965)*.

39. ***HN28***[] Although secondary meaning must be shown to exist at the time the second user commences using the allegedly infringing mark, there is no such limitation on proving likelihood of confusion. *See Amstar Corporation v. Domino's Pizza, Inc., 615 F.2d 252, 259* (5th Cir.), *cert. denied*, *449 U.S. 899, 66 L. Ed. 2d 129, 101 S. Ct. 268 (1980)*; *Brooks Shoe Manufacturing Company, Inc. v. Suave Shoe Corporation, 533 F. Supp. 75, 77-78 n.4 (S.D. Fla. 1981)*, *aff'd*, *716 F.2d 854 (11th Cir. 1983)*.

40. ***HN29***[] The factors to be **[**75]** considered in determining whether there is a likelihood of confusion are:

1. the degree of similarity between the owner's mark and the alleged infringing mark;

2. the strength of the owner's mark;

3. whether the goods are marketed through the same channels of trade and advertised through the same media;

4. the extent to which the targets of the parties' sales efforts are the same;

5. the relationship of the goods in the minds of the public because of the similarity of function;

6. the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;

7. the intent of the defendant in adopting the mark;

8. the length of time the defendant has used the mark without evidence of actual confusion arising;

9. the evidence of actual confusion;

10. other facts suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant's market.

See *Ziebart International Corporation v. After Market Associates, Inc., 802 F.2d 220, 226 (7th Cir. 1986)*; *Scott Paper Company v. Scott's Liquid Gold, Inc., 589 F.2d 1225, 1229 (3d Cir. 1978)*; *Caesars World, Inc. v. Caesar's Palace, 490 F. Supp. 818,* ***[**76]*** *823-24 (D.N.J. 1980)*.

41. No one factor is conclusive, nor are the presence of all factors necessary. *See* *Schmidt v. Honeysweet Hams, Inc., 656 F. Supp. 92, 96 (N.D. Ga. 1986)*. However, the similarity of the marks, the intent of the claimed infringers, and evidence of actual confusion are the "more important" factors. *See* *Ziebart International Corporation v. After Market Associates, Inc., 802 F.2d 220, 226 (7th Cir. 1986)*.

42. ***HN30***[] Knowledge of prior use alone does not in itself constitute a showing of bad faith. *See* *E.R. Squibb & Sons, Inc. v. Cooper Laboratories, Inc., 536 F. Supp. 523, 532 (S.D.N.Y. 1982)*. Moreover, selecting a mark because it conveys the product's purpose or characteristics has been held to demonstrate good faith. *See* *E.S. Originals, Inc. v. Stride Rite Corporation, 656 F. Supp. 484, 490 (S.D.N.Y. 1987)*.

43. The use of a strong house mark virtually precludes confusion between similar **[***1503]** marks. *See* *Vitarroz Corporation v. Borden, Inc., 644 F.2d 960, 968-69 (2d Cir. 1981)*; *McGregor-Doniger Inc. v. Drizzle Inc., 599 F.2d 1126, 1133-34 (2d Cir. 1979)*; *E.S. Originals Inc. v. Stride Rite Corporation, 656 F. Supp. 484, 488 (S.D.N.Y. 1987)*; *Victory* ***[**77]*** *Pipe Craftsmen, Inc. v. Faberge, Inc., 582 F. Supp. 551, 557 (N.D. Ill. 1984)*; *Uniroyal, Inc. v. Kinney Shoe Corporation, 453 F. Supp. 1352, 1355-56 (S.D.N.Y. 1978)*.

(4) *Common Law of Wisconsin*

44. The Wisconsin Supreme Court has adopted the elements of the tort of unfair competition found in the *Restatement (Second) of Torts* §§ 715-17 (Tent. Draft No. 8, 1963) [23] as the common law of Wisconsin. **[*1471]** *See generally* *First Wisconsin National Bank of Milwaukee v. Wichman, 85 Wis. 2d 54, 63, 270 N.W.2d 168 (1978)*. The *Restatement* takes the position that adoption and use of a trademark gives rise to the right to bring an action for infringement. However mere use of a trademark does not lead automatically to exclusive rights in that name. Rather, to be entitled to prevent others from using a name, the claimant must first prove that it is a valid technical, or strong, mark or that it is a nontechnical mark which has acquired secondary meaning. Then, the claimant must show that the effect of the use has been to identify the particular product and to distinguish it from others and that the alleged infringer's use is likely to cause confusion and deception. *See* *First* ***[**78]*** *Wisconsin National Bank of Milwaukee, 85 Wis.2d at 62-63, 270 N.W.2d at 172*, citing *Restatement (Second) of Torts* § 17 comment *a* (Tent. Draft No. 8, 1963). *See also* *Blue Ribbon Feed Company, Inc. v. Farmers Union Central Exchange, Inc., 731 F.2d 415, 418 (7th Cir. 1984)*; *Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 399-403, 280 N.W.2d 129 (1979)*.

45. ***HN31***[] Section 717 of the *Restatement (Second) of Torts* provides that one infringes a trademark if:

> without a privilege to do so, he uses on or in connection with his goods, services or business a designation which so resembles the other's previously used mark or trade name as to **[**79]** be likely to
> (a) cause confusion, mistake or deception, or
> (b) cause prospective purchasers to believe that

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[23] The *Restatement (Second) of Torts* in its final form does not have sections dealing with the fields of unfair competition and trade regulation. The American Law Institute takes the position that these fields have evolved into bodies of law in their own right, no longer dependent upon tort law. Nevertheless, the *Restatement* test continues to be followed by Wisconsin's and other states' courts. *See* *American Association for the Advancement of Science v. Hearst Corporation, 498 F. Supp. 244, 259 n.5 (D.D.C. 1980)*.

(i) the actor's goods or services are those of the other, or
(ii) the actor's goods or services emanate from the same source as the other's goods or services, or
(iii) the actor's goods or services are approved or sponsored by the other, or
(iv) the actor's business is the business of, or is in some manner associated or connected with, the other, even though the actor does not use the designation with a purpose to deceive.

Restatement (Second) of Torts § 717 (Tent. Draft No. 8, 1963).

46. ***HN32***[] Under Wisconsin law a claimant can show infringement without showing that the trademark has previously been identified with a product. It is sufficient to show that the trademark was one used to identify the claimant's product and that the use of the name by another caused confusion or mistake in respect to the sponsorship of the goods. *See Hirsch v. S.C.* *Johnson & Son, Inc., 90 Wis. 2d 379, 401-02, 280 N.W.2d 129*, (1979).

(5) *Liability*

47. Having found that the LA mark is not distinctive and that there is insufficient evidence of a likelihood of consumer confusion between the **[**80]** Heileman and Anheuser-Busch LA beers, the court concludes that the G. Heileman Brewing Company, Inc. is not liable to Anheuser-Busch Incorporated for unfair competition by using the LA mark in violation of section **[***1504]** 43 (a) of the Lanham Trademark Act, *15 U.S.C. § 1125(a)*, the law of Wisconsin, or common law.

48. Having found that the LA mark is not distinctive and that there is insufficient evidence of a likelihood of consumer confusion between the Miller and Anheuser-Busch LA beers, the court concludes that the Miller Brewing Company is not liable to Anheuser-Busch Incorporated for unfair competition by using the LA mark in violation of section 43 (a) of the Lanham Trademark Act, *15 U.S.C. § 1125(a)*, or common law.

C. Trademark Dilution

49. The Illinois Anti-Dilution Act, Ill. Rev. Stat. ch. 140, § 22 provides in pertinent part that:

> ***HN33***[] every person . . . adopting and using a mark [or] trade name, . . . may proceed **[*1472]** by suit, and the circuit court shall grant injunctions, to enjoin subsequent use by another of the same or any similar mark [or] trade name . . . if there exists a likelihood of injury to business reputation or of dilution of the distinctive quality of the mark [or] trade **[**81]** name . . . of the prior user notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services.

Ill. Rev. Stat. ch. 140, § 22.

50. Under the Illinois Anti-Dilution Act, the relevant factors to be considered by the court are: (1) the distinctiveness of the mark, and (2) whether the mark is being diluted. *See Hyatt Corporation v. Hyatt Legal Services, 736 F.2d 1153, 1157* (7th Cir.), *cert. denied*, *469 U.S. 1019, 83 L. Ed. 2d 361, 105 S. Ct. 434 (1984)*. *See also McGraw-Edison Company v. Walt Disney Productions, 787 F.2d 1163, 1174 (7th Cir. 1986)*; *W.H. Brady Company v. LEM Products, Inc., 659 F. Supp. 1355, 1368 (N.D. Ill. 1987)*; *Source Services Corporation v. Source Telecomputing Corporation, 635 F. Supp. 600, 615 (N.D. Ill. 1986)*.

51. ***HN34***[] In determining the distinctiveness of a trademark, the court looks to whether the mark is arbitrary, the length of time the first user has employed the mark, the scope of the first user's advertising, the nature and extent of the first user's business, and the scope of the first user's reputation. *See Hyatt Corporation v. Hyatt Legal Services, 736 F.2d 1153, 1158* (7th Cir.), *cert. denied*, *469 U.S. 1019, 83 L. Ed. 2d 361, 105 S. Ct. 434 (1984)*; **[**82]** *W.H. Brady Company v. LEM Products, Inc., 659 F. Supp. 1355, 1368 (N.D. Ill. 1987)*.

52. ***HN35***[] In determining whether a subsequent user has diluted an alleged mark, the court should look to the similarity of the marks and the extent of the subsequent user's marketing efforts. *See Hyatt Corporation v. Hyatt*

Legal Services, 736 F.2d 1153, 1158 (7th Cir.), *cert. denied*, *469 U.S. 1019, 83 L. Ed. 2d 361, 105 S. Ct. 434 (1984)*; *W.H. Brady Company v. LEM Products, Inc., 659 F. Supp. 1355, 1368 (N.D. Ill. 1987)*.

53. The protections of the Illinois Anti-Dilution Statute are unavailable to a competitor which cannot obtain relief under the laws of trademark infringement or unfair competition. *See EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc., 746 F.2d 375, 380 (7th Cir. 1984)*, citing *Filter Dynamics International, Inc. v. Astron Battery, Inc., 19 Ill. App. 3d 299, 314-15, 311 N.E.2d 386, 398-99 (1974)*; *Victory Pipe Craftsmen, Inc. v. Faberge, Inc., 582 F. Supp. 551, 559 (N.D. Ill. 1984)*.

54. Having found that the LA mark is not distinctive and that, by using the LA mark, Heileman did not engage in trademark infringement or unfair competition, the court concludes that the G. Heileman Brewing Company, **[**83]** Inc. is not liable to Anheuser-Busch Incorporated for trademark dilution under the Illinois Anti-Dilution Act, Ill. Rev. Stat. ch. 140, § 22.

55. Having found that the LA mark is not distinctive and that, by using the LA mark, Miller did not engage in trademark infringement or unfair competition, the court concludes that the Miller Brewing Company is not liable to Anheuser-Busch Incorporated for trademark dilution under the Illinois Anti-Dilution Act, Ill. Rev. Stat. ch. 140, § 22.

D. Attempt to Monopolize

56. ***HN36***[] Under *Section 2* of the Sherman Act, no person may "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . ." *15 U.S.C. § 2*.

57. ***HN37***[] A company attempts to monopolize in violation of *Section 2* when it engages in a course of conduct which would, if successful, accomplish monopolization, and which, though falling short, so closely approaches monopolization as to create a dangerous probability of it. *See Lektro-Vend Corporation v. Vendo Company, 660 F.2d 255, 269-70 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*.

[*1473] (1) *Elements* ***[**84]*** *of Claims*

58. ***HN38***[] In order to prove an attempt to monopolize, a plaintiff must prove by a preponderance of the evidence: (1) a specific intent to achieve a monopoly in a relevant market; (2) predatory or anticompetitive conduct in furtherance of the purpose to monopolize; and (3) a dangerous probability of success in the **[***1505]** relevant market. *See Lektro-Vend Corporation v. Vendo Company, 660 F.2d 255, 270 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*; *Chillicothe Sand & Gravel Company v. Martin Marietta Corporation, 615 F.2d 427, 430 (7th Cir. 1980)*. These elements are conjunctive. *See Conoco, Inc. v. Inman Oil Company, Inc., 774 F.2d 895, 906 (8th Cir. 1985)*.

59. ***HN39***[] The test to be applied in determining whether a trademark is being unlawfully used to confer a monopoly in a certain product is the same as in any other case wherein an unlawful monopoly, or attempt to monopolize, is alleged under *Section 2* of the Sherman Act. There is a violation of that provision only if the defendant's actions have led to or resulted in a dangerous probability that it will gain a monopoly over the relevant market. *See Car-Freshner Corporation v. Auto Aid Manufacturing Corporation, 438 F.* ***[**85]*** *Supp. 82, 87 (N.D.N.Y. 1977)*.

60. In general, the power that manufacturers have over their trademarked products is not the power that makes an illegal monopoly. *See United States v. E.I. du Pont de Nemours & Company, 351 U.S. 377, 393, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*.

SPECIFIC INTENT:

61. ***HN40***[] In the context of an attempted monopoly claim, specific intent refers not to the defendant's general intent to do a particular act, but to an overall anticompetitive intent expressed through its actions to destroy

competition and to build monopoly. *See* *Times-Picayune Publishing Company v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*.

62. ***HN41***[] The specific intent element requires proof that the defendant acted with the purpose of achieving monopoly power in the relevant market. Specific intent does not merely mean intent to prevail over one's rivals; it goes beyond that to include an intent to control prices or to restrain competition unreasonably. *See* *Aspen Skiing Company v. Aspen Highlands Skiing Corporation, 472 U.S. 585, 600-05, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*; *United States v. Empire Gas Corporation, 537 F.2d 296, 302 (8th Cir. 1976)*, *cert. denied*, *429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977)*.

63. Specific intent can be proven by direct evidence of statements **[**86]** made by responsible officers or employees of the defendant or it can be inferred indirectly from the defendant's per se unlawful conduct or from otherwise lawful conduct, if the natural and predictable result of the conduct is to control prices or to exclude or destroy competition in the relevant market. *See* *Conoco Inc. v. Inman Oil Company, Inc., 774 F.2d 895, 905 (8th Cir. 1985)*.

64. ***HN42***[] A manifestation of intent to triumph in the competitive market, or to exclude competition and to expand one's own business, in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish an antitrust violation. *See* *Great Escape, Inc. v. Union City Body Company, Inc., 791 F.2d 532, 541 (7th Cir. 1986)*; *Lektro-Vend Corporation v. Vendo Corporation, 660 F.2d 255, 273 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*.

ANTICOMPETITIVE OR PREDATORY CONDUCT:

65. ***HN43***[] To be labeled "anticompetitive" or "predatory" the conduct involved must be such that its anticipated benefits are dependent upon its tendency to frustrate or eliminate competition and thereby enhance the defendant's long term ability to reap the benefits of monopoly power. Such conduct leads to the **[**87]** acquisition of monopoly power by means other than superior product or business acumen. *See* *Chillicothe **[*1474]** Sand & Gravel Company v. Martin Marietta Corporation, 615 F.2d 427, 430 (7th Cir. 1980)*. *See also* *Aspen Skiing Company v. Aspen Highlands Skiing Corporation, 472 U.S. 585, 600-05, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. To be anticompetitive, it is not necessary that such conduct be unlawful in and of itself, so long as it has the effect of achieving monopoly power. However, anticompetitive conduct is conduct without legitimate business purpose that makes sense only because it eliminates competition. *See* *General Industries Corporation v. Hartz Mountain Corporation, 810 F.2d 795, 804 (8th Cir. 1987)*; *Great Escape, Inc. v. Union City Body Corporation, Inc., 791 F.2d 532, 541 (7th Cir. 1986)*.

66. If litigation is used as an integral part of a scheme attempting to monopolize and exclude competition from the marketplace, that litigation can lose its *first amendment* protection and constitute forbidden anticompetitive conduct. *See* *Walker Process Equipment v. Food Machinery & Chemical Corporation, 382 U.S. 172, 174, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)*.

DANGEROUS PROBABILITY OF SUCCESS:

67. The plaintiffs must prove that there **[**88]** was a dangerous probability that the defendant would sooner or later succeed in achieving its intended monopoly if it continued to engage in anticompetitive conduct that is the same or similar to that charged. *See* *American **[***1506]** Tobacco Company v. United States, 328 U.S. 781, 785, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*. "The Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly. It is the attempt which is the offense." *Lektro-Vend Corporation v. Vendo Company, 660 F.2d 255, 270 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*.

68. The dangerous probability should be evaluated as of the time the alleged anticompetitive events occurred. *See* *General Industries Corporation v. Hartz Mountain Corporation, 810 F.2d 795, 807 (8th Cir. 1987)*.

69. In evaluating whether it was possible for the defendant to achieve its goal of monopoly power at the time the alleged anticompetitive events occurred, the court can consider: the defendant's market power, including sales and profits; the defendant's subsequent market performance; the size and number of competitors in the market; increasing or decreasing concentration within the relevant market; **[**89]** and the defendant's capacity to control prices and exclude competitors. *See* *Lektro-Vend Corporation v. Vendo Company, 660 F.2d 255, 270-71 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*.

RELEVANT MARKET:

70. ***HN44***[] In proving whether the defendant possessed sufficient power to come dangerously close to achieving monopoly power, the plaintiffs must prove the relevant geographic and product markets within which that dangerous probability occurred. *See* *Photovest Corporation v. Fotomat Corporation, 606 F.2d 704, 711-13 (7th Cir. 1979)*, *cert. denied*, *445 U.S. 917, 63 L. Ed. 2d 601, 100 S. Ct. 1278 (1980)*; *United States v. Empire Gas Corporation, 537 F.2d 296, 302 (8th Cir. 1976)*, *cert. denied*, *429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977)*; *Bernard Food Industries, Inc. v. Dietene Company, 415 F.2d 1279, 1284 (7th Cir. 1969)*, *cert. denied*, *397 U.S. 912, 25 L. Ed. 2d 92, 90 S. Ct. 911 (1970)*.

71. A relevant geographic market is defined as the area of effective competition within which the seller operates and to which the purchaser can practically turn for supplies. *See* *Otter Tail Power Company v. United States, 410 U.S. 366, 369 n.1, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*.

72. A relevant product market is comprised of those commodities reasonably interchangeable by consumers **[**90]** for the same purpose. In determining the product market, the court must decide whether the **[*1475]** product is unique or has close substitutes, as to which there are substantial cross-elasticities of demand. *See* *Fishman v. Estate of Wirtz, 807 F.2d 520, 531 (7th Cir. 1986)*.

73. Price, use and qualities must be considered in determining whether products are reasonably interchangeable. *See* *United States v. E.I. du Pont de Nemours & Company, 351 U.S. 377, 404, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*.

74. The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity [24] 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. *See* *Brown Shoe Company v. United States, 370 U.S.* ***[**91]*** *294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *Photovest Corporation v. Fotomat Corporation, 606 F.2d 704, 712 (7th Cir. 1979)*, *cert. denied*, *445 U.S. 917, 100 S. Ct. 1278, 63 L. Ed. 2d 601 (1980)*.

75. A single product will only qualify as a submarket when it is so unique and dominant in the market that there is no practical substitute. *See* *Frito-Lay, Inc. v. Bachman Company, 659 F. Supp. 1129, 1136-37 (S.D.N.Y. 1986)*.

ANTITRUST INJURY:

76. Because this is a private antitrust action in which the plaintiffs are seeking relief under Sections 4 (treble damages) and 16 (injunctive relief) of the Clayton Act, *15 U.S.C. §§ 15* and *26*, the plaintiffs must prove that they

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[24] Products that are similar to each other or 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 X% increase in the sales of "A." *See* *Photovest Corporation v. Fotomat Corporation, 606 F.2d 704, 713 n.12 (7th Cir. 1979)*, *cert. denied*, ***445 U.S. 917, 63 L. Ed. 2d 601, 100 S. Ct. 1278 (1980)***.

have suffered an "antitrust **[**92]** injury," which is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." *See Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. *See also generally Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio **[***1507]** Corporation, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197 (7th Cir. 1986)*. In other words, in a private antitrust action, the plaintiffs must allege specific damage to themselves arising from the allegedly wrongful acts of the defendant. *See Matsushita Electric Industrial Company, Ltd., 106 S. Ct. at 1356*. *See also Fishman v. Estate of Wirtz, 807 F.2d 520, 532 (7th Cir. 1986)* (the concept of antitrust injury is akin to a standing requirement). The plaintiffs must also prove an adverse effect on competition as distinguished from the effects upon the plaintiffs' own businesses. *See Brunswick, 429 U.S. at 488*; *General Industries Corporation v. Hartz Mountain Corporation, 810 F.2d 795, 807 (8th Cir. 1987)*.

(2) *The Noerr-Pennington Doctrine*

77. ***HN45***[] The **[**93]** invocation of the judicial process is protected from antitrust scrutiny by the *Noerr-Pennington* doctrine which holds that the *First Amendment to the United States Constitution* immunizes from antitrust liability bona fide lobbying and litigation efforts, regardless of any anticompetitive motive behind those efforts. *See generally California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*; *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 **[*1476]** (1965)*; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; *Premier Electrical Construction Company v. National Electrical Contractors Association, Inc., 814 F.2d 358, 371 (7th Cir. 1987)*.

78. The *Noerr-Pennington* doctrine does not immunize "sham" lawsuits brought for the purpose of harming one's competitors, not by the result, but by the process of the litigation. *See Winterland Concessions Company v. Trela, 735 F.2d 257, 263-64 (7th Cir. 1984)*; *Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982)*, *cert. denied*, *461 U.S. 958, 77 L. Ed. 2d 1317, 103 S. Ct. 2430 (1983)*. A suit brought only because of the costs litigation imposes also fits the "sham" exception **[**94]** to the *Noerr-Pennington* doctrine. *See Premier Electrical Construction Company v. National Electrical Contractors Association, Inc., 814 F.2d 358, 372 (7th Cir. 1987)*.

79. In the Seventh Circuit, the plaintiffs need not show a pattern of baseless repetitive claims in order to recover under the antitrust laws; even a single baseless, sham lawsuit lacks "the constitutional significance that warrants immunity from the antitrust laws." *MCI Communications v. American Telephone and Telegraph Company, 708 F.2d 1081, 1155* (7th Cir.), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*.

80. In invoking the "sham exception" to the *Noerr-Pennington* doctrine, the plaintiffs have the burden of proving that the defendant's activities were not really efforts to vindicate rights in court, but instead were efforts to interfere directly with their businesses. The plaintiffs must prove the defendant's bad faith by clear and convincing evidence. *See MCI Communications v. American Telephone and Telegraph Company, 708 F.2d 1081, 1155* (7th Cir.), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*. [25]

[95]** 81. The "sham exception" focuses attention on the factors motivating the initiation and prosecution of the suit. It is not dispositive that the ultimate relief will be beneficial to the petitioner and will serve its purposes. It must be shown that the desire for relief was a significant factor underlying the actual bringing and prosecution of the suit. Thus, determining whether the petitioning conduct was a sham often involves questions of motive or subjective intent. The issue of intent that controls is whether the litigant wished to obtain its anticompetitive end through obtaining court-ordered relief or simply through the filing and maintenance of the lawsuit. *See In re Burlington Northern, Inc., 822 F.2d 518, 527-28 (5th Cir. 1987)*.

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[25] Other circuits allow the proponent of the sham exception to meet the lesser, preponderance of the evidence quantum of proof. *See, e.g., Litton Systems, Inc. v. American Telephone and Telegraph Company, 700 F.2d 785, 813-14 (2d Cir. 1983)*, *cert. denied*, ***464 U.S. 1073, 79 L. Ed. 2d 220, 104 S. Ct. 984 (1984)***.

82. Petitioning must be motivated by a genuine desire for relief which is both honest and reasonable. Where a party had no reasonable expectation of obtaining a favorable ruling, its efforts to do so were a sham. *See* [In re Burlington Northern, Inc., 822 F.2d 518, 529 (5th Cir. 1987)]; [Litton Systems, Inc. v. AT&T, 700 F.2d 785, 811-12 (2d Cir. 1983)], *cert. denied*, *464 U.S. 1073, 79 L. Ed. 2d 220, 104 S. Ct. 984 (1984)*.

83. Success on the merits does not necessarily preclude **[**96]** antitrust plaintiffs from proving that the defendant's earlier litigation activities were a sham. [26] The determinative inquiry is not whether the suit was won or lost, but whether it was significantly motivated by a genuine desire for judicial relief. Of course, the success of the claim presented is persuasive evidence that the litigant in fact **[***1508]** wanted the relief. It is highly unlikely that a party with a meritorious claim will not be significantly motivated by a desire to obtain relief **[*1477]** on that claim. Thus, antitrust plaintiffs attempting to base liability on successful petitioning must overcome a strong inference that *Noerr-Pennington* applies and in many cases may be unable to do so. But reliance on the success of the earlier claim cannot substitute for proper consideration of any evidence the plaintiffs might provide of the defendant's motivation. *See* [In re Burlington Northern, Inc., 822 F.2d 518, 528 (5th Cir. 1987)].

[97]** (3) *Liability*

84. Having found that the G. Heileman Brewing Company, Inc. failed to meet its burden of proving essential elements of its claim for attempted monopolization, the court concludes that Anheuser-Busch Incorporated is not liable to the G. Heileman Brewing Company, Inc. for attempting to monopolize trade in violation of [Section 2] of the Sherman Act, [15 U.S.C. § 2].

85. Having found that the Miller Brewing Company failed to meet its burden of proving essential elements of its claim for attempted monopolization, the court concludes that Anheuser-Busch Incorporated is not liable to the Miller Brewing Company for attempting to monopolize trade in violation of [Section 2] of the Sherman Act, [15 U.S.C. § 2].

E. Relief

86. Because none of the parties to these consolidated cases are registrants of the mark at issue, the parties do not have standing to seek the statutory remedies provided in the Lanham Trademark Act, [15 U.S.C. §§ 1111], [1114], [1116], [1117], [1118], [1119], [1120]. *See* [Reliable Tire Distributors, Inc. v. Kelly Springfield Tire Company, 592 F. Supp. 127, 136 (E.D. Pa. 1984)].

87. In deciding whether to enter a permanent injunction, the court must determine whether the **[**98]** plaintiffs have succeeded on the merits of their claims and whether a balancing of the equities favors the grant of injunctive relief. *See* [Banff, Ltd. v. Federated Department Stores, Inc., 657 F. Supp. 336, 338 (S.D.N.Y. 1987)].

88. ***HN46***[] Declaratory relief is available at the discretion of the district court. *See* [28 U.S.C. § 2201]. *See also* [Tempco Electric Heater Corporation v. Omega Engineering, Inc., 819 F.2d 746, 747 (7th Cir. 1987)]; [Chesebrough-Pond's, Inc. v. Faberge, Incorporated, 666 F.2d 393, 396] (9th Cir.), *cert. denied*, *459 U.S. 967, 74 L. Ed. 2d 277, 103 S. Ct. 294 (1982)*.

89. Federal courts are not empowered to issue advisory opinions. *See* U.S. Const. art. III. *See also* [Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 241, 81 L. Ed. 617, 57 S. Ct. 461 (1937)].

90. Parties seeking relief under the Declaratory Judgment Act, [28 U.S.C. §§ 2201-02], must present a "case or controversy" within the meaning of Article III of the United States Constitution. *See* [Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 240, 81 L. Ed. 617, 57 S. Ct. 461 (1937)]; [Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1353 (7th Cir. 1987)].

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[26] *But see* [Coca-Cola Company v. Overland, Inc., 692 F.2d 1250, 1257 n.17 (9th Cir. 1982)] (noting that the court had discovered no case directly supporting the proposition that the bringing of meritorious trademark infringement suits can constitute sham suits violative of the antitrust laws).

91. The test for determining whether an actual case or controversy exists in a declaratory **[**99]** judgment action involving trademarks is two-pronged: (1) the declaratory plaintiff must have a real and reasonable apprehension of litigation; and (2) the declaratory plaintiff must have engaged in a course of conduct which brought it into adversarial conflict with the declaratory defendant. *See* *Windsurfing International v. AMF Incorporated, 828 F.2d 755, 757 (Fed. Cir. 1987)*.

92. In an action seeking a declaratory judgment of noninfringement, the actual controversy requirement is satisfied when a defendant's conduct has "created on the part of the declaratory plaintiff a reasonable apprehension that it will face an infringement suit if it commences or continues the activity in question" and when the plaintiff has actually used the trademark at issue or has prepared to use it. *See* *Indium Corporation of America v. Semi-Alloys, Inc., 781 F.2d 879, 883 (Fed. Cir. 1985)* (patent action) [27] (quoting *Jervis B. Webb **[*1478]** Company v. Southern Systems, Inc., 742 F.2d 1388, 1398-99 (Fed. Cir. 1984))*, *cert. denied*, *479 U.S. 820, 107 S. Ct. 84, 93 L. Ed. 2d 37 (1986)*.

[100]** 93. The declaratory judgment plaintiff carries the burden of proving the existence of facts underlying his allegations of the existence of an actual controversy. *See* *Jervis B. Webb Company v. Southern Systems, Inc., 742 F.2d 1388, 1399 (Fed. Cir. 1984)*.

94. A purely subjective apprehension of an infringement suit is insufficient to satisfy the actual controversy requirement. *See* *Indium Corporation of America v. Semi-Alloys, **[***1509]** Inc., 781 F.2d 879, 883 (Fed. Cir. 1985)*, *cert. denied*, *479 U.S. 820, 107 S. Ct. 84, 93 L. Ed. 2d 37 (1986)*. The threat of injury must be real and immediate, not conjectural or hypothetical. *See* *Foster v. Center Township of LaPorte County, 798 F.2d 237, 242 (7th Cir. 1986)*. *See also* *Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1353 (7th Cir. 1987)*; *Merrick v. Sharp & Dohme, 185 F.2d 713, 717 (7th Cir. 1950)*; *cert. denied*, *340 U.S. 954, 71 S. Ct. 573, 95 L. Ed. 2d 687* (19510.

95. ***HN47***[] The test for an actual case or controversy is an objective one. Reasonable apprehension and the other jurisdictional prerequisites must exist at the time suit is filed. *See* *Indium Corporation of America v. Semi-Alloys, Inc., 781 F.2d 879, 883 (Fed. Cir. 1985)*, *cert. denied*, *479 U.S. 820, 107 S. Ct. 84, 93 L. Ed. 2d 37 (1986)*.

96. Consolidation does not result **[**101]** in a merger of suits or parties such that federal jurisdiction in one case can be engrafted upon a case with which it is consolidated. *See* *Johnson v. Manhattan Railway Company, 289 U.S. 479, 496, 77 L. Ed. 1331, 53 S. Ct. 721 (1933)*; *Xaros v. U.S. Fidelity and Guaranty Company, 820 F.2d 1176, 1180 n.1 (11th Cir. 1987)*.

97. Because Heileman has established that it had a reasonable apprehension that it would face an infringement suit and because, at the time of filing, it was prepared to use the LA trademark, the court concludes that Heileman has standing to maintain its claims for declaratory relief against Anheuser-Busch. *See* *Windsurfing International Inc. v. AMF Incorporated, 828 F.2d 755, 757 (Fed. Cir. 1987)*.

98. Because Miller has established that it competes with Anheuser-Busch in the sale of beer and that, at the time it filed its complaint, it was likely to use the challenged LA mark, the court concludes that Miller has standing to maintain its claims for declaratory relief under the test set forth in *Chromium Industries, Inc. v. Mirror Polishing & Plating Company, Inc., 448 F. Supp. 544, 555 (N.D. Ill. 1978)*.

99. In actions arising under section 43(a) of the Lanham Trademark Act, *15 U.S.C. **[**102]** § 1125(a)*, a prevailing party requesting attorney fees pursuant to *15 U.S.C. § 1117* bears a heavy burden of proving exceptional circumstances by clear and convincing evidence. Exceptional circumstances include inequitable conduct during

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[27] Declaratory judgment actions involving trademarks are analogous to those involving patents. Thus, guidance in trademark cases is often taken from patent cases. *See* *Windsurfing International, Inc. v. AMF Incorporated, 828 F.2d 755, 757 (Fed. Cir. 1987)*.

litigation, fraud, and vexatious or frivolous litigation. *See* *Olsonite Corporation v. Bemis Manufacturing Company, 610 F. Supp. 1011, 1026 (E.D. Wis. 1985)*.

100. Because Heileman and Miller have not met their burden of proving that this case involves "exceptional circumstances," the court concludes that Anheuser-Busch Incorporated is not liable to the G. Heileman Brewing Company, Inc. or to the Miller Brewing Company for attorney fees under *15 U.S.C. § 1117*.

VII. DISCUSSION

A. Standing

(1) *Statutory Relief*

Heileman framed its complaint in this action as if Anheuser-Busch had succeeded in obtaining federal registration for the LA mark. Although the record shows that Anheuser-Busch applied for registrations, its initial applications were **[*1479]** rejected and other applications had not been acted upon by the time of trial. [28] Nevertheless, Heileman's prayer for relief included a request for a declaratory judgment of noninfringement under the Lanham **[**103]** Trademark Act; for cancellation of Anheuser-Busch's trademark registrations for LA pursuant to *15 U.S.C. § 1114(1)*; and for an order that Anheuser-Busch disclaim LA as a trademark pursuant to *15 U.S.C. §§ 1056* and *1119*. An opponent of a trademark does not have standing to seek such relief in a district court unless the mark at issue has been registered by the United States Patent and Trademark Office (PTO). *Cf.* *Reliable Tire Distributors, Inc. v. Kelly Springfield Tire Company, 592 F. Supp. 127, 136 (E.D.Pa. 1984)*. Because Anheuser-Busch was not a registrant of the LA mark, Heileman's claims for statutory relief, which were never withdrawn, must be dismissed for lack of standing.

(2) *Declaratory Relief*

Because the LA mark is not registered, the plaintiffs must look to section 43 (a) of the Lanham Trademark Act, *15 U.S.C. § 1125(a)*, and common law as the source of their causes of action for declaratory **[**104]** relief. Federal courts are not empowered to issue advisory opinions, *see* U.S. Const. art. III, so Heileman and Miller have standing to seek a declaratory judgment only if their actions **[***1510]** present a justiciable case or controversy. [29] *See* *Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 240, 81 L. Ed. 617, 57 S. Ct. 461 (1937)*.

One district court in this circuit has construed the "likely to be damaged" language of section 43(a) to provide standing to a broad class of suitors. [30] **[**106]** In *Chromium Industries v. Mirror Polishing & Plating Company,*

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[28] Although Heileman and Miller could have filed an opposition to registration in the Patent and Trademark Office pursuant to *15 U.S.C.A. § 1063 (West Supp. 1987)*, the record does not reveal that they did so. Instead, they have attempted to accomplish the same ends in this court.

[29] In general, an actual trademark infringer is allowed to seek relief under the Declaratory Judgments Act when there is a trademark infringement controversy because:

> One who is subjected to charges of infringement and the threat of legal proceedings need not wait until his accuser chooses to bring suit to secure a determination of his rights. One of the purposes of the Declaratory Judgments Act is to avoid the unfairness of allowing one party to create a controversy by making such charges but, by withholding suit, to prevent the other party from conclusively refuting them.

Topp-Cola Company v. Coca-Cola Company, 314 F.2d 124, 125 (2d Cir. 1963).

[30] Section 43 (a) of the Lanham Trademark Act provides that:

> ***HN48***[] Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce,

*[**105] Inc., 448 F. Supp. 544, 555 (N.D. Ill. 1978)*, the court stated that: "For trademarks, standing under § 43 (a) is established if the plaintiff competes with defendant in the sale of goods covered by the term and uses or is likely to use the challenged mark." *Id. at 555*. Both Heileman and Miller are competitors of Anheuser-Busch and both alleged in their complaints that they were likely to use the LA mark. Therefore, under the *Chromium Industries* test, they have standing to maintain their claims for declaratory judgments. However, this court does not believe that the *Chromium Industries* test, which was modeled on a trademark registration opposition proceeding under *15 U.S.C.A. § 1063 (West Supp. 1987)*, is supported by the weight of authority. [31]

[*1480] More recently, the Seventh Circuit has explained that a declaratory judgment is available where a party desires a declaration of the legal effect of a proposed or past course of action. Essentially, two related but distinct fact situations are contemplated: (1) the controversy has ripened to a point where one of the parties could invoke a coercive remedy (i.e. **[**107]** a suit for damages or an injunction) but has not done so; and (2) although the controversy is real and immediate, it has not ripened to such a point, and it would be unfair or inefficient to require the parties to wait for a decision. *See Tempco Electric Heater Corporation v. Omega Engineering, Inc., 819 F.2d 746, 749 (7th Cir. 1987)*. These consolidated cases are, at best, of the second type.

Even in situations of the second type, an actual controversy must exist. In *Windsurfing International Inc. v. AMF Incorporated, 828 F.2d 755 (Fed. Cir. 1987)*, a case involving a registered trademark, the Federal Circuit rejected the contention that the mere competitor status of the parties can serve as a basis for the court's jurisdiction. *Id. at 758-59*. Instead, the court held that:

> The test for determining whether an actual case or controversy exists in a declaratory judgment action involving trademarks is two-pronged. First, the declaratory plaintiff must have a real and reasonable apprehension of litigation. Second, the declaratory plaintiff must have engaged in a course of conduct which brought it into adversarial conflict with the declaratory defendant.

Id. at 757 (citations **[**108]** omitted). These jurisdictional prerequisites **[***1511]** must exist at the time the suit is filed. *See Indium Corporation of America v. Semi-Alloys, Inc., 781 F.2d 879, 883 (Fed. Cir. 1985)*, *cert. denied*, *479 U.S. 820, 107 S. Ct. 84, 93 L. Ed. 2d 37 (1986)*.

At trial Heileman established that it had received a cease and desist letter from Anheuser-Busch and that, at the time it filed its complaint, it was ready, willing and able to use the LA mark. The evidence also revealed that Heileman actually used the LA mark in commerce the day after it filed its lawsuit (although it waited until it had secured a temporary restraining order before selling its LA beers through retail outlets). Based on these facts, Heileman had standing to maintain its claims for declaratory relief at the time it filed its complaint. *See Windsurfing International, 828 F.2d at 757*.

Miller's standing, however, is more problematical. The evidence reveals that it had never received a threat or a demand to cease and desist from Anheuser-Busch. Miller's only basis for considering itself threatened was the fact

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> and any person who shall with knowledge of the falsity of such designation or origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any false description or representation.

15 U.S.C. § 1125(a).

[31] There is no appellate decision affirming the *Chromium Industries* judgment and the ruling regarding standing has never been cited as authority or precedent in any Seventh Circuit appellate decision. *But see Exxon Corporation v. Humble Exploration Company, Inc., 695 F.2d 96, 103 n.10 (5th Cir. 1983)*; *Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186, 189 (2d Cir. 1980)*. Moreover, the *Chromium Industries* court applied its standing test in the context of a threshold motion to dismiss. The court ruled that, although the parties were competitors, the plaintiff had not alleged an injury even under its broadly construed test for standing because it had "not alleged that it currently uses or is likely to use this term ["easy release"] in its marketing efforts." *Chromium Industries, 448 F. Supp. at 556*.

that Anheuser-Busch had recently filed suits against Heileman and Stroh. *See* Complaint [of the Miller Brewing Company] at para. 11. Moreover, **[**109]** there was no evidence that Miller had actually brewed any low alcohol beer, announced its new product, or engaged in any introductory advertising at the time it filed its complaint. The only evidence that Miller had made any preparations to sell a low alcohol beer was some vague testimony that Miller had spent money developing a market and that its new products brand manager had traveled to Australia to study the low alcohol beer market there. *See* Transcript at 931-39, 2010-13, 2126, 2132-34, 2237. Miller did not begin to sell its beer in test markets for over two months after it filed its complaint. Given these facts, its claims were not ripe at the time it filed its complaint. *See* *Wembley, Inc. v. Superba Cravats, Inc., 315 F.2d 87, 89-90 (2d Cir. 1963)* ("Major stress should be placed on the 'definite' intention of the plaintiff to take 'immediate' action to utilize its potential and this intention should be 'evident' from the preparatory steps outlined in its complaint."); **[*1481]** *Banff, Ltd. v. Federated Department Stores, Inc., 657 F. Supp. 336, 339 (S.D.N.Y. 1987)* ("Without actual use or the immediate intention to use the trademark at issue, there is no justiciable controversy **[**110]** or case within the meaning of Article III of the United States Constitution.").

In ruling that a party in much the same circumstances did not have standing to maintain a declaratory judgment action, the *Windsurfing* court reasoned that:

> In its complaint and counterclaim, AMF alleged merely that "AMF is interested in using the mark descriptively in connection with its products." AMF cites testimony that AMF has a "desire" to use "windsurfer" in its advertising and promotion, and that other members of the trade have the same "desire." Rather than use the mark, get sued, and fight it out in court, AMF was saying, "We would like to use the mark, but before we do, we want a court to say we may do so safely." Thus AMF's complaint and counterclaim sought an advisory opinion, something a federal court may not give. *Aetna Life Ins., 300 U.S. at 241, 57 S. Ct. at 464*.

Windsurfing International, 828 F.2d at 758.

Similarly, in *Polaroid Corporation v. Berkey Photo, Inc., 425 F. Supp. 605, 607 (D. Del. 1976)*, Berkey counterclaimed for a judgment declaring that it was free to use the registered trademark "POLAROID" in a generic sense. Berkey had not actually tried to use the POLAROID **[**111]** name and Polaroid had not charged Berkey with any infringing activity, although Polaroid admitted that it would take steps to protect its mark should Berkey attempt to use it. The court outlined the controversy as follows:

> Berkey bottoms its claim of justiciability on its desire to use the Polaroid trademark generically, which presently is being thwarted by plaintiff's vigilance in protecting its trademark; thereby placing defendant in "reasonable apprehension" of litigation . . . should it attempt to transgress the Polaroid guidelines. Defendant further complains that at least on one occasion in the past it altered its advertising practices to comport with the Polaroid regulations.

Id. at 607 (citation omitted).

The court then stated that:

> The emerging issue is whether a justiciable controversy is presented where there is no current infringing activity, nor charge of infringement, but only the ever ready vigilance of Polaroid to protect its mark should it be used by a competitor. It is concluded that where the record is devoid, as it is here, of any current activity which effectuates an actual injury suffered by this defendant, a justiciable controversy does not exist.

[112]** *Id*. In granting Polaroid's motion to dismiss the court explained that: **[***1512]**

> At this stage in the proceedings, Berkey's interest is no more adverse to that of Polaroid than any other distributor or would-be distributor of cameras. Berkey's bald assertion, that because it happens to be in the same field as Polaroid, it "contemplates" using the name now enjoyed by Polaroid, is insufficient to defeat plaintiff's motion. While competitors may be loosely considered adversaries in a business sense, they are not *per se* adversaries in a legal sense, until there is demonstrated some concrete controversy between them. Moreover, even though litigation need not be over, even though litigation need not be actually threatened to

> procure relief under the Federal Declaratory Judgment Act, the most liberal interpretation of justiciability will not admit to an active controversy in the absence of either some imminent infringing conduct or some assertion of same.

Id. at 609 (citation omitted).

The same considerations apply to the instant action. However, Anheuser-Busch did not challenge Miller's standing and the facts which could have defeated jurisdiction were not revealed until the trial. Meanwhile, **[**113]** Miller's claims had become ripe. On August 13, 1984, it began to sell its Sharp's LA in test markets and on August 24, 1984, Anheuser-Busch filed a counterclaim alleging trademark infringement and unfair **[*1482]** competition. Miller's premature filing allowed it to choose its own forum and benefit from the rulings made in the *Heileman* case before actually risking use of the mark. Several of the witnesses testified that the parties to these lawsuits had learned a lesson from the Miller LITE litigation in which the defendant, Heileman, ultimately won a Pyrrhic victory when the court of appeals declared that the LITE mark is generic. *See* Transcript at 283-86, 1115, 2209-10, 2221-23. *See also* Miller Brewing Company v. G. Heileman Brewing Company, Inc., 561 F.2d 75 (7th Cir. 1977), *cert. denied*, *434 U.S. 1025, 54 L. Ed. 2d 772, 98 S. Ct. 751 (1978)*. Meanwhile, the injunction entered by the district court prevented Heileman from using the LITE (or light) name for seven months. During that time Miller gained the ascendency in the low calorie beer market and it remains the leading seller of low calorie beer today. *See* Transcript at 285, 346, 2088, 2187, 2222.

The lesson learned from this prior litigation accounts **[**114]** for the overeagerness of Heileman and Miller to gain a procedural advantage by being the ones to initiate the litigation. This court, however, does not believe that federal courts should be placed in the position of serving as part of a marketing strategy for beer or any other product. It would be inefficient to dismiss Miller's declaratory judgment claims at this point, particularly since they did ripen into a justiciable controversy before trial, but to avoid this situation in the future the court will have to hold a hearing at the outset to determine whether a declaratory judgment plaintiff has standing to maintain its claims.

B. CHOICE OF LAW

Heileman, Miller and Anheuser-Busch are each asserting claims for unfair competition under the common law of "various states," as well as under federal law. *See* Complaint [of the G. Heileman Brewing Company, Inc.] at para. 28; Complaint [of the Miller Brewing Company] at para. 12; Answer to Amended Complaint and Amended Counterclaim at para. 30; Answer and Counterclaim at para. 25. Common-law unfair competition is a tort which is governed by state law. *See* Data Cash Systems, Inc. v. JS & A Group, Inc., 480 F. Supp. 1063, 1071 **[**115]** (N.D. Ill. 1979), *aff'd*, 628 F.2d 1038 (7th Cir. 1980). *See also* Terry v. International Dairy Queen, Inc., 554 F. Supp. 1088, 1098 (N.D. Ind. 1983). This is because common-law rights in a trademark are acquired on a state-by-state basis by using a specific trademark in a specific area. *See* Natural Footwear Limited v. Hart, Schaffner & Marx, 760 F.2d 1383, 1406 n.61 (3d Cir.), *cert. denied*, *474 U.S. 920, 106 S. Ct. 249, 88 L. Ed. 2d 257 (1985)*. The forum state's choice of law principles are supposed to determine which states' laws apply. *See generally* Klaxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941). However, in this case the parties have made no attempt to brief or argue whether the law of one state as opposed to that of another is controlling or would make any difference. [32] The unfair competition claims alleged by all three parties are centered on the issue of whether Anheuser-Busch should be entitled to the exclusive use of the LA mark on beer. Thus, in **[***1513]** situations such as this, where Anheuser-Busch is using the disputed mark nationally in competition with Heileman in most states and with Miller in five states, the laws of each of the fifty states potentially apply. **[**116]**

Courts have long recognized the choice of law problems inherent in multistate unfair competition actions, calling them "bewilderingly complicated." *See* Campbell Soup Company v. Armour & Company, 175 F.2d 795, 796 (3d

[32] The only exceptions are Heileman's request for a judgment declaring that it is not unfairly competing with Anheuser-Busch under any Wisconsin Statute, *see* Complaint [of the G. Heileman Brewing Company] at para. 23(c), and Anheuser-Busch's claim for relief under the Illinois Anti-Dilution Act, *see* Answer to Amended Complaint and Amended Counterclaim at para. 29; Answer and Counterclaim at para. 24.

Cir.), *cert. denied*, *338 U.S. 847, 94 L. Ed. 518, 70 S. Ct. 88 (1949)*. *See also generally* Note, *The* ***[*1483]*** *Choice of Law in Multistate Unfair Competition: A Legal-Industrial Enigma*, 60 Harvard Law Review 1315 (1947). Courts which have confronted the problem (which is often ignored by the parties), have managed to avoid having to make a choice of law or having to analyze the claims on a state-by-state basis by concluding that choosing a particular state's law would make no difference to the outcome because there are no discernible modulations from jurisdiction to jurisdiction or **[**117]** under federal law. *See* *International Order of Job's Daughters v. Lindeburg and Company, 633 F.2d 912, 915-17 (9th Cir. 1980)*, *cert. denied*, *452 U.S. 941, 69 L. Ed. 2d 956, 101 S. Ct. 3086 (1981)*; *Keebler Company v. Rovira Biscuit Corporation, 624 F.2d 366, 372 (1st Cir. 1980)*; *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265, 1270 n.5 (2d Cir. 1974)*. *See also* *Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 545 (2d Cir. 1956)* (Clark, C.J., concurring) ("so far as I can discover, we have never found any difference in ultimate result, and so quite often lump federal and New York law together . . . or -- even more conveniently -- eschew all reference to the matter"). After observing that unfair competition law is either undeveloped or not significantly different in the various states, one court resolved the problem pragmatically by deciding that:

> In view of the miniscule likelihood of any effect upon the result to be achieved, the Court has no hesitation in applying the law as articulated in what appear to it to be the best-reasoned cases, whether state or federal and wherever arising.

Kardex Systems, Inc. v. Sistemco N.V., 583 F. Supp. 803, 810-11 ***[**118]*** *n.3 (D. Me. 1984)*. In the absence of any showing by the parties of any outcome determinative conflicts among the various states' laws, this court has adopted this approach and has based its judgment on the body of law set forth in the Conclusions of Law above. *See* *Maternally Yours, 234 F.2d at 546* ("we are entitled to go directly to the apposite federal precedents without subterfuge or ornamental rationalization").

C. Strength of LA Mark

The parties devoted most of their efforts at trial to litigating their dispute over the classification of the LA mark. In its pleadings, Anheuser-Busch, the first user of the mark, claimed that LA is a "unique, arbitrary and fanciful" mark or, in the alternative, that it is "suggestive." *See* Answer to Amended Complaint and Amended Counterclaim at paras. 7 & 8. After trial, Anheuser-Busch appears to have abandoned its theory that "LA" is arbitrary and now argues that:

> LA is merely suggestive of a number of concepts, including "low alcohol" or "light alcohol" or "light adventure" or "lifestyle alternative" or "Light Alcohol from Anheuser-Busch."

Defendant-Counterclaimant's Post-Trial Brief at 8. Heileman and Miller, on the other hand, maintain **[**119]** that LA is a common descriptive or generic term. *See* Complaint [of the G. Heileman Brewing Company] at para. 8; Complaint [of the Miller Brewing Company] at para. 6. After these lawsuits were commenced, the United States District Court for the Eastern District of Missouri held that LA is a suggestive mark. *See* *Anheuser-Busch, Inc. v. Stroh Brewery Company, 587 F. Supp. 330, 337-38* (E.D. Mo.), *aff'd*, *750 F.2d 631 (8th Cir. 1984)*. Based on the evidence adduced at trial, this court has found that the term "LA" is merely descriptive when applied to beer.

Numerous courts have commented on the difficulty of classifying a mark within one of the four traditional categories of trademark strength: (1) arbitrary, (2) suggestive, (3) merely descriptive, or (4) generic. *See, e.g.,* *A.J. Canfield Company v. Honickman, 808 F.2d 291, 296-97 & n.8 (3d Cir. 1986)* (and cases cited therein). Given the overlap of these categories, it is not unusual for courts ruling on the same marks under similar facts to arrive at different conclusions *Compare* *A.J. Canfield Company v. Honickman, 808 F.2d 291 (3d Cir. 1986)* ("chocolate fudge" a generic mark for a soft drink) *with* *A.J. Canfield Company* ***[**120]*** *v. Vess Beverages, Inc., 796 F.2d 903 (7th Cir. 1986)* ("chocolate fudge" a merely descriptive mark for a soft drink).

[*1484] Dissatisfied with simply assigning marks to the traditional four categories, the Seventh **[***1514]** Circuit, in recent years, has focused instead on the function of the mark at issue. *See Blau Plumbing, Inc. v. S.0.S. Fix-It, Inc., 781 F.2d 604, 608 (7th Cir. 1986)* ("Labels should not determine rights."). *See also* *Scandia Down Corporation v. Euroquilt, Inc., 772 F.2d 1423, 1431 n.3 (7th Cir. 1985)*, *cert. denied*, *475 U.S. 1147, 106 S. Ct. 1801, 90 L. Ed. 2d*

346 (1986); *Walt-West Enterprises, Inc. v. Gannett Company, Inc., 695 F.2d 1050, 1057 (7th Cir. 1982)*. The court has pointed out that the main function of trademark protection is:

> to allow a firm to affix an identifying mark to its product . . . offering that will, because it is distinctive and no competitor may use a confusingly similar designation, enable the consumer to discover in the least possible amount of time and with the least possible amount of headscratching whether a particular brand is that firm's brand or a competitor's brand.

Blau Plumbing, 781 F.2d at 609. Trademarks are not properly used as patent substitutes to further **[**121]** or perpetuate product monopolies. Rather, they are meant to protect consumers from being misled as to the enterprise from which the goods emanate. It is this source denoting function which trademark laws protect, and nothing more. *See* *Calvin Klein Cosmetics Corporation v. Lenox Laboratories, 815 F.2d 500, 503 (8th Cir. 1987)*; *Smith v. Chanel, Inc., 402 F.2d 562, 566-69 (9th Cir. 1968)*.

The traditional method of testing whether a mark is generic is by use of a "primary significance" test. This type of test has its origin in the case of *Kellogg Company v. National Biscuit Company, 305 U.S. 111, 83 L. Ed. 73, 59 S. Ct. 109 (1938)*, where Kellogg was claiming that it was entitled to the exclusive use of the term "shredded wheat." The Court ruled that:

> To establish a trade name in the term "shredded wheat" the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer.

Id. at 118. *See also* *Bayer Company v. United Drug Company, 272 F. 505, 509 (S.D.N.Y. 1921)* ("The single question . . . in all these cases, is merely one of fact: What do buyers understand **[**122]** by the word for whose use the parties are contending?"); *15 U.S.C.A. § 1064(c) (West Supp. 1987)*. Even though it is unlikely that the name of a completely new product such as LA beer could have any significance to consumers, the parties, in support of their respective positions, each offered survey evidence aimed at determining the primary meaning of "LA" in the minds of ordinary beer buyers.

(1) *The Primary Significance Surveys*

As is true in too many cases, the "method of poll taking adopted by each of the parties reflects their respective views of the law and each method was designed to elicit the kind of evidence each wished to bring out." *American Thermos Products Company v. Aladdin Industries, Inc., 207 F. Supp. 9, 20 (D. Conn. 1962)*, *aff'd sub nom.* *King-Seeley Thermos Company v. Aladdin Industries, Inc., 321 F.2d 577 (2d Cir. 1963)*. Well before the four primary meaning surveys were taken, each party had chosen to use the LA mark in a manner calculated to elicit "correct" responses from possible interviewees. Anheuser-Busch rejected a line extension approach and decided to use "LA" as a single brand mark with a less prominent corporate source indicator, "from Anheuser-Busch." **[**123]** Heileman, on the other hand, chose to pursue the line extension approach by using its well-established house marks followed by an equally prominent "L.A." as a category descriptor. Early in its marketing efforts, Heileman included an asterisk after the L.A. initials directing the consumer to the explanation "low alcohol." *See* Transcript at 335, 366-67, 437, 481, 483, 2051-52, 2087. The use of the asterisk was soon discontinued, but both Heileman and Anheuser-Busch continued to educate the public about the meaning of LA through advertising and point-of-sale materials. *See, e.g.*, Trial Exhibits 442, 740. Miller took a third **[*1485]** approach by adopting a single brand name, Sharp's, followed by an equally prominent "LA" as a category descriptor. It was obvious that Anheuser-Busch hoped that consumers surveyed would perceive LA as a brand name, while Heileman and Miller hoped it would be viewed as the common descriptor of a beer category. The plaintiffs also hoped that consumers would exhibit minimum confusion due to the equal prominence given to the house or single brand marks on their LA beer labels.

Despite this built-in bias, the parties attempted to qualify their respective surveys **[**124]** as trustworthy and accurate by establishing that:

1. the proper universe was selected and examined; **[***1515]**

2. a representative sample was drawn from that universe;

3. a fair and correct method of questioning the interviewees was used;

4. the persons conducting the survey were recognized experts;

5. the data gathered was accurately reported;

6. the sample, the questionnaire and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys;

7. the sample and the interviews were conducted independently of the attorneys in the case;

8. the interviewers were adequately trained in the field and had no knowledge of the litigation purposes for which the survey was to be used.

See Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 365, 429 (1960). *See* Transcript at 509-658, 661-874, 1515-1875. Nevertheless, the surveys were severely flawed and of little value to the court. [33]

[125]** Anheuser-Busch offered two surveys in support of its claim that LA is a legally protectible mark. Both were conducted by Dr. Yoram Wind, Lauder Professor and Professor of Marketing at the Wharton School of the University of Pennsylvania. *See* Trial Exhibit 772. Wind's own testimony established that he exercised little supervision over the collection or interpretation of data for either survey. *See* Transcript at 1564-68, 1574-98. His first study (Wind I) was conducted among 1,051 consumers at shopping malls in fifteen cities on April 19, 20 and 21, 1984. *See* Trial Exhibit 733. Potential interviewees were screened for the following characteristics:

-- meet security requirements (not known by interviewer, has not participated in any survey other than a political poll in the past six months, does not work for a company that manufactures or distributes beer, a market research company or an advertising agency, gives the interviewer his/her telephone number);
--is legal drinking age or older and fits within age/sex quotas;
-- has purchased beer;
-- fits income and race quotas;
-- agrees to participate.

See Transcript at 1544-45. The objective of the survey was "to determine **[**126]** whether consumers perceived LA as a brand name of beer produced by Anheuser-Busch or alternatively as a generic non-brand designation for the category of low or light-alcohol beer." *See* Transcript at 1542. After being screened, those selected were shown a can of LA from Anheuser-Busch or LA advertising [34] or both. Then each person was asked: How do you describe the product?; What type of beer is it?; What is the brand name of the new product?; and, What company produces the brand? Finally, the consumer was asked whether he or **[*1486]** she had ever seen, heard about or tried LA. *See* Transcript at 1548-54.

Dr. Wind purposely set out to isolate the responses of consumers who had not been "contaminated" by advertising or any other exposure to LA. *See* Transcript at 1569-73, 1772-94. At the time this survey was taken Heileman had only made a token shipment of its LA beer and Miller had not publicized or sold any Sharp's LA. Anheuser-Busch had been selling its LA beer to retail customers for less than three weeks in eight of **[**127]** the fifteen cities where the survey was conducted. Seven of the fifteen sites selected had had no LA sales and were in jurisdictions where

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[33] It is the burden of the proffering party to prove the quality of survey evidence. However, even though a survey may not meet all criteria, the results may still be admitted and given lesser weight. *See* SquirtCo v. Seven-Up Company, 628 F.2d 1086, 1091 (8th Cir. 1980); American Home Products Corporation v. Barr Laboratories, Inc., 656 F. Supp. 1058, 1062 (D.N.J. 1987).

[34] The promotional material used the phrases "light in alcohol," "half the alcohol," or "reduced alcohol," but not "low alcohol." *See* Transcript at 1546.

advertising the alcoholic weakness of beer was forbidden. *See* Transcript at 1543. *See also* *Id. at 367, 2157* (beer could not be advertised as being low in alcohol in Mississippi). Moreover, the questionnaires of those who had had prior exposure to LA (369 out of 1,051) were disregarded in tabulating the answers to the first three questions about the description, type and brand of the product. *See* Trial Exhibit 773 at 300016. It is not surprising, then, that only about 4.9% of those surveyed who had had no prior exposure to LA associated the name "LA" with light, low or less alcohol. *See* Transcript at 1613. It is equally unsurprising that 76.5% of these same consumers guessed that the brand [35] name of the new beer was "LA." **[***1516]** *See* Transcript at 1614, 1757-58, 1806. Hoping for this type of response, Anheuser-Busch had deliberately designed its label with large "L" "A" letters dominating the trade dress. *See* Deposition of Zanvel A. Zack at 28. *See also* Transcript at 1756-58. Under these circumstances, the court agrees with **[**128]** the dissenting judge in the *Stroh* appeal who observed that: "The perceptions of a group of wholly uninformed consumers are . . . simply legally irrelevant." *Anheuser-Busch, Inc. v. Stroh Brewery Company, 750 F.2d 631, 645 (8th Cir. 1984)*. *See also* Burgunder, *An Economic Approach to Genericism*, 23 American Business Law Journal 391, 413-14 n.84 (1985).

[129]** The survey also revealed that about 80% of those who had had prior exposure to LA, as well as those who had not, named Anheuser-Busch as the source of the beer after being shown a can labeled "LA from Anheuser-Busch." *See* Transcript at 1628, 1692. The responses led Dr. Wind to conclude that "LA" is perceived and understood by consumers as the brand name of the new product, and not a generic descriptor of the type of beer. *See* Transcript at 1628-29. However, the court believes that this only shows that a mark can have a dual function when there is only one producer of the product. [36] *See* Transcript at 910, 914, 1885.

During the cross-examination of Dr. Wind, Miller and Heileman were able to point out many coding errors which affected the results of the survey. **[**130]** *See* Transcript at 1808-29, 1880-82. Some of the criticized coding was plainly erroneous. Other disputes arose because the consumers surveyed gave multiple answers or answers which could arguably be classified in more than one category. Wind's report gave no indication of the order in which the multiple responses came to mind. *Cf*. Coverdale, **[*1487]** *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 University of Chicago Law Review 868, 886 (1984) (if many survey respondents give multiple responses, the court would have to consider absolute frequency of use and the order in which the terms came to mind). While a certain number of errors and good-faith disputes are unavoidable in quantifying survey data, these errors, combined with the built-in bias, plus the flaws in the universe, design and supervision of the survey have caused the court to place very little weight on the results of Wind I.

Wind II fares little better. *See* Trial Exhibit 774. This survey was conducted among 800 beer drinking consumers in eight cities [37] in September of 1984. The objectives of this study were to determine: (1) whether consumers perceive LA to be the brand name for a low alcohol **[**131]** beer or a descriptor of the low alcohol beer category, and (2) how consumers describe this type of beer. *See* Transcript at 1666. These consumers, prescreened to

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[35] The Wind survey respondents were not tested to determine what they understood by the concept "brand name." *See* Transcript at 1568-70. Many courts have recommended the methodology of the survey conducted in the case of *E.I. DuPont de Nemours & Company v. Yoshida International, Inc., 393 F. Supp. 502 (E.D.N.Y. 1975)* in which the term "Teflon" was at issue. That survey offered the examples of "Chevrolet" to illustrate what it meant by a brand name and "automobile" to illustrate what it meant by a product type. Then, respondents were asked to classify other brand names and product names among which was "Teflon." However, other courts have cautioned that this type of test is helpful only when the distinction between the brand name and the product genus is obvious. *See* *A.J. Canfield Company v. Honickman, 808 F.2d 291, 303 (3d Cir. 1986)*. These courts have expressed doubts that any consumer survey can be helpful when a category descriptor is used as a brand name. *See* *Id. at 302*.

[36] A trademark has a dual function if it identifies particular product characteristics while at the same time indicating its source. *See A.J.* *Canfield v. Honickman, 808 F.2d 291, 300 (3d Cir. 1986)*; *American Thermos Products Company v. Aladdin Industries, Inc., 207 F. Supp. 9, 20 (D. Conn. 1962)*, *aff'd. sub nom.* *King-Seeley Thermos Company v. Aladdin Industries, Inc., 321 F.2d 577 (2d Cir. 1963)*.

[37] LA from Anheuser-Busch and at least one other low alcohol beer was being sold in each of the survey sites. *See* Transcript at 1864-69.

select only those who had consumed beer within the past thirty days, were shown five photographs of low alcohol beers, including the Anheuser-Busch product, but not including any product from Miller or Heileman. [38] *See* Transcript at 1834, 1869. Sixty-two percent of those surveyed described the beers as some form of low alcohol; while sixty percent identified LA as the brand name. *See* Transcript at 1686, 1693. Again, the plaintiffs were able to point out numerous coding errors in this survey. *See* Transcript at 1675-81, 1714-21, 1843-58, 1872-75, 1883-85, 1901-07.

Miller offered its own version of a primary meaning survey taken by the Admar **[**132]** Research Company, Inc. and directed by Dr. Henry Ostberg, Admar's president. *See* Trial Exhibit 435. Eight hundred and ten male and female beer drinkers at twelve shopping malls in eight cities were questioned during the period June 21-23, 1984. After an initial screening which included a determination that the subjects had consumed beer during **[***1517]** the past seven days and were familiar with LA from Anheuser-Busch, the interviewees were shown photographs of a can and bottle of Budweiser, Schlitz, Miller High Life and "LA from Anheuser-Busch." Those who were familiar with LA were then asked what "LA" on the Anheuser-Busch can and bottle means, if anything. *See* Transcript at 525. Fifty-two percent said the meaning of LA is low or light alcohol. [39] *See* Transcript at 530, 567. Eleven percent said LA is a brand name. *See* Transcript at 532-33. While the Ostberg survey does not indicate whether consumers think of LA or low alcohol as a type of beer, it does show that a majority of consumers, who by June had been exposed to advertising and sales of LA, recognized that LA stands for low alcohol.

[133]** Heileman also contributed a survey designed to discover what, if anything, the term LA, as used in connection with beer, means to consumers. *See* Trial Exhibit 436; Transcript at 672. Its Beer Display Study was conducted by Legal Marketing Research, Inc. and directed by its president John Bunge. From July 11 through August 4, 1984, 536 consumers, who had purchased beer within the past month, were interviewed in shopping malls in five cities in which Heileman and Anheuser-Busch LA beers were being sold. Those selected were first asked to name all the types of beer they could remember. Only 6.3% (37 people) mentioned LA or low alcohol beer. *See* Transcript at 745. This stage of the survey was described as "unaided awareness" by Bunge. *See* Transcript at 687-88. **[*1488]** The next stage was "aided" (by advertising and probing questions) awareness. *See* *Id. at 687-91*. At this stage each interviewee was shown one of two displays meant to simulate beer sections in liquor stores: 271 saw Display 1, made up of only Anheuser-Busch LA products and accompanying advertising; 265 saw Display 2, made up of both Anheuser-Busch and Heileman LA products and advertising. The interviewee was then **[**134]** led away from the display and asked: "Does the term LA, as used in connection with beer, mean anything in particular to you?" Transcript at 693. A majority (69.4% of those viewing Display 1 and 75.8% of those viewing Display 2) said "yes." Next, those who said "yes" were asked: "As used in connection with beer, what does the term LA mean?" Of those who said LA has some meaning, 67% of those viewing Display 1 and 71% of those viewing Display 2 said that meaning was "low alcohol." [40] Based on these statistics, Bunge concluded that "the term LA as used in connection with beer really has several [meanings]. The primary meaning of which, . . . is the concept of low, light, less alcohol." Transcript at 673.

Anheuser-Busch attacked this survey as biased because the Heileman advertising and point-of-sale materials included in Display 2 translated LA as "low alcohol." *See* Transcript at 755-63. However, the disparity between the responses to the two displays was small, so these materials could have had little effect on the ultimate result. *See* Transcript at **[**135]** 866. The defendant also criticized the validity of the percentages because many of the subjects gave multiple answers and were counted in more than one category. *See* Transcript at 747-99. The court

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[38] *See* *Loctite Corporation v. National Starch and Chemical Corporation, 516 F. Supp. 190, 206 (S.D.N.Y. 1981)* (criticizing a primary significance survey in which test subjects were not shown the products of each party).

[39] The survey results appear to have been somewhat stretched to reach a percentage over 50%. Multiple answers given by a single respondent were all tallied. *See* Transcript at 531. Seventeen percent gave answers that fell into more than one category, *see* Transcript at 608, leading to numerous discretionary coding decisions which were challenged by the defendant. *See* Transcript at 569-633.

[40] When all 536 interviewees are considered, 50.2% (269) stated that LA means low alcohol. *See* Transcript at 716.

agrees that there was too much aiding of awareness and probing. However, Bunge did attempt to record the answers which first came to mind in his study's tables.

Within the context of this survey's design, the central question "As used in connection with beer, what does the term LA mean?" leads the interviewee to "translate" the LA initials rather than to name the type of beer on display (even though, ultimately, the two answers may be identical). Therefore, the court believes that the Beer Display Study does little to establish that LA is the generic name for a type of beer. However, it does indicate that by the time this survey was conducted a majority of consumers understood LA to be descriptive of the low alcohol characteristic of the beer.

(2) *Classification of the LA Mark*

In many trademark infringement or cancellation suits, properly conducted surveys can be of assistance to the finder of fact in evaluating consumer perceptions. However, the situation at hand presents an atypical **[**136]** factual situation. In the usual "genericide" case a venerable mark has come under attack because, over the course of years consumers have come to regard it as a name for the genus of a product rather than as a brand name of a particular product from a single **[***1518]** source. *See, e.g., Kellogg Company v. National Biscuit Company, 305 U.S. 111, 83 L. Ed. 73, 59 S. Ct. 109 (1938)* (shredded wheat); *Donald E. Duncan, Inc. v. Royal Tops Manufacturing Company, 343 F.2d 655 (7th Cir. 1965)* (yo-yo). In contrast, low alcohol beer was virtually a new product when Anheuser-Busch began to use the LA mark in 1984. Prior to April 27 of that year, the federal Bureau of Alcohol, Tobacco and Firearms (BATF) and the laws of many states would not allow beer to be advertised or labeled with any indication of the level of alcoholic strength or weakness.

Were it not for these historical facts, the court would have no trouble finding that LA is a generic or common descriptive term for a type of beer, [41] **[**140]** despite **[*1489]** any survey results to the contrary. The initials clearly stand for low alcohol -- the adjectives which describe the unique characteristic of a kind of beer. *See Henri's Food Products Company v. Tasty Snacks, Inc., 817 F.2d* ***[**137]*** *1303, 1305-06 (7th Cir. 1987)*. Some courts, without benefit of consumer surveys, have held that a term is a common descriptor primarily because the word or words are the most common terms which can be used to denominate the product genus. *See, e.g., Technical Publishing Company Division of Dun-Donnelley Publishing Corporation v. Lebhar-Friedman, Inc., 729 F.2d 1136 (7th Cir. 1984)* ("Software News" generic when applied to a trade magazine dealing with the softwear industry). In *A.J. Canfield Company v. Honickman, 808 F.2d 291, 301-03 (3d Cir. 1986)*, the court ruled that the name "chocolate fudge," as used for a soft drink, is generic [42] because "to the extent that a trademark also communicates functional characteristics, it does not function as a trademark." *Id. at 305*. Until shortly before that case arose, the plaintiff Canfield had been the sole user of the unregistered "Chocolate Fudge" mark and the sole producer of Diet Chocolate Fudge Soda. The name had only recently been appropriated for use by the defendant and other soft drink manufacturers. In this situation the court reasoned that the survey Canfield offered had no probative value:

> In contrast to the advocates **[**138]** of this survey technique, we do not believe that a direct survey of public views can truly measure consumer understanding if a term identifies a product that arguably constitutes its own genus. As we have discussed above, generic marks signifying goods produced by only one manufacturer may function both as generic terms, signifying the product genus, and as brand names, indicating continuity of

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[41] Recently, the Seventh Circuit has explained that "an adjective can be generic term when that word is a part of a common descriptive name of a *kind* of goods. In order to be generic, however (as the word implies), the word in question must serve to denominate a type, a kind, a genus or a subcategory of goods." *Henri's Food Products Company, Inc. v. Tasty Snacks, Inc., 817 F.2d 1303, 1305-06 (7th Cir. 1987)* (footnote omitted).

[42] The court determined that "chocolate fudge soda" rather than "soda" or "chocolate soda" was the product genus and held that: "If a producer introduces a product that differs from an established product class in a particular characteristic, and uses a common descriptive term of that characteristic as the name of the product, then the product should be considered its own genus. Whether the term that identifies the product is generic then depends on the competitors' need to use it." *A.J. Canfield Company, 808 F.2d at 305-06*.

> source. Faced with a mark like shredded wheat, the consumer has no reason to define it either as the name of a brand or as the name of a genus because the term functions most efficiently as both. Accordingly, a survey inquiring whether a designation like shredded wheat is a brand name or a product name forces respondents to make a false dichotomy. Because consumers will never have had a reason to consider the question before, such a survey might not elicit real attitudes but merely answers developed on the spot that would be highly susceptible to the influences of survey phraseology.
>
> Perhaps more significantly, directly surveying the public without first differentiating the product brand from the product genus -- or at least without first offering a definition for the distinction -- would not, **[**139]** in the context of this case, test the meaning of words to the public but would rather request a legal conclusion. A conscientious survey respondent, when asked whether a term is a brand name or product name, might ask, "Exactly what do you mean by product name and what do you mean by brand name?" Using the primary significance test and taking account of the anonymous source rule, we would be compelled to answer: "A brand name primarily signifies a product brand while a product name primarily signifies a product genus." The respondent then asks: "How do I distinguish a product brand from a product genus?" If we seek to answer this question with the results of this survey, we can only answer in a circular fashion: "That question depends on the answers we obtain **[***1519]** from you and other respondents." We simply cannot circumvent the requirement of defining the distinction between product brand and product genus by asking the public to tell us if a name is a brand name or the name of a product genus; we can only ignore it.

A.J. Canfield Company v. Honickman, 808 F.2d at 302 (footnotes omitted).

[*1490] For the same reasons, Dr. Wind's conclusion that consumers understood "LA" to be a brand name are of no probative value under the circumstances of this case. Nevertheless, the surveys have been of some help to Anheuser-Busch in sustaining its burden of proving that "LA" is not a generic term. The Wind surveys, as well as those of Ostberg and Bunge, reveal that many consumers were not aware of low alcohol beer at all, so it was not surprising that the poll takers found that these consumers, as well as those with only recent exposure to the product, had not formed a consensus that "LA" or "low alcohol" is the name of a distinctive type of beer. While Canfield's **[**141]** "Diet Chocolate Fudge" had been on the market for thirteen years when Canfield's trademark claim arose, LA had been sold to consumers for less than a month when Heileman filed its lawsuit. As the surveys indicate, consumers had had no reason to call beer with less alcohol anything until it became available in the marketplace. Nevertheless, the law requires that generic or common descriptive usage be determined from the point of view of the relevant consumer. [43] **[**142]** *See* *Kellogg Company v. National Biscuit Company, 305 U.S. 111, 118, 83 L. Ed. 73, 59 S. Ct. 109 (1938)*; *In re Merrill Lynch, Pierce, Fenner and Smith, 828 F.2d 1567, 1569 (Fed. Cir. 1987)*. For this reason, the court cannot find that "LA" was born generic. [44] *See* Greenbaum, Ginsburg & Weinberg, *A Proposal for Evaluating Genericism After "Anti-Monopoly*," 73 Trademark Reporter 101, 105 (1984).

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[43] The plaintiffs attempted to show that LA and "low alcohol" were generic terms within the beer industry and that LA had gained currency as a category descriptor for beer in Australia. *See, e.g.*, Transcript at 51-54, 68, 109-16, 240-42, 415, 944-48, 959, 2212-13, 2225-28. *See also* Trial Exhibits 74, 77, 100, 101, 102, 103, 400, 401, 426, 427. However, industry and foreign usage are not indicative of a term's generic use by ordinary consumers. *See* *Big O Tire Dealers v. Goodyear Tire & Rubber Company, 561 F.2d 1365, 1369 (10th Cir. 1977)* (industry usage not determinative), *cert. denied*, ***434 U.S. 1052, 54 L. Ed. 2d 805, 98 S. Ct. 905 (1978)***; *Donald F.* *Duncan, Inc. v. Royal Tops Manufacturing Company, Inc., 343 F.2d 655, 661-62 (7th Cir. 1965)* (generic use of term "yo-yo" in Philippine Islands not dispositive of whether "yo-yo" is generic among consumers in the United States).

[44] At the time LA beer was introduced there was merely a hope or expectation by those entering the low alcohol field that LA would become a product category. In its introductory stage, LA beer was little more than a fad. "One can capitalize on a market or fad created by another provided that it is not accomplished by confusing the public into mistakenly purchasing the product in the belief that the product is the product of the competitor." *American Footwear Corporation v. General Footwear Company, Limited, 609 F.2d 655, 662 (2d Cir. 1979)* (term "bionic" could be used in the absence of confusion). *See also* *International Order of Job's Daughters v. Lindeburg and Company, 633 F.2d 912, 919 (9th Cir. 1980)*, *cert. denied*, ***452 U.S. 941, 69 L. Ed. 2d 956, 101 S. Ct. 3086 (1981)***.

Faced with a similar situation in *Gimix, Inc. v. JS & A Group, Inc., 699 F.2d 901 (7th Cir. 1983)*, the Seventh Circuit explained that:

> Words may be classified as generic in two distinct ways. A manufacturer may select a word which is already in common use and apply it to his product according to that common meaning; the use of "light" in relation to beer is an example of this first type of generic term. [45] However, a manufacturer **[**143]** may also invent a word which thereafter enters common usage and becomes generic. *See* 3 R. Callman, *The Law of Unfair Competition and Monopolies* § 74.2 (3d ed. 1969).

Gimex, 699 F.2d at 905. In that case the court of appeals ruled that "Auto Page" is not a generic term for an automatic dialing device which connects an automatic telephone answering service with a paging terminal. The court noted that, although the words "auto" and "page" are generic, they are each capable of multiple meanings and were not combined as the name "Auto Page" until used by the plaintiff Gimex in **[*1491]** its patent application. At that time the public had not been exposed to the type of product at issue. Thus, because "Auto **[***1520]** Page" was not a commonly understood or commonly used term prior to its association with the plaintiff's invention, the court concluded that it is not a generic term, but is merely descriptive. *Id. at 906-07*. *See also* *Trak Inc. v. Benner Ski KG, 475 F. Supp. 1076, 1079 (D. Mass. 1979)* (no consumer consensus as to generic term for new product). Likewise, in Anheuser-Busch's case against Stroh, Stroh's vice president testified that at the time of that trial (May 7, 1984) LA was **[**144]** not a generic name as far as consumers were concerned, but that if Anheuser-Busch and several other breweries used it, it would become generic. *See* *Anheuser-Busch, Inc. v. Stroh Brewery Company, 587 F. Supp. 330, 338* (E.D. Mo.), *aff'd*, *750 F.2d 631 (8th Cir. 1984)*.

Although the Stroh prediction had not materialized by the time of this trial, the record shows that, after several weeks of exposure to LA beer through retail outlets, advertising and news reports, a majority of consumers surveyed recognized that LA describes the beer as being low in alcoholic content. *See* Trial Exhibits 435, 436, 774. Anheuser-Busch contends that the media publicity and advertising -- some of which it generated itself -- "contaminated" **[**145]** these consumer perceptions by translating "LA" as low alcohol. However, as the plaintiffs correctly point out, in determining whether a mark is merely descriptive, a fact finder must consider the mark as it is applied to the goods in question:

> Evidence of the context in which a mark is used on labels, packages, or in advertising material directed to the goods is probative of the reaction of prospective purchasers to the mark. To hold otherwise would be to separate the concept of the average prospective purchaser from the world of reality.

Application of Abcor Development Corporation, 588 F.2d 811, 814 (C.C.P.A. 1978). *See also* Transcript at 539, 1601, 1779-86, 1792, 2078-87.

Anheuser Busch points out that it has never objected to competitors using the phrase "low alcohol" or any of its variants to describe beer. *See* Answer to Amended Complaint and Amended Counterclaim at paras. 18, 19, 20. *See also* Transcript at 1303-04. It is only claiming trademark rights to the term "LA." Despite the evidence that LA is descriptive, Anheuser-Busch maintains that it is a protectible mark because the letters "L" and "A" are not initials for low alcohol or anything else, but are **[**146]** merely suggestive of a number of things, including low alcohol, light in alcohol, less alcohol, light adventure, lifestyle alternative, and "low in alcohol from Anheuser-Busch."

The problem with this theory is that even these suggested meanings are words beginning with "L" and "A," so that, even under the defendant's reasoning, the letters are being used as initials. Initials do not "suggest" or "connote" the words for which they stand, they directly denote those words. [46] **[**148]** For example, **[*1492]** throughout the

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[45] In the Miller LITE litigation, the court of appeals relied heavily on a standard dictionary definition of "light" in ruling that "LITE" (or light) is a common descriptor for beer. *See Miller Brewing Company v. G.* *Heileman Brewing Company, 561 F.2d 75, 80-81 (7th Cir. 1977)*, *cert. denied*, ***434 U.S. 1025, 54 L. Ed. 2d 772, 98 S. Ct. 751 (1978)***. In the instant case none of the parties presented evidence that either "LA" or "low alcohol" is defined by any lexicon as a type of beer.

trial **[***1521]** the plaintiffs drew the court's attention to internal communiques among Anheuser-Busch executives which were signed with initials. *See, e.g.*, Transcript at 131-32, 181, 184, 201, 243, 1106, 1250, 1253, 1282, 1325. When shown memos signed by "A.A.B. III" none of the defendant's personnel testified that these initials suggest a variety of possibilities or that the letters have no meaning. They all recognized that when the initials "A.A.B. III" are attached to an Anheuser-Busch document they directly denote the chief executive officer, August A. Busch III. Similarly, the initials "L" and "A" on a can of beer directly denote low alcohol. Other meanings, such as "light adventure," **[**147]** which were later concocted by the parties, are little more than plays on words or initials. [47] Despite any other possible associations, the primary function of the LA initialism is to describe to consumers the unique selling point of the beer -- namely, that it is low in alcohol.

The Seventh Circuit has explained that merely descriptive terms are unsuited to the function of trademarks because they are poor means of distinguishing one source of goods from another and because they are often necessary to the description of all goods of a similar nature. *See* *Gimix, Inc. v. JS & A Group, Inc., 699 F.2d 901, 909 (7th Cir. 1983)*; *M.B.H.* *Enterprises, Inc. v. WOKY, Inc., 633 F.2d 50, 54 (7th Cir. 1980)*.

Anheuser-Busch witnesses testified that it is not necessary to use "LA" to describe the beer in question because other phrases such as "low alcohol," "light in alcohol," "less alcohol," and "reduced alcohol" remain available for common use. *See* Transcript at 1310, 2245. However, the plaintiffs' expert John Nevin disagreed, pointing out that "LA" is the most acceptable term because consumers naturally tend to shorten or abbreviate product names. *See* Transcript at 884-89. *Accord* *American Thermos Products Company v. Aladdin Industries, Inc., 207 F. Supp. 9, 20 (D. Conn. 1972)*, *aff'd* ***[**149]*** *sub nom.* *King-Seely Thermos Company v. Aladdin Industries, Inc., 321 F.2d 577 (2d Cir. 1963)*. Moreover, the words "less" and "low" are thought to have negative connotations, while the phrase "light in alcohol" could be confused with a different product -- light alcohol. *See* Transcript at 297, 941-42, 1114, 1154, 2195.

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[46] The dictionary defines "initial" as: "Denoting the first letter or letters of a word." *American Heritage Dictionary of the English Language* 676 (1969). "Denote" is defined as: "To refer to specifically; mean explicitly." *Id. at 353*. In contrast "connote" means: "To suggest or imply in addition to literal meaning." *Id. at 283*.

In the Stroh case, the district court stated that:

> It is apparent from the [Wind] study that consumers do not generally recognize the term LA to immediately *connote* low alcohol when they see such on plaintiff's product. Rather, it is this Court's opinion that the study supports a conclusion that LA, when placed prominently on a can of beer as the sole brand name, stands for an idea which requires some operation of the imagination to connect it with the product, and therefore is suggestive in nature.

Anheuser-Busch, Inc. v. Stroh Brewery Company, 587 F. Supp. 330, 337 (E.D. Mo.), *aff'd*, *750 F.2d 631 (8th Cir. 1984)* (emphasis supplied). It is well-established that "[a] term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of the goods." *Abercrombie & Fitch v. Hunting World, Inc., 537 F.2d 4, 11 (2d Cir. 1976)*; *Gear, Inc. v. L.A. Gear California, Inc., 670 F. Supp. 508, 514 (S.D.N.Y. 1987)*. However, the "imagination, thought and perception" refers to the mental process required to connect a name that is incongruous or figurative with the product (e.g., "Roach Motel" with an insect trap or "TIDE" with soap), not the intermediate thought process needed to translate initials into the name which directly describes the salient characteristic of the product.

The Missouri court also referred to "LA" as an acronym. *See* *Anheuser-Busch, 587 F. Supp. at 334-35* & n.7. However, "LA" is not a true a acronym which is a "word formed from the initial letters of a name." *See American Heritage Dictionary of the English Language* 12. As noted throughout this opinion, the initials "L" "A" are not used or pronounced as a word when they are applied to beer. A true acronym could be a word which is arbitrary or suggestive on its own without reference to the underlying words. *See, e.g.,* *Merritt Forbes & Company Incorporated v. Newman Investment Securities, Inc., 604 F. Supp. 943, 955-56 (S.D.N.Y. 1985)* (denying summary judgment because the acronym "TOP's" standing for the generic term "tender option security program," may conceivably constitute a valid and protectible service mark). In contrast, "LA" is nothing more than initials.

[47] Reporters have even joined in this play. *See* Trial Exhibit 493 (Advertising Age headline from August 23, 1984, proclaiming "Light Audience so far for 'L.A.'").

After the BATF abandoned its restrictions on the advertising of alcoholic weakness, the use of "LA" as a subterfuge for denoting low alcohol without spelling it out became moot. However, the testimony from both sides revealed that the main value of the LA initialism lay in the hope that "LA" would become "the bar call of the Eighties." *See* Trial Exhibit 243 at 12. *See also* Transcript at 806, 1114, 1167, 1180, 1198. While the parties extolled the virtues of low alcohol beer as being part of a trend toward moderate drinking and a healthier lifestyle, *see* Transcript at 883, 1110-11, they also implied that customers who are supposedly seeking these values would be embarrassed to ask for a low alcohol beer in a public establishment. *See* Transcript at 941-42. Consequently, although there are alternate terms which can describe LA beer, the LA name is clearly **[**150]** the most desirable. *See* Transcript at 912, 2019, 2028, 2217, 2221.

[*1493] Under the law of this circuit, abbreviations for generic phrases are themselves treated as generic. [48] *See* *National Conference of Bar Examiners v. Multistate Legal* ***[***1522]*** *Studies, 692 F.2d 478, 488 (7th Cir. 1982)*, *cert. denied*, *464 U.S. 814, 78 L. Ed. 2d 83, 104 S. Ct. 69 (1983)*. Likewise, an abbreviation for a merely descriptive term will be protected only if it has acquired secondary meaning. *See* *Continental Corrugated Container Corporation v. Continental Group, Inc., 462 F. Supp. 200, 204 (S.D.N.Y. 1978)*.

[151]** Anheuser-Busch made no serious attempt to establish that the "LA" mark had acquired secondary meaning during the brief interval between April 2, 1984, when it began using the LA mark and April 24, when Heileman also began to use the mark. A merely descriptive term has acquired secondary meaning if, through long and exclusive use, the public has come to associate the mark only with the senior user's business. *See* *American Footwear Corporation v. General Footwear Company, 609 F.2d 655, 663 (2d Cir. 1979)*; *Union Carbide Corporation v. Ever-Ready, Inc., 531 F.2d 366, 380* (7th Cir.), *cert. denied*, *429 U.S. 830, 97 S. Ct. 91, 50 L. Ed. 2d 94 (1976)*. The senior user has the burden of proving that its mark possessed secondary meaning at the time the junior user commenced its use of the mark. *See* *Saratoga Vichy Spring Company, Inc. v. Lehman, 625 F.2d 1037, 1043 (2d Cir. 1980)*.

The undisputed evidence shows that Anheuser-Busch sold 200,000 barrels of LA beer and spent $ 27,000,000.00 on advertising by the time of trial. However, a large expenditure of money does not in itself create legally protectible rights. *See* *American Footwear Corporation, 609 F.2d at 663*; *Eagle Snacks, Inc. v. Nabisco Brands,* ***[**152]*** *Inc., 625 F. Supp. 571, 583 (D.N.J. 1985)*. This evidence cannot overcome the fact that there had not been adequate time for the "LA" mark to acquire secondary meaning. *See* Transcript at 734-35. The court has found no other case in which there has been a finding that secondary meaning had developed in a matter of weeks. To the contrary, in *Gimix, Inc. v. JS & A Group, Inc., 699 F.2d 901, 907 (7th Cir. 1983)*, the court stated that "the period of time involved here from the introduction of the plaintiff's product in 1975 until the introduction of Iwata's similar product in 1980, is so brief as to cast serious doubt upon the very possibility of having established a strong secondary meaning . . . ." Under even less doubtful circumstances, this court has found that the "LA" mark had not acquired a secondary meaning at any time relevant to these actions.

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[48] A few courts in other districts have advanced the proposition that the abbreviation itself must have become generic or descriptive by virtue of being commonly understood in order to be ineligible for trademark status. *See, e.g.,* *Merritt Forbes & Company Incorporated v. Newman Investment Securities, Inc., 604 F. Supp. 943, 956 (S.D.N.Y. 1985)* (and cases cited therein); *Kampgrounds of America v. North Delaware A-OK Campground, Inc., 415 F. Supp. 1288, 1292 (D. Del. 1976)* (and cases cited therein). However, in *Merritt Forbes* and in *Kampgrounds of America* more than merely initials were at issue. In *Merritt Forbes* the initials formed an acronym, TOP's, while in *Kampgrounds*, the KOA mark was deemed protectible when considered in combination with other aspects of trade dress. These cases fail to recognize that initials are merely short forms of the words for which they stand and should be accorded the same degree of protection as those words.

In another case cited by the defendant, *Modern Optics v. Univis Lens Company, 43 C.C.P.A. 970, 234 F.2d 504 (C.C.P.A. 1956)*, the court ruled that the initials "CV," standing for continuous vision, were not merely descriptive of trifocal lenses. The court reasoned that trifocal lenses had been sold for over fifty years without the terms "continuous vision" or "CV" being used to describe them. *Id. at 505*. Thus, the court found that the term "CV" was neither the necessary nor the obvious descriptor for the product. In contrast, "LA" was used from the outset to describe the unique characteristic of the new type of beer.

In sum, although Anheuser-Busch met its burden of proving that "LA" was not generic when it first began to use the mark or by the time of trial, it failed to prove that LA is a suggestive or arbitrary mark or that it had acquired secondary meaning at the time Heileman began to use it. Therefore, the court has found that, by using **[**153]** the LA mark, Heileman and Miller have not engaged in common-law trademark infringement or any other form of unfair competition.

[*1494] (3) *Likelihood of Confusion*

Because this is not a trademark opposition or cancellation action, the parties' efforts to establish that LA is either a generic or a suggestive mark were disproportionate to their efforts to address the issue of confusion. These actions have been brought under the Lanham Trademark Act, *15 U.S.C. § 1125(a)*, and the common law of trademark infringement and unfair competition. The crucial issue in any action for unfair competition is whether there is any likelihood that an appreciable number of ordinary purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question. *See* *Mushroom Makers, Inc. v. R.G. Barry Corporation, 580 F.2d 44, 47 (2d Cir. 1978)* (per curiam), *cert. denied*, *439 U.S. 1116, 59 L. Ed. 2d 75, 99 S. Ct. 1022 (1979)*; *Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 542 (2d Cir. 1956)*. Even if the court had ruled that LA is a generic mark, Anheuser-Busch, as the first user, could maintain a claim for unfair competition by showing a likelihood of confusion. *See* *Technical Trademark **[**154]** Publishing Company Division of Dun-Donnelley Publishing Corporation v. Lebhar-Friedman, Inc., 729 F.2d 1136, 1142 (7th Cir. 1984)*.

Anheuser-Busch, as the claimant to trademark protection, bears the burden of proving a likelihood of confusion. *See* *Lindy Pen Company, Inc. v. Bic Pen Corporation, 725 F.2d 1240, 1243 (9th Cir. 1984)*, *cert. denied*, *469 U.S. 1188, 83 L. Ed. 2d 962, 105 S. Ct. 955 (1985)*. However, the defendant did not offer a relevant consumer survey or any evidence of actual confusion in its case-in-chief. The evidence at trial revealed that, although the LA marks used by the parties are virtually identical on the levels of sight, sound and meaning, Heileman displayed the L.A. mark with an equally prominent house mark, while Miller displayed the LA mark with an equally prominent single brand name, Sharp's. The weight of authority holds that the conspicuous **[***1523]** use of housemarks virtually dispels any confusion that might otherwise result from the use of identical marks. *See* *Lindy Pen Company, 725 F.2d at 1245* & n.4 (no confusion where "BIC" and "LINDY" prominently displayed on "Auditor's" pens); *Vitarroz Corporation v. Borden, Inc., 644 F.2d 960, 968-69 (2d Cir. 1981)* ("Bravo's" and "Bravo" **[**155]** not confusing on snack food where name of manufacturers prominently displayed); *McGregor-Doniger Inc. v. Drizzle Inc., 599 F.2d 1126, 1133-34 (2d Cir. 1979)* ("DRIZZLE" and "drizzler" coats not confusing where latter paired with prominent display of manufacturer's name); *Uniroyal, Inc. v. Kinney Shoe Corporation, 453 F. Supp. 1352, 1355-56 (S.D.N.Y. 1978)* (no likelihood of confusion between "KEDS" and "Kinney KIDS" children's sneakers); *Ye Olde Tavern Cheese Products, Inc. v. Planters Peanuts Division, 261 F. Supp. 200, 206 (N.D. Ill. 1966)* ("Planters Ye Olde Tavern Nuts" not likely to be confused with competitor's "Ye Olde Tavern" food products where "Planters" name is very well known), *aff'd mem*., *394 F.2d 833 (7th Cir. 1967)* (per curiam). *See also* Transcript at 905-09.

In addition, the court has found that the LA mark is a weak, merely descriptive mark which had not acquired secondary meaning. The parties' beers bearing this mark are all sold at the same prices, through the same channels. They are advertised through the same media, compete for the same customers, and fulfill the same function. *See* Transcript at 94-99, 104, 485-86, 1311-19, 1329. However, **[**156]** by law, beer can only be sold in licensed outlets and in standard sized containers with labels approved by the BATF. Thus, consumers presumably are used to choosing among competing beers and, although beer is a relatively low priced item, they do exhibit a degree of brand loyalty. *See* Transcript at 903, 1203.

More importantly, there was no evidence or contention that Heileman and Miller hoped to pass off their low alcohol beers as "LA from Anheuser-Busch." Rather, in adopting and using the LA mark, they were motivated by a desire to use a name which described the product and which was most likely to be accepted by consumers. *See* Transcript at 325-33, 345-48, 433-37, **[*1495]** 446-48, 2131, 2138-40, 2236. Although Heileman and Miller were fully aware that Anheuser-Busch had already adopted the LA mark when they named their own LA beers, knowledge of prior use alone does not in itself constitute bad faith. Selecting a mark because it conveys the product's purpose or characteristics has been held to demonstrate good faith. *See* *E.S. Originals Inc. v. Stride Rite Corporation, 656 F.*

Supp. 484, 490 (S.D.N.Y. 1987); Eagle Snacks, Inc. v. Nabisco Brands, Inc., 625 F. Supp. 571, 583 **[**157]** (D.N.J. 1985).

None of the parties offered any probative evidence of actual confusion among consumers, but Heileman introduced its Beer Label Study which was meant to determine whether there is a significant likelihood of confusion. *See* Trial Exhibit 440. This survey was conducted by Legal Marketing Research, Inc. under the direction of its president John Bunge during the period from July 11 through August 4 of 1984 in five cities where Heileman and Anheuser-Busch LA beers were being sold.

Five hundred and thirty consumers who said they had purchased beer within the past month were shown either a can of LA from Anheuser-Busch or a can of a Heileman LA beer. After being allowed to examine the can at length, each consumer was asked: "What company or organization puts out that product?" The interviewee was then shown the other can and the question was repeated. Those who answered either question with "I don't know" were asked whether they thought the beers were put out by the same or different companies. Out of all 530 respondents, only twenty-four (4.5%) of the interviewees said they thought both low alcohol beers were put out by the same producer because both were labeled with **[**158]** the LA mark. *See* Transcript at 728-29. Most of the 400 people who recognized that the beers came from different producers said they came to this conclusion by reading the names of the producers on the beer labels. *See* Transcript at 731, 801-03, 826.

The Beer Display Study's method of presentation did little to duplicate market conditions. *Cf.* *Calvin Klein Cosmetics Corporation v. Lenox Laboratories, Inc., 815 F.2d 500, 504 (8th Cir. 1987)* ("A realistic evaluation of consumer confusion must attempt to recreate the conditions in which buying decisions are made, and the court should try to determine not what it would do, but what a reasonable purchaser in market conditions would do."). However, by showing the beer products to the interviewees in monadic sequence, Bunge managed to avoid the criticisms made of side-by-side comparisons. "The test is not whether the consumer will know the difference if he sees the competing products on the same shelf. It is whether he will know the **[***1524]** difference if [one product] is *singly* presented and he has heard of [the competing product]." *American Home Products v. Johnson Chemical Company, 589 F.2d 103, 107 (2d Cir. 1978)*. *See also* **[**159]** *James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 275 (7th Cir. 1976)*; *Union Carbide Corporation v. Ever-Ready Incorporated, 531 F.2d 366, 382 (7th Cir. 1976)*, *cert. denied*, *429 U.S. 830, 50 L. Ed. 2d 94, 97 S. Ct. 91 (1976)*; *Sterling Drug, Inc. v. Lincoln Laboratories, Inc., 322 F.2d 968, 971 (7th Cir. 1963)*; *American Automobile Association (Incorporated) v. AAA Insurance Agency, Inc., 618 F. Supp. 787, 792 (W.D. Tex. 1985)*; *American Association for Advancement of Science v. Hearst Corporation, 498 F. Supp. 244, 259 (D.D.C. 1980)*.

Anheuser-Busch made little headway challenging the design and methodology of the Beer Label Study, [49] but it did dispute the finding of a 4.5% level of confusion. The defendant contends that all 62 people who thought the two beers were produced by the same source should have been counted as confused, not just those who attributed their confusion to the presence of the LA mark on both cans. *See* Transcript at 803-18. Under this reasoning, **[*1496]** 11.6% of the interviewees were confused, and at least two courts have found that this percentage indicates a significant level of confusion. *See* *James Burrough Ltd. v. Lesher, 309 F. Supp. 1154 (S.D. Ind.* **[**160]** *1969)* (11%); *Jockey International, Inc. v. Burkard, 185 U.S.P.Q. 201 (S.D. Cal. 1975)* (11.4%).

Within the confines of the classifications made by Bunge, the 4.5% percentage of confusion falls well within the range which other courts have determined weighs against a finding of infringement. *See* *Henri's Food Products Company, Inc. v. Kraft, Inc., 717 F.2d 352, 358-59 (7th Cir. 1983)* (and cases cited therein); *James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 277-79 (7th Cir. 1976)* (and cases cited therein); *Union Carbide Corporation v. Ever-Ready Inc., 531 F.2d 366, 386* (7th Cir.) (and cases cited therein), *cert. denied*, *429 U.S. 830, 97 S. Ct. 91, 50 L. Ed. 2d 94 (1976)*.

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[49] The defendant also suggests that even those people who named different sources for each beer should have been asked whether they thought the different sources were part of the same company. *See* Transcript at 818-25. The court finds no merit to this proposal, since this was not a survey of consumers' knowledge of corporate structures.

Despite the narrowness of Bunge's classification of "confused" responses, the court has given some weight to the results of the Beer Label Study, particularly because **[**161]** the defendant offered no contradictory survey of its own. The low level of consumer confusion found, plus the plaintiffs' lack of intent to deceive or "pass off," and the lack of evidence of actual confusion have lead the court to find that it is unlikely that a significant number of consumers will be confused among the LA beers of Anheuser-Busch, Heileman and Miller.

D. Plaintiffs' Unfair Competition Claims

In addition to claims for declaratory relief and antitrust violations, Heileman and Miller both asserted claims, arising under section 43 (a) of the Lanham Trademark Act, *15 U.S.C. § 1125(a)*, and common law, alleging that Anheuser-Busch engaged in unfair competition. [50] Heileman contends that Anheuser-Busch's claimed exclusivity in the LA mark would effectively deny it entry into the low alcohol beer market; that Anheuser-Busch has threatened litigation over use of the LA mark; and that Anheuser-Busch has misused its trademark applications for LA to restrain trade in the low alcohol beer market. As a result, Heileman concludes that: "Defendant's aforesaid acts and false representations constitute violations of the federal law of unfair competition as set forth in *15 U.S.C.* ***[**162]*** *§ 1125(a)*" and the common law. Complaint at paras. 28 & 29.

Heileman explains that it is alleging:

> . . . that the abbreviation L.A. is a generic term when used with low alcohol beer, and hence cannot become a trademark under *any* circumstances. Busch fully knew the generic nature of the L.A. abbreviation, but nevertheless, filed various trademark applications, and adopted a label on which the abbreviation L.A. is marked with the symbol "TM." Busch also represented to Heileman and others, that it holds preemptive **[***1525]** trademark rights **[**163]** in the abbreviation L.A. for use in connection with L.A. beer. Count III further alleges that Busch's false representations constitute violations of the Lanham Act, that Heileman and defendant are in competition with respect to L.A. beers, and that Heileman is damaged by Busch's false representations. Thus, Count III properly pleads a cause under § 43 (a).

Plaintiff's Brief in Opposition to Motion for Dismissal at 23-24 (footnote and citations omitted).

Similarly, Miller alleges that:

> A-B's assertion of exclusive rights in the initialism "LA," and its efforts to enforce the same, are inconsistent with the trademark laws of the United States **[*1497]** (*15 U.S.C. §§ 1051 et seq.*) and of the various states, and with principles of unfair competition embodied in federal law (*15 U.S.C. § 1125(a)*) and the various states' common and statutory law all of which contemplate protection only for designations capable of distinguishing the goods of one party from those of others.
>
> A-B's use of "LA" and its assertion of and attempts to enforce exclusive rights therein constitute unfair competition, in that such actions give an erroneous impression of ownership by A-B and will hinder Miller in competing under **[**164]** the most apt, convenient and desirable term for indicating low alcohol content.

Complaint at paras. 12, 13 & 14.

In moving to dismiss these claims at the outset of this litigation, Anheuser-Busch pointed out that they are merely restatements of the plaintiffs' antitrust allegations and are not actionable under section 43 (a) of the Lanham Trademark Act. *See* Memorandum in Support of Defendant's Motion to Dismiss at 7-8. Section 43 (a) has been interpreted broadly to provide a cause of action for a wide variety of deceptive practices. *See, e.g., Data Cash Systems, Inc. v. JS & A Group, Inc., 480 F. Supp. 1063, 1070 (N.D. Ill. 1979)*, *aff'd*, *628 F.2d 1038 (7th Cir. 1980)*;

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[50] The plaintiffs have not pressed these unfair competition claims in their posttrial summations or briefs. Therefore, it appears that these claims have been abandoned. *See 20 th Century Wear, Inc. v. Sanmark-Stardust, Inc., 747 F.2d 81, 92 & n.14 (2d Cir. 1984)*, *cert. denied*, ***470 U.S. 1052, 84 L. Ed. 2d 818, 105 S. Ct. 1755 (1985)***; *Fogel v. Chestnutt, 533 F.2d 731, 738 n.7 (2d Cir. 1975)*, *cert. denied*, ***429 U.S. 824, 50 L. Ed. 2d 86, 97 S. Ct. 77 (1976)***; *E.S. Originals Inc. v. Stride Rite Corporation, 656 F. Supp. 484, 485* & n.1, 491 & n.13 (S.D.N.Y. 1987). Even if the plaintiffs do not consider these claims abandoned, the court, in its ruling above, concludes that they are not entitled to relief.

In re Uranium Antitrust Litigation, 473 F. Supp. 393, 407 (N.D. Ill. 1979) ("Act covers something more than just trademark misuse and something less than all forms of unfair competition"). But there is no direct precedent for the type of claims the plaintiffs are raising.

Heileman relies on the single case of *Chromium Industries v. Mirror Polishing & Plating Company, Inc., 448 F. Supp. 544 (N.D. Ill. 1978)*, in which the court ruled that the defendant's claim of exclusivity in a federally registered **[**165]** trademark posed a sufficient threat of harassment and litigation to create a cognizable injury. However, the threat of harassment and litigation in *Chromium Industries* was directed toward customers of the plaintiff Chromium, not toward Chromium itself. The court noted that: "Mirror's [the defendant's] claim of exclusivity will tend to divert purchasers from Chromium to Mirror so as to avoid potential harassment of patent or trademark infringement suits." *Id. at 554*. By contrast, in the cases at hand, the record contains no evidence that purchasers have been diverted or threatened with litigation. Furthermore, at trial the plaintiffs were unable to show that they had been effectively denied entry into the low alcohol beer market or that Anheuser-Busch had successfully used its registration applications to restrain trade. The only injury the plaintiffs have been able to allege is that they incurred the expense of this litigation. But because Heileman and Miller did not meet their burden of proving that Anheuser-Busch has engaged in unfair competition, they are not entitled to attorney fees or any other relief for these claims.

E. Attempt to Monopolize

In Count IV of its complaint, **[**166]** Heileman alleged that Anheuser-Busch is attempting to monopolize the low alcohol beer submarket in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, by "making excessive, unfounded and reckless complaints, demands and threats of litigation." Complaint [of G. Heileman Brewing Company, Inc.] at para. 32. Heileman further charges that:

> Defendant by its aforesaid acts, seeks to forestall plaintiff and others in their lawful use of the abbreviation "L.A." in the normal and proper promotion and sale of low alcohol beers; defendant's acts constitute a misuse of defendant's alleged trademark which defendant employs as one of its means of effectuating its aforesaid attempted monopolization and unreasonable restraint in violation of the antitrust laws.

Id. at P 34.

Miller's complaint alleges that:

> On information and belief, A-B's assertion of exclusive rights in "LA" and attempted enforcement thereof have not been done in good faith to prevent confusion, but rather have been done in an attempt to monopolize trade among the **[*1498]** several States in the low alcohol beer market, in violation of *15 U.S.C. § 2*.

Complaint [of the Miller Brewing Company] at para. 15. **[***1526]**

The gravaman of the plaintiffs' **[**167]** Sherman Act claims is that Anheuser-Busch attempted to monopolize the low alcohol beer market in the United States by preventing competitors from using the LA name. The defendant allegedly tried to accomplish this illegal end by applying for LA trademark registrations (even though, according to the plaintiffs, the mark is clearly unprotectible) and by threatening competitors with baseless litigation. However, the excessive "threats," "demands," and "complaints" alleged in Heileman's complaint turned out to be nothing more than one cease and desist letter the plaintiff received from Anheuser-Busch. *See* Complaint [of the G. Heileman Brewing Company, Inc.] at Exhibit J. Anheuser-Busch's lawsuits against Heileman and Stroh and the counterclaims in these cases were not filed until after Heileman commenced its own case in this court.

At trial, the plaintiffs' antitrust claims failed because they were unable to prove that the trademark applications, or the "threats," or the actual litigation constituted predatory or anticompetitive acts which resulted in Anheuser-Busch's achieving a dangerous probability of successfully monopolizing the relevant market. The evidence at trial revealed **[**168]** that Anheuser-Busch had a colorable basis for attempting to register the LA trademark, even though this court ultimately concluded that the mark is not protectible. Likewise, the court was not persuaded that the threatened or actual litigation was merely a sham. [51] One favorable court ruling does **[*1499]** not necessarily negate claims of this type. *See* In re Burlington Northern, Inc., 822 F.2d 518, 528 (5th Cir. 1987). However, the plaintiffs' position that Anheuser-Busch pursued trademark registrations and infringement **[***1527]** suits in bad faith was undeniably damaged when, prior to this trial, the United States District Court for the Eastern District of Missouri ruled in Anheuser-Busch's favor that "LA" is a suggestive and therefore protectible trademark. *See generally* Anheuser-Busch Incorporated v. Stroh Brewery Company, 587 F. Supp. 330 (E.D. Mo.), *aff'd*, 750 F.2d 631 (8th Cir. 1984).

[169]** Besides being unable to prove that Anheuser-Busch engaged in predatory, anticompetitive acts of filing sham trademark applications and lawsuits, the plaintiffs were unable to prove their contention that the low alcohol beer market in the United States is the relevant product market. [52] The court was not persuaded that a consumer submarket in low alcohol beer had actually been established or that there are no close substitutes for low alcohol beer. The plaintiffs' own marketing expert, John Nevin, testified without dispute that it takes a minimum of three months to create consumer awareness of a new product and a minimum of three months after that to reinforce that awareness. *See* Transcript at 923. By the time of trial, LA beers were just beginning to be sold throughout the

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[51] Courts have ruled that even a single sham lawsuit can serve as the basis for a cognizable claim under Section 2 of the Sherman Act. *See, e.g.,* MCI Communications v. American Telephone and Telegraph Company, 708 F.2d 1081, 1155 (7th Cir.), *cert. denied*, ***464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)***. However, such claims have been notably unsuccessful in the context of trademark and copyright litigation. *See* Coca-Cola Company v. Overland, Inc., 692 F.2d 1250, 2157 n.17 (9th Cir. 1982) ("We merely pause to note that we have found no case directly supporting the proposition that the bringing of meritorious suits can constitute sham suits violative of the antitrust laws."). *See also* Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154, 161 (3d Cir. 1984) ("a good faith attempt to enforce a copyright does not violate the antitrust laws"); Alberto-Culver Company v. Andrea Dumon, Inc., 466 F.2d 705, 711 (7th Cir. 1972) ("plaintiff's good faith effort to enforce its copyright and trademark is not the kind of exclusionary conduct condemned by § 2 of the Sherman Act"); Drop Dead Company v. S.C. Johnson & Son, Inc., 326 F.2d 87, 96 (9th Cir. 1963) (registering multiple marks for wax products, mass advertising, mass sales and bringing of colorable infringement suits are lawful acts which do not "constitute the sort of aggressive competition and promotion that ***antitrust law*** seeks to protect, particularly within the limits of lawful monopolies granted by Congress"); Toro Company v. R & R Products Company, 600 F. Supp. 400, 401-02 (D. Minn. 1984) ("The good faith attempt to protect a copyright interest, even if unsuccessful, is a defense to an action for attempted monopolization."), *aff'd*, 787 F.2d 1208 (8th Cir. 1986); Car-Freshner Corporation v. Auto Aid Manufacturing Corporation, 438 F. Supp. 82, 87 (N.D.N.Y. 1977) (". . . under any set of facts which could be proven by the defendants in support of their antitrust counterclaim, the acts of the plaintiffs in registering and enforcing the trademark in issue did not create a dangerous probability that the plaintiff would gain monopoly power in the market for auto air freshners. Rather, the acts complained of merely represent fair and aggressive competition which does not constitute a violation of the antitrust laws."); Armstrong Cork Company v. Armstrong Plastic Covers Company, 434 F. Supp. 860, 872 (E.D. Mo. 1977) ("good faith enforcement by the plaintiff of its trademark rights does not constitute an antitrust violation or a trademark misuse"); Sam S. Goldstein Industries, Inc. v. General Electric Company, 264 F. Supp. 403, 406 (S.D.N.Y. 1967) (plaintiff's antitrust claim that defendant, by seeking to monopolize the word "Americana" as a trademark, seeks to render it impossible for any other company to represent that its products are American in origin is patently frivolous).

In contrast, misuse of patent claims have met with more success. *See, e.g.,* Walker Process Equipment, Inc. v. Food Machinery & Chemical Corporation, 382 U.S. 172, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965). In Alberto-Culver Company v. Andrea Dumon, Inc., 295 F. Supp. 1155, 1158 (N.D. Ill. 1969), *aff'd in part, rev'd in part*, 466 F.2d 705 (7th Cir. 1972), the court explained that "the consequences of a label copyright or trademark infringement case are different than those of a patent infringement case" in which a claimant is more likely to prevail on antitrust grounds. The owner of a patent is granted a monopoly over a particular product or invention, while the owner of a trademark merely acquires rights to a name. *See* Calvin Klein Cosmetics Corporation v. Lenox Laboratories, 815 F.2d 500, 503 (8th Cir. 1987). Thus, a patent owner can exclude competitors from marketing a particular product, whereas a trademark owner can only exclude competitors from using a particular name. Even if Heileman and Miller were not able to use the LA name, they could still market low alcohol beers under other names.

[52] An antitrust plaintiff has the burden of proving that the defendant possessed sufficient power to come dangerously close to achieving monopoly power and the plaintiff must also prove the boundaries of the relevant geographic and product markets within which that dangerous probability occurred. *See* Photovest Corporation v. Fotomat Corporation, 606 F.2d 704, 711-13 (7th Cir. 1979), *cert. denied*, ***445 U.S. 917, 100 S. Ct. 1278, 63 L. Ed. 2d 601 (1980)***. Anheuser-Busch maintains that the relevant product market is simply beer. *See* Defendant-Counterclaimant's ("Busch") Pretrial Memorandum of Law at 21-22.

United States and, despite statements to the contrary by witnesses for Heileman, a preponderance of the evidence shows that the development of a low alcohol segment of the beer market remained only a hope or expectancy. *See* Transcript at 156-57, 280, 500, 881, 883-84, 1098-99, 1137, 1164, 1169, 1179-83, 1191-92, 1201, 1328-29, 1332, 1346, 2132, 2161-63, 2174-75, 2178, 2199-2202, 2221. *See also* Trial **[**170]** Exhibit 205.

The evidence also shows that there are close substitutes for low alcohol beer. The unique selling point of LA beer is that it contains less alcohol than regular beer. However, the record contains substantial evidence that light (low calorie) beer also contains less alcohol, while low alcohol beer, in turn, can contain fewer calories than regular beer. *See* Transcript at 102, 245, 297, 411-12, 423, 435, 533-34, 1329-30, 2063, 2065, 2073-74, 2122, 2152, 2193, 2228.

In the Miller LITE litigation, the Seventh Circuit ruled that LITE (or light) is a generic name for a category of beer, in part **[**171]** because a dictionary defined the word "light" as meaning "low alcohol content." *See* *Miller Brewing Company v. G. Heileman Brewing Company, 561 F.2d 75, 80 (7th Cir. 1977)*, *cert. denied*, *434 U.S. 1025, 54 L. Ed. 2d 772, 98 S. Ct. 751 (1978)*. Miller, which had registered LITE as a trademark, grudgingly conceded that "the caloric content of beer depends primarily on alcoholic content," *Id. at 81*; while Heileman, which was arguing that "light" or "LITE" is a generic category descriptor, assured the court that "low in calories" adds nothing to "low in alcoholic content." [53] *Id. at 81 n.11*. The court of appeals accepted these representations and noted that: "In any event, we can take judicial notice that alcoholic and caloric content go hand in hand." *Id*.

[*1500] In the instant cases the parties did not go so far as to admit that low alcohol beer is simply old beer in new bottles, **[**172]** but the plaintiffs did not meet their burden of showing that LA beer is so unique and dominant in the market that there is no acceptable substitute. *See* *Frito-Lay, Inc. v. Bachman Company, 659 F. Supp. 1129, 1136-37 (S.D.N.Y. 1986)*. Consequently, the court has ruled that, at a minimum, the relevant product market is comprised of light beers and all other beers which contain less alcohol than regular beer. The plaintiffs made no attempt to show that Anheuser-Busch had a reasonable probability of dominating this submarket, nor could they. Light beer sales far exceed the sales of all other beers in this submarket and it is undisputed that Miller has captured a better than fifty-percent share of light beer sales. *See* Transcript at 60, 286, 438, 2210.

In the end, the plaintiffs failed to meet their burden of proving any of the elements of their Sherman Act claims (with the exception of the relevant geographic market). Accordingly, relief will be denied and judgment will be entered in favor of Anheuser-Busch on the antitrust claims. **[***1528]**

ORDER

Based on the Findings of Fact and Conclusions of Law set forth above, the court ORDERS that judgment be entered declaring that the use of the **[**173]** term "LA" (or "L.A.") by the G. Heileman Brewing Company, Inc. and by the Miller Brewing Company on their low alcohol beers does not infringe any rights of or constitute unfair competition with Anheuser-Busch Incorporated.

IT IS FURTHER ORDERED that the plaintiffs' requests for permanent injunctive relief ARE DENIED. Given the court's findings and conclusions, the court would not expect that Anheuser-Busch will continue to interfere with the use of the "LA" name for low alcohol beer by Heileman and Miller. The plaintiffs have produced no evidence that Anheuser-Busch will continue to threaten lawsuits, nor have they otherwise established the possibility of prospective irreparable injury.

IT IS FURTHER ORDERED that the G. Heileman Brewing Company, Inc.'s claims for relief pursuant to *15 U.S.C. §§ 1056*, *1114* & *1119* ARE DISMISSED for lack of standing.

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[53] Heileman tried to change its position in the instant case. On direct examination Heileman's chief executive officer Russell Cleary was asked: "Does your low-calorie products or do your low-calorie products have low alcohol?" Cleary answered, "No." *See* Transcript at 297. *See also* Transcript at 50, 102, 297, 435, 883.

IT IS FURTHER ORDERED that judgment be entered against plaintiffs G. Heileman Brewing Company, Inc. and the Miller Brewing Company and in favor of defendant Anheuser-Busch Incorporated on the plaintiffs' claims that the defendant is engaging in acts of unfair competition under *15 U.S.C. § 1125 (a)* or the common law.

IT IS FURTHER ORDERED **[**174]** that judgment be entered against plaintiffs G. Heileman Brewing Company, Inc. and the Miller Brewing Company and in favor of defendant Anheuser-Busch Incorporated on the plaintiffs' claims that the defendant has attempted to monopolize the low alcohol beer market in the United States in violation of *15 U.S.C. § 2*.

IT IS FURTHER ORDERED that the plaintiffs' requests for attorney fees pursuant to *15 U.S.C. § 1117* ARE DENIED.

IT IS FURTHER ORDERED that Anheuser-Busch Incorporated's Motion for Preliminary Injunction (filed June 11, 1984) IS DENIED.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiffs G. Heileman Brewing Company, Inc. and the Miller Brewing Company and against defendant Anheuser-Busch Incorporated on the defendant's claims that the plaintiffs engaged in common-law trademark infringement of the LA mark.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiffs G. Heileman Brewing Company, Inc. and the Miller Brewing Company and against defendant Anheuser-Busch Incorporated on the defendant's claims arising under *15 U.S.C. § 1125 (a)* and the common law that the plaintiffs engaged in acts of unfair competition.

IT IS FURTHER ORDERED that judgment **[**175]** be entered in favor of plaintiffs G. Heileman Brewing Company, Inc. and the Miller Brewing Company and against defendant Anheuser-Busch Incorporated on **[*1501]** the defendant's claims arising under the Illinois Anti-Dilution Act, III, Rev. Stat. ch. 140, § 22, that the plaintiffs have diluted the LA mark.

IT IS FURTHER ORDERED that Anheuser-Busch Incorporated's requests for attorney fees and costs ARE DENIED.

IT IS FURTHER ORDERED that Civil Action No. 84-C-511 IS DISMISSED with each party to bear its own costs.

IT IS FURTHER ORDERED that Civil Action No. 84-C-738 IS DISMISSED with each party to bear its own costs.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 31st day of December, 1987.

End of Document

Pennsylvania ex rel. Zimmerman v. Pepsico, Inc.

United States Court of Appeals for the Third Circuit

November 17, 1987, Argued ; January 4, 1988, Filed

No. 87-5351

Reporter

836 F.2d 173 *; 1988 U.S. App. LEXIS 16 **; 1987-2 Trade Cas. (CCH) P67,814; 1988 WL 84

Commonwealth of Pennsylvania, ex rel. LeRoy S. Zimmerman, Attorney General of Pennsylvania Appellant v. PepsiCo, Inc., Allegheny Pepsi-Cola Bottling Company, Inc., and Confair Bottling Company, Inc.

Prior History: [1]** Appeal from the United States District Court for the Middle District of Pennsylvania, D.C. Civil No. 86-1799.

Core Terms

soft drink, resellers, bottlers, territory, amended complaint, conspiracy, horizontal, allegations, antitrust, group boycott, manufacturer, products, licensing, retailers, sales, anti trust law, district court, Sherman Act, transshipping, defendants', effective, trademark, boycott, syrup, consumers, prices, co-conspirators, complaints, customers, practices

LexisNexis® Headnotes

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

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Clayton Act, Remedies**

On appeal of an order dismissing a case for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, the court's standard of review is whether, taking the allegations of the complaint as true, and liberally giving the plaintiff the benefit of all inferences that may be drawn therefrom, it appears beyond doubt that the plaintiff can prove no set of facts upon which relief could be granted.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Trademark Law > Conveyances > General Overview

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Licenses

Trademark Law > ... > Licenses > Licensable Subject Matter > Tying Arrangements

HN2[] Ownership & Transfer of Rights, Licenses

See *15 U.S.C.S. § 3501*.

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

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

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

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Trademark Law > ... > Licenses > Licensable Subject Matter > Tying Arrangements

HN3[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

See *15 U.S.C.S. § 3502*.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN4[] Reviewability of Lower Court Decisions, Preservation for Review

A trial court should not be reversed on grounds that were never urged or argued in the court below.

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

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

HN5[] Exemptions & Immunities, Exempt Cartels & Joint Ventures

The Soft Drink Interbrand Competition Act of 1980, *15 U.S.C.S. §§ 3501-3503*, explicitly provides for the enforcement of agreements limiting extraterritorial sales both directly and indirectly and is aimed at combating both bottlers and third parties who transship. Providing for the limitation of manufacture, distribution, and sale only for ultimate resale to consumers within a defined geographic area, the language of the Act squarely applies to the entire chain of distribution, from initial manufacture right through the ultimate sale to the consumer.

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

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

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

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

HN6[] **Horizontal Refusals to Deal, Boycotts**

The Soft Drink Interbrand Competition Act of 1980, *15 U.S.C.S. § 3502*, exempts from the Act's protection price-fixing agreements, horizontal restraints of trade, or group boycotts, if such agreements, restraints, or boycotts would otherwise be unlawful.

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Conspiracy to Monopolize, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1*, forbids any contract, combination or conspiracy, in restraint of trade.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Criminal Law & Procedure > Preliminary Proceedings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN8[] **Complaints, Requirements for Complaint**

The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN9[] Motions to Dismiss, Failure to State Claim

The plaintiff must allege sufficient facts in the complaint to survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim.

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

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

HN10[] Pleadings, Amendment of Pleadings

A complaint may not be amended by the briefs in opposition to a motion to dismiss.

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

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

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

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

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

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

HN11[] Practices Governed by Per Se Rule, Boycotts

The Soft Drink Interbrand Competition Act of 1980, *15 U.S.C.S. § 3502*, contains an exception for price fixing agreements, horizontal restraints of trade, or group boycotts, if such agreements, restraints, or boycotts would otherwise be unlawful.

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

HN12[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A classic boycott exists where there is concerted action with a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive object, or both.

Counsel: Eugene F. Waye (Argued), LeRoy S. Zimmerman, Carl S. Hisiro, Kelly H. Greensmith, Office of the Attorney General, for Appellant.

Fred A. Freund (Argued), Richard M. Steuer, Kaye, Scholer, Fierman, Hays and Handler, Rod J. Pera, Alan R. Boynton, Jr., McNees, Wallace & Nurick, Gerard W. Casey, Robert K. Biggart, PepsiCo, Inc., For Appellees PepsiCo., Inc. and Allegheny Pepsi-Cola Bottling Co., Inc.

James B. Kobak, Jr., (Argued), Robert J. Sisk, David W. Wiltenburg, Hughes, Hubbard & Reed, J. David Smith, McCormick, Rieder, Nichols, Sarno, Bahl & Knecht, for Appellee Confair Bottling Company, Inc.

Judges: Seitz, Hutchinson, and Aldisert, Circuit Judges.

Opinion by: ALDISERT

Opinion

[*174] OPINION OF THE COURT

ALDISERT, Circuit Judge.

The question for decision in this antitrust case of first impression under the Soft Drink Interbrand Competition Act of 1980, *15 U.S.C. §§ 3501-3503*, is whether the Commonwealth of Pennsylvania, as a *parens patriae* plaintiff, properly set forth a claim on which relief could be granted in its **[**2]** complaint against PepsiCo, Inc., a soft drink manufacturer, and two Pepsi-Cola bottlers. After affording Pennsylvania an opportunity to amend, the district court analyzed the amended complaint's allegations and, concluding that the plaintiff had failed to mount the hurdles imposed by the Soft Drink Act, dismissed the action for failure to state a claim under *Rule 12(b)(6), F.R. Civ. P.*, *658 F. Supp. 816*. Pennsylvania has appealed and we will affirm.

The district court had jurisdiction under *28 U.S.C. § 1337*. Jurisdiction on appeal is proper based on *28 U.S.C. § 1291*.

I.

PepsiCo, Inc. makes soft drink syrup and concentrate, the flavoring ingredients in its trademarked soft drinks. Allegheny and Confair are two Pepsi-Cola bottlers; Allegheny is a wholly-owned subsidiary of PepsiCo. The bottlers buy syrup and concentrate from PepsiCo to produce and sell carbonated soft drinks. Each is licensed by PepsiCo to produce and market its soft drinks within an exclusive geographic territory in Pennsylvania. Both Allegheny and Confair sell soft drinks to distributors, retailers, and other resellers. These resellers are independent **[**3]** operators having no licensing agreements with either PepsiCo or the bottlers.

Although resellers generally sell retail, some sell wholesale to other resellers. Under such circumstances, the wholesaling reseller becomes a competitor of the wholesaling bottler. When resellers sell to other **[*175]** resellers outside of their bottler's territory, the practice is known as "transshipping."

Pennsylvania alleges that PepsiCo, Allegheny, and Confair have conspired to eliminate horizontal competition between bottlers and resellers by prohibiting sales between resellers. Specifically, Pennsylvania claims that the three defendants have engaged in the following practices: using a coding identification system to trace and monitor soft drink sales; fining bottlers when their product is shipped out of their territory; refusing to deal with resellers who enage in transshipping; refusing to deal with resellers who buy from or sell to other resellers; threatening termination of resellers who engage in such sales; and limiting sales to resellers to the amount the reseller needs solely for its own retail sales, in order to prevent that reseller from wholesaling.

Pennsylvania brought a *parens* **[**4]** *patriae* action in the district court, alleging that defendants' practices violated *section 1* of the Sherman Act, *15 U.S.C. § 1*, and seeking an injunction against defendants pursuant to the Clayton Act, *15 U.S.C. § 26*. Defendants moved to dismiss for failure to state a claim on which relief could be granted. *Rule 12(b)(6), F.R. Civ. P.* Pennsylvania filed an amended complaint. Defendants again moved to dismiss. On April 28, 1987, the district court granted defendants' motion. ***HN1***[] Our standard of review of the district court's dismissal is whether, taking the allegations of the complaint as true, and liberally giving the plaintiff the benefit of all inferences that may be drawn therefrom, it appears beyond doubt that the plaintiff can prove no set of facts upon which relief could be granted. *Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985)*.

II.

Pennsylvania's case stands or falls on federal statutory authority. Just as the Sherman and Clayton Acts were designed to define antitrust violations, the Soft Drink Act **[**5]** was enacted to remove certain soft drink industry practices from the reach of the antitrust laws:

> *HN2*[] Nothing contained in any ***antitrust law*** shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement . . . of provisions . . . limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within a defined geographic area: *Provided*, That such product is in substantial and effective competition with other products of the same general class in the relevant market or markets.

15 U.S.C. § 3501.

The Act insures that "nothing contained in any ***antitrust law***" shall render enforcement of territorial restraints unlawful, except where it is alleged and proved that competition among soft drink brands -- *i.e.*, interbrand competition -- is not substantial and effective.

The Act also includes a second substantive section that provides:

> **[**6]** *HN3*[] Nothing in this chapter shall be construed to legalize the enforcement of provisions described in *section 3501* of this title in trademark licensing contracts or agreements described in that section by means of price fixing agreements, horizontal restraints of trade, or group boycotts, if such agreements, restraints, or boycotts would otherwise be unlawful.

15 U.S.C. § 3502.

The genesis of the Act is in the Supreme Court's rulings on vertical restraints, and in the effect of those rulings on standard soft drink industry distribution practices. *See* Note, *The Soft Drink Interbrand Competition Act of 1980: Antitrust Loses its Fizz*, 18:1 Harv. J. on Legis. 91 (1981) (hereinafter "Note"). In 1967, the Supreme Court, in the now overruled *Schwinn* decision, held that, under certain circumstances, manufacturer-imposed territorial restraints are *per se* illegal under *section 1* of the Sherman Act. *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*. The *Schwinn* decision helped launch a Federal Trade Commission investigation into soft drink industry distribution practices. **[**7]** In 1971, that investigation culminated **[*176]** in the filing of complaints against seven soft drink syrup companies. *See* Note, *supra*, at 108.

During the pendency of those actions, the Supreme Court overruled the *Schwinn* decision in *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. In *Sylvania*, the Court held that the law should "return to the rule of reason that governed vertical restrictions prior to *Schwinn*." *Id. at 59*. In 1978, relying in part on *Sylvania*, the FTC ruled that certain territorial restrictions existing in the soft drink industry were unlawful. *Coca Cola Co., 91 F.T.C. 517 (1978), 207 U.S. App. D.C. 1, 642 F.2d 1387 (D.C. Cir. 1981)* (remanding for dismissal); *PepsiCo, Inc., 91 F.T.C. 680 (1978), 207 U.S. App. D.C. 1, 642 F.2d 1387 (D.C. Cir. 1981)* (same). Those decisions were the primary stimuli to the enactment of the Soft Drink Act in 1980. *See* H.R. Rep. No. 1118, 96th Cong., 2d Sess. 6, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2373, 2375; Note, *supra*, at 106.

The Soft Drink Act was adopted after **[**8]** Congress conducted an intensive investigation into the soft drink industry. In passing the Act, Congress determined that the exclusive territorial distribution agreements common to the soft drink industry warranted protection because that industry was a prototype of industries in which territorial restraints foster interbrand competition. *See* H. Rep. No. 1118, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2377. Such restraints encourage each bottler to invest and promote in his own territory, and prevent "free riding" by sellers from outside the territory on the bottler's investment and effort. As described in the Senate Report accompanying the Act:

> Under the trademark licensing system which exists in the soft drink industry, the franchise company produces and sells syrups or flavoring concentrates pursuant to trademark licensing agreements with independent

> bottlers, participates in advertising and promotional expenditures made in connection with the trademarked products, provides advice and technical assistance on production, quality control, management, and sales problems, and assists in development and test marketing of new products and containers.
>
> The bottler, **[**9]** in turn, manufactures, distributes and sells the trademarked products and provides the capital investment necessary for his market. He determines the plant and equipment to be used, the volume of production by size and type of container, the product mix, the wholesale price to be charged, and the manner in which he can maximize his market penetration to secure the widest possible distribution of his products throughout the territory.

S. Rep. No. 645, 96th Cong., 2d Sess. 3 (1980).

Congress considered what would happen if the long-standing practice of territorial exclusivity was eradicated:

> If territories are eliminated, wholesale prices for non-returnable packages may fall temporarily for large volume accounts, principally chain stores. However, it is the committee's opinion that it is unlikely that chain stores will pass on these reduced prices to their customers because their past practice has been to maintain a retail price differential between their own private label soft drinks and the franchised brands. Moreover, it is clear that prices in non-chain stores, which account for 55-60 percent of sales, would rise and the cheaper returnable bottles would be more **[**10]** difficult to find.

Id. at 9. From these findings, Congress concluded that "the public policy stated in the antitrust laws would be better served by retention of the existing, competitive structure of the soft drink industry under the standards of this bill." *Id.*

III.

Having examined the statute at issue, we turn to the questions presented. At the outset, we must address a threshold issue. Pennsylvania alleges that the district court erred in concluding that the Soft Drink Act applied to defendants' conduct without first making factual findings on the existence of substantial and effective competition in the relevant market. In the district court, **[*177]** Pennsylvania made no effort to contend by factual allegations or otherwise that the Act did not apply because of an absence of "substantial and effective competition with other products of the same general class in the relevant market or markets." *15 U.S.C. § 3501*. The House Report recommending passage of the bill placed this burden squarely on the plaintiff. "If a plaintiff cannot establish that there is an absence of substantial and effective competition within the territory, then **[**11]** the existence and enforcement of such arrangements would not violate the antitrust laws." H. Rep. No. 1118, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2389. Neither the original complaint nor the amended complaint alleged that PepsiCo's products do not face "substantial and effective competition" from other products in the same general class in the relevant market.

As Justice Stevens stated in *Associated General Contractors of Cal. v. California State Counsel of Carpenters, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, "it is not proper to assume that [a plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." But there is another reason for putting this issue aside. We have held on numerous occasions that ***HN4***[] "a trial court should not be reversed on grounds that were never urged or argued in the court below." *Caisson Corp. v. Ingersoll-Rand Co., 622 F.2d 672, 680 (3d Cir. 1980)*. Thus, we cannot conclude that the district court erred in applying **[**12]** the Act without making findings on the issue of substantial and effective competition in the relevant market.

IV.

The centerpiece of Pennsylvania's complaint was the allegation that not only did PepsiCo prohibit bottlers from transshipping directly into other territories, but that all three defendants prohibited both bottlers and resellers from aiding and abetting third party transshippers. The plain language of the Act flies in the face of these crucial allegations. ***HN5***[] The Act explicitly provides for the "enforcement" of agreements limiting extraterritorial sales both "directly or indirectly," and is aimed at combatting both bottlers and third parties who transship. Providing for the limitation of manufacture, distribution, and sale "only for ultimate resale to consumers within a defined geographic area," the language of the Act squarely applies to the entire chain of distribution, from initial manufacture right through the ultimate sale to the consumer. We believe that it is unquestionably permissible for PepsiCo to require a bottler to ensure that the "ultimate" resales of the PepsiCo products **[**13]** it produces will be to consumers within its own territory.

We do not find it necessary to go beyond the plain language of the Act to conclude that it applies to transshipments by retailers as well as by bottlers. Yet were it necessary, a resort to the legislative history makes no doubt about the intent of Congress. A number of transshippers testified against the Act, but the record shows that Congress unequivocally rejected their position. *See Hearings Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary of the House of Representatives on H.R. 3567 and H.R. 3573*, 96th Cong., 1st and 2d Sess. 196-317 (hereinafter *1980 Hearings*); *see also* S. Rep. No. 645, 96th Cong., 2d Sess. 10 (1980) (bill precludes "indirect evasions" of license agreements); *Exclusive Territorial Allocation Legislation: Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary of the United States Senate*, 92d Cong., 2d Sess. 356 (1972) ("If we don't have this territorial exclusivity law, [transshipment] is just what is going to happen") (remark by P. Chumbris); *id.* at 381-83 (remark by C. Bangert); *1980 Hearings*, 229-30, 518, 528 **[**14]** (questions posed by Chairman Rodino) ("under this legislation, the retailer would not be able to purchase soft drinks outside the territory"); 126 Cong. Rec. 11358 (1980) (remarks by Sen. Baucus); S. Rep. No. 188, 93d Cong., 1st Sess. 5-6 (1973) (bill makes lawful license provisions which have the effect of precluding indirect evasions of the licensing agreement).

[*178] V.

We now turn to the question of horizontal restraint. Pennsylvania has alleged a conspiracy among PepsiCo, Allegheny, and Confair to eliminate competition for sales of Pepsi-Cola to third parties. The Commonwealth alleged that the defendants were consciously committed to a common scheme of withholding the product from certain resellers so that the resellers could not compete with the bottlers. At argument, Pennsylvania emphasized that it does not rely on theories of vertical restraint and that such allegations in the complaint were set forth only "to show the total scheme of restraints." Its brief makes the same point: "This is a case of first impression, as no court has considered the Soft Drink Act in the context of a horizontal conspiracy among soft drink bottlers and their syrup manufacturer to restrain **[**15]** sales between resellers." Br. for appellant at 8.

Section 3502 of the Soft Drink Act ***HN6***[] exempts from the Act's protection "price-fixing agreements, horizontal restraints of trade, or group boycotts, if such agreements, restraints, or boycotts would otherwise be unlawful." *15 U.S.C. § 3502*. According to appellant, its allegations of horizontal conspiracy and group boycott are sufficient to invoke the exemption provision of *section 3502*. It thus contends that defendants are constrained from interposing the Soft Drink Act as a total legal defense to the amended complaint.

We shall now proceed to examine Pennsylvania's horizontal conspiracy contention, but before we do we make clear that we need not, and do not, decide the extent to which the Act protects vertical restraints. Rather, our inquiry is confined to the single issue of whether, given the protection of the Soft Drink Act afforded the defendants, Pennsylvania's complaint can be fairly read as properly alleging an illegal horizontal conspiracy. [1]

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[1] Because this Act is *sui generis* to the soft drink industry, we need not analyze at length the many cases on which Pennsylvania relies. Thus, even if the holding of *Cernuto Inc. v. United Cabinet Co., 595 F.2d 164 (3d Cir. 1979)*, survives the holding and rationale of *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, it is of no help. In *Cernuto*, there were no exclusive territories. The supplier had two competing dealers in the same area and the first dealer allegedly undertook to eliminate the second. The same was true in *Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482 (3d Cir. 1985)*, *vacated and remanded*, *475 U.S. 1105, 106 S. Ct. 1509, 89 L. Ed. 2d 909 (1986)*, *on remand* *823 F.2d 49 (3d Cir. 1987)*. In *United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*, the supplier had many dealers. Some of them discounted and the non-discounters persuaded the supplier to take action against the discounters. Pennsylvania's so-called group boycott cases are not relevant either. These spring from scenarios in which a group of competitors hatched a plan to eliminate a competitor at the same level of competition among themselves. They then issued ultimatums to all the

[16]** A.

A horizontal conspiracy is governed by section 1 of the Sherman Act, **HN7**[] which forbids "any contract, combination . . . or conspiracy, in restraint of trade. . . ." 15 U.S.C. § 1. Economic values have played an important role in the development of statutes and case law regulating the market by permitting or prohibiting particular economic conduct. *See, e.g.,* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The dominant value, of course, is the maintenance of competitive commercial and industrial activity in those areas to which the Sherman Act applies. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1976). In the present case, the concern is with the maintenance of competition in those areas controlled by the Soft Drink Act. The other value to which the courts have attached importance, as did Congress in adopting the Soft Drink Act, is economic efficiency. *See, e.g.,* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 **[*179]** (1979). **[**17]** In a competitive economy, there is a clear goal of efficiency in production, distribution, and resource allocation. We must agree that there is no basic conflict between competition and efficiency.

Congress decided that the distribution practices of the soft drink industry merited special protection on the theory that territorial restraints foster the competitive spirit by encouraging each bottler to invest and promote in its own territory. *See* H. Rep. No. 1118, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2390. Congress also made the calculated judgment that sellers outside a territory could not be intrusive beneficiaries of a bottler's investment and effort. This summarizes, albeit in simplistic form, the basic foundation upon which we must analyze Pennsylvania's allegation of a horizontal conspiracy.

B.

The issued is joined head-on by the parties before us. Pennsylvania asserts that the Soft Drink Act does not apply. It argues that the amended complaint alleges a *per se* unlawful horizontal conspiracy, and that the Act excludes such *per se* unlawful restraints from its coverage. PepsiCo, Allegheny, and Confair contend that the conduct alleged in the amended **[**18]** complaint falls within the protection of the Act. The question presented on this appeal comes down to whether the appellant adequately pleaded a *per se* illegal horizontal conspiracy, which would be excluded from the Act's protection. 15 U.S.C. § 3502. If not, the Act applies, and we must affirm the district court's dismissal of the amended complaint.

Before examining the specifics of the complaint, we summarize the ruling case law governing the pleading obligation of a plaintiff in an antitrust case. Our starting point is Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957):

> **HN8**[] The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what 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 **[**19]** 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.

Id. at 47-48 (footnotes omitted).

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suppliers or customers in their market. *See* St. Paul Fire & Marine Ins. Co. v. Bamy, 438 U.S. 531, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978); Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94, 9 L. Ed. 2d 150, 83 S. Ct. 162 (1961); Radiant Burners, Inc. v. Peoples Gas Light & Coal Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961); Fashion Originators' Guild v. FTC, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 75 L. Ed. 145, 51 S. Ct. 42 (1930).

Speaking through Judge Seitz, this court in 1968 admonished that "we should be extremely liberal in construing antitrust complaints." *Knuth v. Erie-Crawford Dairy Coop., 395 F.2d 420, 423 (3d Cir. 1968)*, *cert. denied*, *410 U.S. 913, 35 L. Ed. 2d 278, 93 S. Ct. 966 (1973)*. But, as Judge Joseph S. Lord III ably pointed out in 1980, "while antitrust complaints are not subject to especially stringent pleadings, see *Knuth, supra*, neither are they exempt from the federal rules." *Sims v. Mack Truck Corp., 488 F. Supp. 592, 608 (E.D. Pa. 1980)*. Judge Friendly hammered home the same point in *Klebanow v. New York Produce Exch., 344 F.2d 294, 299 (2d Cir. 1965)*:

> A mere allegation that defendants violated the antitrust laws as to a particular plaintiff and commodity no more complies with *Rule 8* than an allegation which says only **[**20]** that a defendant made an undescribed contract with the plaintiff and breached it, or that a defendant owns a car and injured plaintiff by driving it negligently.

Even given the teachings of *Conley*, which we must follow in all events, ***HN9***[] the plaintiff must allege sufficient facts in the complaint to survive a *Rule 12(b)(6)* motion. Confronted with such a motion, the court must review the allegations of fact contained in the complaint; for this purpose the court does not consider conclusory recitations of law. *Rule 8(a)* requires "a short and plain *statement* of the claim showing that the pleader is entitled to relief." *Rule 8(a), F.R. Civ. P.* (emphasis added). The Court of Appeals for the Second Circuit has **[*180]** held that dismissal with prejudice of a "bare bones" allegation of antitrust conspiracy without any supporting facts is appropriate where, as here, the plaintiff has already amended his complaint once with leave of the court. *Heart Disease Research Found. v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)*. Moreover, in a case involving dismissal **[**21]** of an amended complaint, the Supreme Court noted that the plaintiff "had an adequate opportunity to amend its pleading to add failed allegations demonstrating that the District Court's decision to dismiss the complaint was based on a misunderstanding of its antitrust claim." *Associated Gen. Contractors of Cal. v. California State Counsel of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. Speaking through Justice Stevens, the Court stated:

> As the case comes to us, we must assume that the [plaintiff] can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.

Id. at 526 n.11.

Accordingly, we will review the plaintiff's amended complaint in detail, keeping in mind that Pennsylvania's rights rise no higher than the facts it has alleged, and that the defendants cannot be said to have violated the antitrust laws in ways that have not been alleged.

C.

Both the original and the amended complaints alleged that PepsiCo had granted **[**22]** two bottlers, Allegheny and Confair, exclusive trademark licenses to bottle and sell PepsiCo soft drinks within exclusive geographic territories located in sections of Pennsylvania. App. at 6, 56. In both complaints Pennsylvania alleged that pursuant to the licenses, "defendants and their co-conspirators" refused to sell to retailers or other resellers who made a practice of reselling PepsiCo products to customers located outside the territory, in other bottlers' territories. *Id. at 10, 59*.

Both complaints also asserted that "defendants and their co-conspirators" refused to sell to resellers who bought PepsiCo products from or sold them to other resellers wherever located. *Id.* The Commonwealth alleged that bottlers were subject to monetary penalties if resellers in their territory engaged in shipping to customers located outside the territory. *Id.* The amended complaint added the allegation that "defendants and their co-conspirators" tracked any such shipping by means of a coding identification system. *Id. at 58*. Further, the original complaint alleged that "defendants and their co-conspirators" had "told" retailers not to sell to other retailers, and had "terminated" **[**23]** them as customers or "limited" their volume if they failed to comply. *Id. at 10*. The amended complaint revised this allegation, asserting that "defendants and their co-conspirators" would "combine with resellers not to sell soft drink to other resellers," and would "threaten" to either terminate them or limit their volume if they did not comply. *Id. at 59*.

The most prominent new feature in the amended complaint consisted of eight paragraphs of background allegations. The first of these substituted the word " resellers" for "retailers" (the term used in the original complaint), but defined "resellers" to include virtually every type of retailer who bought soft drinks from a bottler. *Id. at 57*. The amended complaint alleged that these resellers were independent from the bottlers and from PepsiCo. *Id.* at 58. It further alleged that Allegheny and Confair had territories that were proximate to one another, that they sometimes charged different prices from one another for the same item, and that they sometimes charged different prices to different customers for the same item within their own territories. *Id.* Finally, the amended complaint alleged that resellers bought **[**24]** from other resellers because their local bottler "charge[d] higher prices," refused to supply them, or limited their volume. *Id.*

In addition to the factual allegations, the amended complaint set forth two averments of law:

> **[*181]** 23. Defendants' conduct consisted of, among other things, horizontal restraints of trade, group boycotts and agreements which, directly or indirectly, fixed or stabilized prices.
>
> 24. Defendants' conduct is not exempt from the antitrust laws under the defense provided by the Soft Drink Interbrand Competition Act of 1980, *15 U.S.C. §§ 3501 et seq.*

App. at 59-60.

In both the original and amended complaints, appellant concluded by requesting that the alleged agreements be "decreed *per se* unreasonable restraints of trade in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*," and that an injunction be issued against refusals to deal with resellers and against imposing any system "to enforce geographic bottling territories against resellers." App. at 11-12, 61.

VI.

It is one thing to set forth theories in a brief; it is quite another to make proper allegations **[**25]** in a complaint. Because the soft drink industry is involved, Pennsylvania has a pleading burden much higher than that in a mine-run antitrust complaint. In a *Rule 12(b)(6)* motion resting on the Soft Drink Act, the district court should look only to the complaint's averments in order to make two critical determinations: what specific antitrust conduct was alleged in the complaint, and what conduct was permitted or not covered by the Act. Thus, in the case at bar, the legal theories set forth in Pennsylvania's brief are helpful only to the extent that they find support in the allegations set forth in the complaint. "It is axiomatic that ***HN10***[] the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)*, *cert. denied*, *470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1984)*. Accordingly, we cannot see much strength in two pillars supposedly constructed as mighty structures in Pennsylvania's horizontal conspiracy case.

A.

First, Pennsylvania contends that it alleged **[**26]** in its complaint "[a] conspiracy between two soft drink bottlers, with or without the help of their syrup manufacturer, to eliminate competition by resellers and to boycott resellers. . . ." Br. for appellant at 19. The representation in the brief, however, does not properly describe what was said in the complaint. The allegations in the amended complaint consistently refer to conduct by "defendants and their co-conspirators" -- not otherwise identified. The complaint does not allege any agreement or conspiracy attributable solely to the competing bottlers, without PepsiCo. Moreover, Pennsylvania cannot base its claim on any conspiracy between PepsiCo and Allegheny. A parent company cannot conspire with its wholly owned subsidiary for purposes of *section 1* of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*; *Garshman v. Universal Resources Holding Inc., 824 F.2d 223, 230 (3d Cir. 1987)*.

Equally significant is the fact that Pennsylvania did not allege any meetings between Allegheny and Confair, any communications between them, or any other means by which their alleged conspiracy **[**27]** came about. This notwithstanding that in this circuit, "only allegations of conspiracy which are particularized . . . will be deemed sufficient." *Garshman v. Universal Resources Holding, Inc., 641 F. Supp. 1359, 1370 (D.N.J. 1986)*, *aff'd* *824 F.2d 223 (3d Cir. 1987)* (quoting *Kalmanovitz v. G. Heileman Brewing Co., 595 F. Supp. 1385, 1400 (D. Del. 1984)*, *aff'd*, *769 F.2d 152 (3d Cir. 1985))*. Instead, all that appellant was apparently prepared to plead was a naked conclusion dropped into the amended complaint, reciting a bare-bones assertion that there had been a "horizontal" conspiracy.

Although the Supreme Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, addressed our present concern in the context of a motion for summary judgment and not a motion to dismiss, what the court said there is not **[*182]** irrelevant to our present inquiry: "To survive a motion for summary judgment . . . plaintiff . . . must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id. at 588* **[**28]** (quoting *Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*.

In *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1108 (7th Cir. 1984)*, *cert. denied*, *470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)*, the court stated that the attachment of per se labels to defendants' conduct is inadequate in itself to sustain a complaint. "The defendants' alleged activity must be scrutinized to determine whether such a characterization is appropriate." *Id.* The court further remarked that the pleader may not evade the requirements of proper pleading "by merely alleging a bare legal conclusion." *Id. at 1106*. Thus, a plaintiff must plead the essential facts of a horizontal restraint or group boycott in order to plead either properly.

What this court said on this subject almost 50 years ago bears repeating:

> The vital allegations [in stating a cause of action under the Sherman or Clayton Acts] are similar to those in any civil conspiracy case. A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient **[**29]** of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment. The plaintiffs have pleaded none of these facts. Neither the date of the alleged conspiracy nor its attendant circumstances are set forth. Nor is it averred who made the statements, where, when or to whom.

Black & Yates v. Mahogany Ass'n, 129 F.2d 227, 231-32 (3d Cir. 1941). The law in this regard has not changed. *See* *Garshman v. Universal Resources Holding, Inc., 824 F.2d 223, 230 (3d Cir. 1987)* ("The allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act.") (citing *Black & Yates*); *Kalmanovitz v. G. Heileman Brewing Co., 595 F. Supp. 1385, 1400 (D. Del. 1984)*, *aff'd*, *769 F.2d 152 (3d Cir. 1985)*.

In *Car Carriers*, the Court of Appeals for the Seventh Circuit emphasized the importance of a consideration that has motivated this court over the years in insisting upon reasonable **[**30]** specificity in antitrust complaints. The court recognized that litigation today is too expensive a process to waste time on fanciful claims:

> When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.

Car Carriers, 745 F.2d at 1106.

The same sentiment was expressed by Judge Pollak in *Pao v. Holy Redeemer Hospital, 547 F. Supp. 484, 491 (E.D. Pa. 1982)*, where the court dismissed a complaint with prejudice, saying:

> Although this is plaintiff's second attempt to state a valid Sherman Act claim, the complaint still offers only uncertain clues as to plaintiff's theory of liability and the facts which would support a finding of Sherman Act liability. It is simply not fair to the defendants, and it would be an onerous imposition on the judicial process, to permit litigation to go forward on the basis of such conclusory and speculative allegations.

Likewise, in **[**31]** *Havoco v. Shell Oil Co., 626 F.2d 549, 553 (7th Cir. 1980)*, affirming dismissal of a complaint for failure to state a claim, the court stated:

> [If] the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility.

There is no disagreement that the second section of ***HN11***[] the Soft Drink Act contains an exception for "price fixing agreements, horizontal restraints of trade, or group **[*183]** boycotts, if such agreements, restraints, or boycotts would otherwise be unlawful." *15 U.S.C. § 3502*. The purpose of this section was to ensure that certain *per se* violations would be excluded from the approved enforcement of territorial exclusivity. H. Rep. No. 1118, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2389. But the factual allegations of the amended complaint did not come close to adequately pleading conduct amounting to any of these *per se* offenses, and this **[**32]** failure cannot be cured by simply reciting that appellees' conduct "consisted of" such offenses. Nor does it add anything to tack on an *ipse dixit* legal conclusion that appellees' conduct "is not exempt" under the Act.

B.

Pennsylvania's other major contention supporting its horizontal conspiracy theory is the naked allegation, considerably fleshed out by brief and oral argument, that there was a group boycott by the defendants designed "to eliminate competition by resellers and to boycott resellers." Br. for appellant at 19. Here again, Pennsylvania recognizes the existence of the Soft Drink Act, but says that it does not apply because the defendants' activities come within the purview of the Act's exceptions for per se violations, including group boycotts. *See* *15 U.S.C. § 3502*. But Pennsylvania cannot travel very far on its group boycott argument.

This court has consistently limited application of the *per se* rule to the "classic" boycott. *See* Malley-Duff & Assocs. v. Crown Life Ins. Co., 734 F.2d 133, 142 (3d Cir. 1984), *cert. denied*, *469 U.S. 1072, 105 S. Ct. 564, 83 L. Ed. 2d 505 (1984)* (quoting Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council, 670 F.2d 421, 430 **[**33]** (3d Cir.), *cert. denied*, *459 U.S. 916, 74 L. Ed. 2d 182, 103 S. Ct. 229 (1982))*. ***HN12***[] A classic boycott exists where there is concerted action with "a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive object, or both." *Id.* (quoting *De Filippo v. Ford Motor Co., 516 F.2d 1313, 1318 (3d Cir. 1975)*, *cert. denied*, *423 U.S. 912, 46 L. Ed. 2d 141, 96 S. Ct. 216 (1975))*.

Although dressed in the pejorative appellation "group boycott," the specific conduct complained of in this case, stripped of name-calling or label-pasting, is nothing more than conduct *expressly* permitted by the provisions of *section 3501*. What Pennsylvania now describes as a "group boycott" is precisely the conduct specifically authorized by the clear unambiguous language of the Soft Drink Act and its legislative history as set forth in Part II of this opinion. As we stated before, the Act provides for the "enforcement" of agreements limiting extraterritorial sales either "directly or indirectly." It is designed to **[**34]** combat and prevent transshipping by both bottlers and third parties. It is not for us to determine in this case what conduct would be permitted by a business enterprise not engaged in the manufacture and distribution of soft drinks. For our purposes here and now, we have decided that the Soft Drink Act applies to the entire chain of distribution -- from the manufacturer all the way through to the consumer. It permits the manufacturer to require a bottler to ensure that the ultimate resale of the PepsiCo products it produces will be to consumers within its own territory. Thus, it allows bottlers to refuse to sell to resellers whose actions impede this goal.

C.

This, too, must be said. We believe that to adopt Pennsylvania's view that *section 3502* prevents the conduct described above would lead to a great inconsistency. On the one hand, this view would say that the Act grants suppliers the right to establish exclusive bottler territories; on the other hand, those territories could not be enforced because to do so would amount to a "horizontal restraint" or a "group boycott." We will not so implement this statute. It is well settled that "a statute should be interpreted so as not **[**35]** to render one part inoperative." *Colautti v. Franklin, 439 U.S. 379, 392, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979)*.

[*184] Equally important, we reject Pennsylvania's interpretation because it contradicts the express intent of Congress. When Congress enacted *section 3502*, it explicitly did not "tak[e] away . . . what it gave in *§ [3501]*." 126 Cong. Rec. 16,576 (1980) (remarks by Rep. Butler). Nor did it intend "to vitiate the t[h]rust of *section [3501]*." *Id.* at 16,570 (remarks by Rep. Hall) (the Act "contemplates not only the existence but also the enforcement of bottler territories"). Rather, Congress enacted *section 3502* to ensure that *section 3501* did not sanction bottler-instigated market division or conspiracies among syrup manufacturers.

At the hearings on the Act, an attorney for a transshipper testified that unless a qualifying proviso like *section 3502* were added, the first section of the Act would permit "bottlers [to] get together and form their own policing committees" and would permit the major syrup manufacturers to join together to "boycott" supermarket chains that transshipped. *See 1980 Hearings* 191-92. His interpretation **[**36]** of *section 3501* concerned Judiciary Chairman Rodino that bottlers might create restraints on their own, and foist them upon their supplier. The Chairman asked the attorney if *section 3501* would permit "bottlers [to] conspire[] to divide markets or allocate customers, and have their supplier . . . enforce the agreement. . . ." *Id. at 195*. The attorney replied that, unless qualified, it would. *Id.* This is the conduct that *section 3502* was intended to address. But no such conduct was alleged in this case.

Section 3502 does not render bottlers impotent to seek enforcement of exclusive territories lawfully granted by the supplier, and that is all that is alleged here. On these facts, we reject the contention that *section 3502* prevents the interposition of the Soft Drink Act as a total legal defense to the appellant's amended complaint.

VII

We have carefully considered the contentions of the appellant, the Commonwealth of Pennsylvania. The judgment of the district court will be affirmed.

Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.

Supreme Court of New York, Appellate Division, First Department

January 5, 1988

No Number in Original

Reporter

136 A.D.2d 461 *; 523 N.Y.S.2d 102 **; 1988 N.Y. App. Div. LEXIS 20 ***; 1988-1 Trade Cas. (CCH) P67,980

Creative Trading Company, Inc., et al., Respondents, v. Larkin-Pluznick-Larkin, Inc., Doing Business as National Fashion & Boutique Show, et al., Appellants

Core Terms

cause of action, conspiracy, Donnelly Act, plaintiffs', exhibitors, Boutique, favored, defendants', reciprocal, Antitrust, asserting, contracts, pleadings, entities, replead, smaller, space

LexisNexis® Headnotes

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

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

A party claiming a violation of the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, which was modeled on the Federal Sherman Act, *15 U.S.C.S. § 1*, must identify a relevant product market, describe the nature and effects of a purported conspiracy and allege how the economic impact of that conspiracy is to restrain trade in the market in question.

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

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

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Donnelly Act, *N.Y. Gen. Bus. Law § 340*, mandates that there be a conspiracy or reciprocal relationship between two or more entities before liability can be found.

Judges: [*1]** Concur -- Kupferman, J. P., Sullivan, Ross and Milonas, JJ.

Opinion

[*461] [102]** Order of the Supreme Court, New York County (Alfred M. Ascione, J.), entered on January 14, 1987, which denied defendants' motion pursuant to *CPLR 3211* to dismiss the third and fourth causes of action, is unanimously reversed on the law and the motion granted with leave to plaintiffs to replead, without costs or disbursements.

Plaintiffs are small businesses engaged in the retailing of women's clothing, accessories and jewelry. Defendants organize and sponsor fashion and boutique shows and, in that regard, produced the National Fashion and Boutique Show, which was held at the Jacob Javits Convention Center on May 17th through 20th of 1986. It is plaintiffs' contention that defendants, as a result of their contracts and arrangements with the Javits Convention Center, advertising **[**103]** firms, manufacturers and others, have gained exclusive control over exhibition space at this most premier of trade shows and throughout the metropolitan area. According to plaintiffs, defendants have utilized their monopoly power to allocate the most desirable space to favored exhibitors and then sell the booths having the poorest location **[***2]** and access to smaller exhibitors at exactly the same charge per square foot. Thus, plaintiffs urge, the smaller exhibitors have been placed at a substantial competitive disadvantage in relation to the favored ones, and, in effect, the former are forced to subsidize the latter.

Plaintiffs' complaint contains four causes of action, the third and fourth of which derive from New York's ***antitrust law***, *section 340 of the General Business Law*, commonly known as the Donnelly Act. Defendants moved pursuant to *CPLR 3211* to dismiss the third and fourth causes of action for legal insufficiency. In denying the motion, the Supreme Court determined that in view of the principle favoring the liberal construction of pleadings, plaintiffs' factual assertions are adequate to make out a cognizable cause of action. Defendants have appealed.

[*462] ***HN1***[] A party claiming a violation of the Donnelly Act, which was modeled on the Federal Sherman Antitrust Act (*15 USC § 1*; *see, State of New York v Mobil Oil Corp., 38 NY2d 460*), must identify the relevant product market, describe the nature and effects of the purported conspiracy and allege how the economic impact of that conspiracy **[***3]** is to restrain trade in the market in question *(Internationl Tel. Prods. v Twentieth Century-Fox Tel. Div., 622 F Supp 1532* [SD NY 1985]). While the complaint herein sufficiently pleads these elements, there is one further requirement for a valid claim under the Donnelly Act, the lack of which renders plaintiffs' third and fourth causes of action defective. As the Court of Appeals declared in *State of New York v Mobil Oil Corp.* (*supra, at 464*), in discussing the type of contract or agreement deemed by the statute to constitute an unlawful restraint of trade, "the term, 'arrangement' * * * must be interpreted as contemplating a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms, 'contract', 'combination' or 'conspiracy'". Thus, ***HN2***[] the Donnelly Act mandates that there be a conspiracy or reciprocal relationship between two or more entities before liability can be found *(see also, Saxe, Bacon & Bolan v Martindate-Hubbel, Inc., 710 F2d 87* [2d Cir 1983]; *International Tel. Prods. v Twentieth Century-Fox Tel. Div., supra)*.

[*4]** In the instant situation, defendant Larkin-Pluznick-Larkin, Inc., doing business as National Fashion & Boutique Show, is a corporation of which the individual defendants are all officers or agents. Plaintiffs have failed to identify any alleged coconspirator(s) and may not remedy the defect in their complaint by asserting, in conclusory fashion, the existence of a generalized conspiracy arising out of defendants' various contracts and arrangements or by referring to unilateral business actions taken by them *(see, International Tel. Prods. v Twentieth Century-Fox Tel. Div., supra)*. Consequently, the third and fourth causes of action should be dismissed with leave to plaintiffs to replead in accordance with the foregoing.

End of Document

[Ford Piano Supply Co. v. Steinway & Sons]

United States District Court for the Southern District of New York

January 7, 1988, Decided; January 13, 1988

No. 85 Civ. 1284-CSH

Reporter

1988 U.S. Dist. LEXIS 523 *; 1987-2 Trade Cas. (CCH) P67,828

Ford Piano Supply Company, Plaintiff v. Steinway and Sons, Defendants

Core Terms

piano, relevant market, Sherman Act, monopoly, Robinson-Patman Act, manufacturer, price-fixing, prices

LexisNexis® Headnotes

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

With respect to monopoly and exclusive dealing claims under *sections 1* and *2* of the Sherman Act, *15 U.S.C.A. § § 1*, *2* , a plaintiff must allege as a threshold matter that the agreement in question resulted in a substantial foreclosure of competition in an area of effective competition, that is, in a relevant market.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

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

HN2[] **Robinson-Patman Act, Claims**

In order to have standing to raise a claim under the Robinson-Patman Act, a plaintiff must allege either: (1) a causative link between illegal price discrimination and injury to the plaintiff which is direct rather than incidental, or (2) that the plaintiff's business or property falls within the "target area" of the allegedly illegal conduct.

Counsel: **[*1]** RUBENSTEIN & McCALLA, Attorneys for Plaintiff, Martin Rubenstein, Esq. of Counsel.

MILLER & WRUBEL, P.C., Attorneys for Defendant, Martin Edel, Esq. of Counsel.

Opinion by: HAIGHT

Opinion

HAIGHT, *District Judge*:

Defendant, Steinway and Sons ("Steinway"), moves, pursuant to *F.R.Civ. P. 12(b)(6)*, for an order dismissing the complaint for failure to state a claim, and for award of costs including attorney fees under *F.R.Civ.P. 11*. Plaintiff defends its complaint as legally sufficient or, in the alternative, requests *leave to file an amended complaint* to remedy any deficiencies. For the reasons set forth below, I dismiss the complaint in its entirety, grant limited leave to amend, and grant defendant's motion for sanctions under *Rule 11*.

Plaintiff, Ford Piano Supply Company ("Ford"), is a supplier of piano parts. Ford accuses Steinway, a manufacturer and supplier of pianos and piano parts, of conspiring with Louis Renner Stuttgart ("Renner"), a German manufacturer of piano parts, to violate the federal antitrust laws. Ford claims that in October 1984, Steinway and Renner conspired to create a monopoly in certain piano parts manufactured by Renner which fit Steinway pianos. The facts alleged in **[*2]** the complaint, which must be assured to be true for purposes of this motion, are that until October 1984, Ford bought certain piano parts known as "shanks, flanges st, repetitions, whipper st and various other action parts" (Complaint para. 7) from Renner, (the "Renner parts"). Ford then resold these parts to its own customers. On or about October or November 1984, Ford alleges that Steinway entered into a contract with Renner "to prevent plaintiff from obtaining piano parts" from Renner. Although the nature of the Renner/Steinway contract is not made explicit in the complaint, plaintiff's memorandum of law in opposition to the present motion makes clear that it was an exclusive distributorship agreement, casting Steinway as the distributor of Renner piano parts.

In a nutshell, Ford claims that as a result of this exclusive distributorship agreement, Ford and all other purchasers of these particular Renner piano parts may no longer purchase such parts directly from Renner, but instead must purchase them through Steinway. Plaintiff alleges that this arrangement has resulted in higher prices and greater delay in filling orders for Renner parts.

By parsing the single count contained **[*3]** in Ford's complaint, one may identify eight antitrust claims alleged by Ford: (1) unlawful pricefixing in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1 (1984)*; (2) a refusal by Renner to deal with Ford as a result of its exclusive distributorship agreement with Steinway, in violation of the same statutory provision; (3)-(5) monopolization, attempted monopolization and a conspiracy to monopolize the market for Renner piano parts, in violation of *section 2* of the Sherman Act, *15 U.S.C. § 2 (1984)* and *(6)-(8)* violations of section 13(a), (d) and (f) of the Robinson-Patman Act, 15 U.S.C. (Sec.Sign) 13 (1984). Steinway contends that all of these claims are legally insufficient.

A. *Monopoly and Exclusive Dealing claims*

HN1[] With respect to its monopoly and exclusive dealing claims under *sections 1* and *2* of the Sherman Act, Ford must allege as a threshold matter "that the agreement in question result[ed] in a substantial foreclosure of competition in an area of effective competition, that is, in a relevant market." *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-28, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961)*; *Twin City Sportservice. Inc. v. Charles O. Finley & Co., 676* ***[*4]*** *F.2d 1291, 1301-02 (9th Cir. 1982)*; *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1352 (7th Cir. 1982)*. Steinway claims that Ford has failed to allege an anticompetive effect in a "relevant market." I agree.

Ford alleges that the relevant market over which Steinway exercises monopolistic control in violation of the Sherman Act (the "Act") is the market for Renner parts. This allegation is not sufficient to state a claim under the Act unless the market for Renner parts is a market capable of competitive structure. As the Supreme Court recognized in *United States v. Du Pont & Co., 351 U.S. 377, 393 (1956)*, any non-standarized commodity [1] could theoretically be described as a "market" over which the manufacturer of the commodity exercises "monopolistic" control. The Court explained in *Du Pont* that although

" . . . one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product . . . this power is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product."

United States ***[*5]*** *v. Du Pont & Co., supra, 351 U.S. at 393*.

Whether a particular product market controlled by one interest constitutes an illegal monopoly under the Act depends on whether and to what extend substitutes to that produce are available. To be a "substitute" does not require that the alternatives be fungible; rather, the relevant inquiry is whether there are "market alternatives that buyers may readily use for their purposes." *Id. at 394*. Economists refer to this inquiry as one into the "cross-elasticity" of demand for the product. *See Hayden Publishing Co.. Inc. v. Cox Broadcasting Corp., 703 F.2d 63, 70 (2d Cir. 1984)*.

Ford argues that Renner parts are recognized in the industry as unique in that they are of superior quality. Quality differences between products can, in some circumstances, be relevant to a determination of the relevant market for anti-trust purposes, as the quality of a product may affect the cross-elasticity of demand. I do not reach the issue on the present motion, which, however, is limited to the sufficiency of the complaint as filed. *F.R.Civ.P. 12(b)(6)*. The complaint fails to identify **[*6]** a relevant market and thus fails to sufficiently allege illegal monopolization. *See U.S. v. Grinnell Corp., 384 U.S. 563, 571 (1965)* (allegation and proof of monopoly power over a relevant market is an essential element of *§ 2* violation under the Act).

Accordingly, I dismiss the complaint in so far as it attempts to state a claim or claims for monopoly and exclusive dealing under *§ § 1* and *2* of the Sherman Act. Plaintiff is granted leave to replead these claims, if so advised after adequate inquiry into the facts and law concerning the allegedly relevant market.

B. *Price-Fixing Conspiracy*

Plaintiff's allegations of a price-fixing conspiracy under *section 1* of the Sherman Act are deficient not only for failure to identify a relevant product market, as discussed *supra*, but also for failure to allege joint conspiratorial activity between Renner and Steinway. Plaintiff's complaint at paragraph 22 states:

That defendant participated in a price-fixing conspiracy which it was enabled to adopt, follow and adhere to a pricing formula *established by itself* which enabled it to raise prices and maintain raised prices *set by itself* in interstate commerce. (emphasis added).

[*7] Such unilateral price determination by Steinway fails to state a claim for unlawful price-fixing under the Sherman Act. *Car Carriers Inc. v. Ford Motor Co., 745 F.2d 1101, 1110 (7th Cir. 1984)*. I therefore dismiss plaintiff's price fixing claims. I decline to grant leave to re-plead these claims because plaintiff has failed to offer any legal theory or proposed factual allegation which might support the claims.

C. *Robinson-Patman Act Claims*

HN2[] In order to have standing to raise a claim under the Robinson-Patman Act, a plaintiff must allege either: (1) a causative link between illegal price discrimination and injury to the plaintiff which is direct rather than incidental, or

[1] As opposed to standard commodities such as salt or wheat.

(2) that the plaintiff's business or property falls within the "target area" of the allegedly illegal conduct. *See Reborn Enterprises, Inc. v. Fine Child. Inc., 590 F.Supp. 1423, 1450 (SDNY 1986)*; *Litton Systems, Inc. v. AT&T, 700 F.2d 785, 821 (2d Cir. 1983)*.

Plaintiff's Robinson-Patman claim is contained in paragraph 34 of the complaint, which states:

That upon information and belief, defendant

violated *Section 2* of the Robinson-Patman Act (*15 U.S.C.A. Section 13a*, d, f) in that, upon information **[*8]** and belief, it made two or more sales by itself, at different prices, commodities (piano parts) of like grade and quality with sales in inter-state commerce which adversely affected competition including that of the plaintiff and proximately caused injury to plaintiff.

This paragraph does not provide sufficient information to determine whether plaintiff is within the "target area" of the challenged conduct, or whether the plaintiff suffered direct rather than incidental injury. I therefore dismiss the complaint in so far as it purports to state a claim under the Robinson-Patman Act because plaintiff's standing to bring the claim is not sufficiently alleged. Plaintiff is granted leave to re-plead this claim, if so advised after adequate inquiry.

D. *Rule 11 Sanctions*

Steinway's motion for an award of sanctions, including reasonable attorneys, fees incurred in connection with this motion to dismiss is granted. Ford's papers in opposition to the motion fail to show that its complaint is "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Fed.R.Civ.P. 11*.

Plaintiff's counsel virtually admitted **[*9]** violation of *Rule 11* when, during oral argument, he responded to a question put on the relevant market issue by saying "I agree with your Honor that the law in this would be of greater interest, and I believe that we would unfortunately have to do a review of cases, but I feel very confident that we would find many instances where a unique product market was found on those bases, design, competition and workmanship." (Transcript at 39-40). This statement reveals that plaintiff's counsel's investigation into ***antitrust law*** prior to filing this complaint fell well short of the reasonable prefiling inquiry required by *Rule 11*. An allowance to Steinway is mandatory under the rule. [2]

[*10] In the circumstances of this case, I believe the only appropriate sanction is one which completely compensate's defendant for the costs it incurred as a result of this motion. Steinway is directed to file and serve, within thirty (30) days of the date of this order, appropriate affidavits giving the details of the expenses and fees it claims. These affidavits must be accompanied by copies of lawyers, time sheets and other appropriate proof. Within fourteen (14) days thereafter, Ford may certify its agreement with the amount, or file an affidavit and memorandum of authorities in opposition. Any dispute will be resolved in such further proceedings as may be appropriate.

The remaining question is whether the costs should be borne by Ford or its attorneys. The rule permits either or a combination. Because the deficiencies of the complaint are legal in nature, and there is no evidence of misleading behavior or bad faith on the part of Ford, I direct that Ford's counsel pay these charges, without recourse to the client.

Ford's amended complaint, if any, is to be served and filed within thirty (30) days of the date of this Memorandum Opinion and Order.

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[2] This necessary motion practice is particularly offensive where, as here, defendant raised objections to the legal sufficiency of plaintiff's pleading at the initial pretrial conference before this Court; the Court instructed the parties to meet and candidly review the complaint together; defendant spelled out to plaintiff informally all of the arguments that it eventually had to make formally to this Court; and the plaintiff chose merely to stand, on its pleading without amendment. This waste of both the Court's and opposing counsel's time is not acceptable.

It is SO ORDERED.

DATED: New York, **[*11]** New York, January 7, 1988

[Rosefielde v. Falcon Jet Corp.](#)

United States District Court for the District of New Jersey

January 11, 1988, Decided ; January 11, 1988, Filed

Civil Action Nos. 82-3788, 85-4671

Reporter

701 F. Supp. 1053 *; 1988 U.S. Dist. LEXIS 14360 **; 1990-1 Trade Cas. (CCH) P69,091

Alan Rosefielde, et al. v. Falcon Jet Corporation; Gulfstream III Associates, Inc. v. Falcon Jet Corporation

Subsequent History: [1]** As Amended February 2, 1989.

Core Terms

Jet, Defendants', Plaintiffs', manufacturers, prices, conspiracy, aircraft, business jet, summary judgment, anticompetitive, purchasers, price information, competitors, summary judgment motion, contracts, resales, damages, sales, parties, new business, co-conspirators, price-fixing, price fixing, exchanged, antitrust, deter, Sherman Act, alleged conspiracy, assigned, policies

LexisNexis® Headnotes

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

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

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

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

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

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

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

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

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Under the Federal Rules of Civil Procedure, summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Accordingly, to defeat a motion for summary judgment, the non-moving party must respond by setting forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

HN2[] **Summary Judgment, Evidentiary Considerations**

On a motion for summary judgment, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. This determination must be guided by the substantive evidentiary standards that apply to the case. A motion for summary judgment may be granted unless the evidence, construed in favor of the non-moving party, is sufficient for a reasonable jury to return a verdict for that party.

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

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

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

HN3[] **Entitlement as Matter of Law, Appropriateness**

A summary judgment motion in an antitrust case should be granted if the plaintiff's allegations are unsupported or if defendant has introduced probative evidence rebutting the antitrust allegations in the complaint, and plaintiff fails to come forward with factual support for his allegations.

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

HN4[] **Antitrust & Trade Law, Sherman Act**

The elements of a cause of action under section one of the Sherman Act are (1) that the defendants contracted, combined or conspired among each other or with other co-conspirators; (2) that the combination or conspiracy produced adverse, anti-competitive effects, within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

Concerted action is an essential element of a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, claim. Unilateral or independent action, irrespective of its intent, does not violate *§ 1* of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, states, in pertinent part, that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states is declared to be illegal.

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

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

HN7[] **Conspiracy, Elements**

A conspiracy may be inferred from circumstantial evidence. However, the extent to which such inferences can be made is limited.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

Once the plaintiff in an action pursuant to *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, establishes a conspiracy can be inferred from circumstantial evidence, the defendants may deny the existence of the conspiracy and offer an innocent explanation of the questioned conduct. In some cases, sworn denials of the defendants may be sufficient to shift the burden of proof back to the plaintiff.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Antitrust & Trade Law, Sherman Act

Even if the plaintiffs present circumstantial evidence from which a conspiracy can be inferred, such evidence without more is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Antitrust & Trade Law, Sherman Act

Summary judgment will be entered against a plaintiff under § 1 of the Sherman Act, 15 U.S.C.S. § 1, if he cannot show the inference of conspiracy is reasonable in light of the competing inferences of independent action or colusive action that could not have harmed plaintiff.

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

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN11[] Cartels & Horizontal Restraints, Price Fixing

The reciprocal exchange of price information among competitors is sufficient to establish a combination or conspiracy, the initial ingredient of a violation of § 1 of the Sherman Act, 15 U.S.C.S. § 1. Price information exchanged in some markets may have no effect on truly competitive price. The mere showing of an exchange of price information among competitors, without more, is insufficient to establish a violation of the antitrust laws. Plaintiffs must also show that the information exchange had an anticompetitive effect on prices.

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

HN12[] Regulated Practices, Price Fixing & Restraints of Trade

In markets which are oligopolistic, where the competition is for a fungible product, and demand is inelastic, the exchange of price information has the anticompetitive effect of stabilizing prices. But, where the exchange of information takes place in a market which is competitive, where the product is not fungible, competition is based on quality rather than price, and the market is elastic, then no anticompetitive effect exists.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > Inferences

HN13[] Antitrust & Trade Law, Sherman Act

A plaintiff in an action based on *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, should present direct or circumstantial evidence that reasonably tends to prove that the defendants' had a conscious commitment to a common scheme designed to achieve an unlawful objective. The plaintiffs may alternatively show the defendants had an anticompetitive intent in entering into the agreement. To support an inference of more than a mere exchange of information, that is a conspiracy in violation of *§ 1* of the Sherman Act, the plaintiffs must show the inference of rational, independent choice is less attractive than that of concerted action.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN14[] **Antitrust & Trade Law, Sherman Act**

The extent to which an inference of a conspiracy can be drawn from circumstantial evidence is limited. One of these limits is the plausibility of the conspiracy claim. As the Supreme Court reemphasized in Matsushita, the jury should not be permitted to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. A court must consider the "practical obstacles" to the implementation of the alleged conspiracy in connection with defendants' motion for summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN15[] **Antitrust & Trade Law, Sherman Act**

In markets where the products are heterogeneous, or where there is rapid technological change, in order for a price-fixing cartel to function it may be necessary to establish and enforce a complex schedule of prices corresponding to gradations in actual or perceived quality attributes among the competing products.

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

It is not unlawful for a business to take the prices charged by its competitors into account when setting its own prices, or to follow or copy the prices of a competitor, if the decision to do so is the result of a unilateral business judgment, and not the result of collusive agreement.

Civil Procedure > Judgments > Summary Judgment > General Overview

HN17[] **Judgments, Summary Judgment**

Granting summary judgment in an antitrust action is disfavored when issues of motive and intent are central to the case.

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Antitrust & Trade Law, Sherman Act**

With fungible goods, the goods of competing manufacturers are virtually identical, so the primary, if not the only, source of competition among manufacturers is in price.

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

HN19[] **Regulated Practices, Market Definition**

In determining what constitutes a relevant market no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up the relevant market. The relevant market must be determined in terms of both product and geographic markets.

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN20[] **Private Actions, Remedies**

It is an essential element of any antitrust claim that the plaintiff demonstrate injuries of the type the antitrust laws were meant to protect. In alleging antitrust damages, the plaintiffs have a lesser burden of proof than they do on the other elements of their claim. Antitrust damage calculations need not be proven with certainty. Plaintiffs have satisfied their burden with respect to the fact of damages if they demonstrate merely a "causal relationship" between defendants' illegal acts and plaintiffs' alleged injuries.

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

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

Evidence > ... > Documentary Evidence > Writings > General Overview

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

HN21[] **Regulated Industries, Higher Education & Professional Associations**

Although an antitrust plaintiff may not be allowed to defeat a motion for summary judgment with an expert report that lacks factual support in the record, the credibility of the evidence submitted should not be a factor in deciding a motion for summary judgment. In the Third Circuit it is even disfavored to give careful scrutiny to the assumptions underlying and inferences made in an expert report when considering the admissibility of the report.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN22[] **Purchasers, Direct Purchasers**

The holding in Illinois Brick precludes indirect purchasers from bringing lawsuits alleging antitrust damages. The Illinois Brick rule limits standing to assert price fixing claims to direct purchasers of the defendant's products because to permit both indirect and direct purchasers to sue would subject the defendants to the risk of multiple liability for the same antitrust violation and because of the uncertainties and difficulties in analyzing price and output decisions in the real economic world rather than in the economist's hypothetical model.

Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN23[] **Antitrust & Trade Law, Sherman Act**

Inferences of conspiracy made from ambiguous evidence of consciously parallel business behavior cannot be made without the existence of certain "plus factors". A high level of interfirm communications is one of the "plus factors" which may indicate the defendants were engaged in collusive anticompetitive behavior.

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Judges: Alfred J. Lechner, Jr., United States District Judge.

Opinion by: LECHNER, JR.

Opinion

[*1055] ALFRED J. LECHNER, JR., UNITED STATES DISTRICT JUDGE

This case is a consolidation of the two above-mentioned cases (the "*Rosefielde*" and "*Gulfstream*" cases). The *Rosefielde* case was filed in the District of New Jersey in November, 1982. It involves a protracted dispute concerning the imposition of a warranty transfer fee by defendant Falcon Jet Corporation ("Falcon Jet") upon plaintiff Alan Rosefielde. In October, 1983 the *Rosefielde* complaint was amended to add two antitrust claims. Count sixteen of the *Rosefielde* Amended Complaint charges Falcon Jet and seven other business jet manufacturers conspired to fix the base price of new business jets in the United States. Count seventeen of the *Rosefielde* Amended Complaint alleges a conspiracy among Falcon Jet and three other business jet manufacturers to limit the contractual terms of sale of new business jets so as **[**2]** to inhibit their resale.

The *Gulfstream* case was originally filed in the Central District of California in June, 1985, but was consolidated with the *Rosefielde* case by Judge Barry in April, 1986. The *Gulfstream* case alleges a price-fixing conspiracy, the operative facts of which are identical to those of count sixteen of the *Rosefielde* Amended Complaint. The *Gulfstream* case and count sixteen of the *Rosefielde* Amended Complaint will be referred to collectively as the "price-fixing claims."

The court is now faced with cross-motions for summary judgment with respect to the price fixing claims, and defendants' motion for summary judgment on count seventeen of the *Rosefielde* Amended Complaint ("count seventeen"). [1] Defendants' motion on the price fixing claims is granted with respect to the existence of an express agreement to fix prices, and is denied in all other respects. Plaintiffs' cross-motion for summary judgment on the price-fixing claims is partially granted and partially denied. Finally, defendants' motion for summary judgment on count seventeen is granted.

[3]** *Background*

Plaintiff Alan Rosefielde is a former practicing tax attorney who is presently **[*1056]** engaged in the business of purchasing, selling and leasing business jet aircraft. (Plaintiff's Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment, dated September 30, 1986 ("Plaintiffs' Mem.") at page "a", Table I.) [2] Mr. Rosefielde organized each of the other plaintiffs, which are closely held corporations or limited partnerships, for the purpose of purchasing Falcon Jet or Gulfstream [3] business jets. (Memorandum in Support of Defendants' Motion for Partial Summary Judgment with Respect to the Sixteenth and Seventeenth Counts of the *Rosefielde* Amended Complaint and for Summary Judgment in *Gulfstream III Associates*, dated August 1, 1986, ("Defendants' Mem.") at 7.) Mr. Rosefielde conducts all of the business affairs of each of the plaintiffs. (Plaintiffs' Mem. at page "a", Table I.) Typically, Mr. Rosefielde, through one of his corporations, [4] purchases new business jets in the United States and then assigns the contract to a subsequent purchaser. (Defendants' Mem. at 9.) During the period **[**4]** between the purchase of the aircraft by the plaintiffs and the assignment to a subsequent purchaser, the planes are managed by Jet Leasing Corporation, of which William F. Handy, a close associate of Mr. Rosefielde, is the president and principal shareholder. (Defendants' Mem. at 8.)

Defendant Falcon Jet Corporation is the United States subsidiary of defendant Avions Marcel Dassault-Breguet Aviation ("AMD-BA"), a French aircraft manufacturer. AMD-BA manufactures military and civilian aircraft, including the "Falcon" series of business jet aircraft. (Defendants' Mem. at 6-7.) Falcon **[**5]** Jet is responsible for marketing and selling Falcon business jets in the western hemisphere. (Defendants' Mem. at 6.) In most instances Falcon Jet purchases "green" aircraft (*i.e.*, aircraft sold without exterior paint, completed interiors, or permanent avionics packages) from AMD-BA and ships them to the United States for completion according to the specifications of Falcon Jet customers (Defendants' Mem. at 7.)

The Falcon Jet aircraft which plaintiffs purchased from defendants were "completed" aircraft sold with a standard equipment package for a "base" price. (Defendants' Mem. at 15.) The base price is the price of an aircraft equipped to a standard specification set by the manufacturer before the addition of optional equipment or price escalation. [5] (Plaintiffs' Mem. at 13 n. 25.)

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[1] Motions are also pending to exclude certain testimony of plaintiffs' expert witnesses and to bar use of certain government reports. Because these motions have not been argued and because these motions concern rulings which may be more appropriately addressed immediately prior to or during trial, these motions will be addressed by Judge Wolin, the judge to whom this case has been re-assigned. For the purpose of this opinion, all evidence submitted by both parties is assured to be admissible.

[2] Because of the mass of supporting material accompanying the parties' motions, citations in most instances are to the appropriate briefs, which in turn cite to the supporting data.

[3] Gulfstream business jets are manufactured by the Gulfstream Aerospace Corporation, an American aircraft manufacturer. (Plaintiffs' Mem. at 1, n. 1.) Gulfstream Aerospace and defendant Falcon Jet Corporation are two of the alleged co-conspirators which exchanged price information with the other business jet manufacturers.

[4] Mr. Rosefielde has not purchased or sold any aircraft personally. (Defendants' Mem. at 8.)

[5] Falcon Jet did not subject the Rosefielde contracts to price escalation. (Defendants' Mem. at 15.)

The *Rosefielde* plaintiffs contracted to purchase eight Falcon jets over a period of two years beginning in 1978. (Defendants' Mem. at 19.) Six of these contracts were assigned to subsequent purchasers who accepted legal title to the aircraft prior to the time of delivery. (*Id*.) Three **[**6]** of those assignees are not parties in this action. (Defendant's Mem. at 10.) In 1981, the *Gulfstream* plaintiffs contracted to purchase two Gulfstream Aerospace Jets. One of these contracts was cancelled and the other was assigned to a non-plaintiff. (Defendants' Mem. at 11.) In addition, plaintiffs terminated three options to purchase Gulfstream IV aircraft. (Reply Memorandum in Support of Defendants' Motion for Partial Summary Judgment with Respect to the Sixteenth and Seventeenth Counts of the *Rosefielde* Amended Complaint and for Summary Judgment in *Gulfstream III Associates*; Memorandum in Opposition to Plaintiffs' Cross-Motion for Summary **[*1057]** Judgment, dated November 12, 1986 ("Defendants' Reply") at 55.)

In July, 1982, a dispute arose between Mr. Rosefielde and Falcon Jet concerning the imposition of a $ 100,000 assignment fee to transfer the warranty of a Falcon Jet aircraft from Mr. Rosefielde to another customer. (DX-454; Defendant's Mem. at 11.) In November, 1982, the *Rosefielde* plaintiffs filed a fifteen count complaint in the District of New Jersey. [6] The first six counts of the complaint, alleging that the defendants attempted to monopolize the business jet **[**7]** market, were dismissed with prejudice in June of 1985. (Defendants' Mem. at 13.) The remaining nine counts are contract and tort claims based on defendants' warranty transfer policy. (Defendants' Mem. at 11.)

In October, 1983, plaintiffs amended their complaint to add two additional counts alleging conspiracies in violation of Section One of the Sherman Act, *15 U.S.C. § 1*. Count sixteen alleges a horizontal price-fixing conspiracy among defendants and seven international business jet manufacturers. [7] (Defendants' Mem. at 11.) Count seventeen alleges a conspiracy among the same manufacturers to fix the contractual terms of sale for the purpose of inhibiting the resale of new business jets. (Defendants Mem. at 11.)

Defendants have filed several previous motions for summary judgment. The first motion, directed at counts one through six, the monopolization counts of plaintiff's original Complaint, was not adjudicated because **[**8]** plaintiffs dropped these counts shortly before their response was due, and agreed to a dismissal with prejudice. (*See* Defendants' Mem. at 12; Plaintiffs' Mem. at 20, n. 52.) Defendants then filed a motion for partial summary judgment as to plaintiffs' contract and tort claims in June of 1985. (Defendants' Mem. at 13.) Finally, in August, 1985, defendants filed a motion for partial summary judgment with respect to the sixteenth and seventeenth counts of plaintiffs' Amended Complaint. Defendants also filed motions *in limine* to exclude certain testimony of plaintiffs' expert witnesses.

Ruling on defendants' motions, Judge Lacey denied in part and granted in part summary judgment on the contract and tort claims. He also ruled that plaintiffs' expert witnesses would be precluded from testifying unless they filed supplemental reports and submitted to further depositions. He then denied defendants' motion for summary judgment as to counts sixteen and seventeen without prejudice to renewal after plaintiffs' experts submitted to the supplemental discovery orders. [8] After plaintiffs' experts complied with Judge Lacey's orders, defendants renewed their summary judgment motion with respect **[**9]** to the price fixing claims and count seventeen of the *Rosefielde* case. (Defendants' Mem. at 13.) Plaintiffs then filed a cross-motion for summary judgment with respect to liability on the price fixing claims, seeking to leave for trial only the matter of plaintiffs' damages. (Plaintiffs' Mem. at 103.)

Facts

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[6] The *Gulfstream* case was filed in the Central District of California in June, 1985. (Defendants' Mem. at 12.)

[7] The operative facts of count sixteen are identical to the price-fixing conspiracy alleged in the *Gulfstream* case. (Defendants' Mem. at 12.)

[8] Judge Lacey subsequently retired from the bench. The *Rosefielde* case was then transferred to Judge Barry, who consolidated *Rosefielde* and *Gulfstream* in April, 1986 in this district.

1. The Price Fixing Claims

Since the early 1970's eight business jet manufacturers which sell their product in the United States have engaged in a regular exchange of price and other information on a reciprocal reciprocal basis. (Plaintiff's Mem. at 13, pages "a" and "b", Table II.) This exchange took place primarily during monthly telephone conversations between the sales engineers of the various manufacturers. (Plaintiffs' Mem. at 15; Defendant's Mem. at 18.) The sales engineers exchanged information relating to the "base" price of the aircraft for the next available delivery. (Plaintiff's Mem. at 13; Defendants' Mem. at 18.) This information **[*1058]** was recorded in internal Falcon **[**10]** Jet documents called "price list comparisons." (*e.g.*, PX-147, Defendants' Mem. at 18.) These documents listed the base price, the next available delivery, production rate, price of typical options, and escalated and equipped prices of Falcon Jet and other aircraft. (Defendants' Mem. at 18.)

The price list comparisons were widely circulated among sales representatives as well as executives of Falcon Jet. (Defendants' Mem. at 19; Plaintiff's Mem. at 5, 46.) Plaintiffs allege Falcon Jet executives used this information to set the prices of their aircraft. (Plaintiffs' Mem. at 5, 26, page "c", Table III.) Defendants claim, to the contrary, the information exchange was not authorized by executives of Falcon Jet, but the practice merely evolved over time among sales engineers, who had or have no pricing authority. (Defendants' Mem. at 18.) It is contended this information exchange was meant to assist the sales engineers in their efforts to sell Falcon aircraft -- not to set prices.

Since 1980 Falcon Jet was responsible for publishing the Business Jet Activity Report ("BJAR") which reported detailed order and delivery information including the names of individual purchasers. [9] (Plaintiffs' **[**11]** Mem. at 16. [10]) The BJAR was distributed monthly to all of the aircraft manufacturers who contributed information to it. (Plaintiffs' Mem. at 17-18.) Plaintiffs also claim representatives of the various aircraft manufacturers exchanged information following the annual convention of the National Business Aircraft Association. (Plaintiffs' Mem. at 16.)

Defendants concede there "is no question that sales engineers for aircraft companies routinely exchanged information relating to the published list price and performance characteristics of aircraft." (Defendants' Mem. at 18.) However, the defendants disagree with the inferences plaintiffs draw from these facts.

In opposition to the plaintiffs' allegation of conspiracy, defendants have offered sworn statements of the senior executives of all the business jet manufacturers denying the existence of any agreement **[**12]** or understanding among them with respect to price fixing. (Defendants' Mem. at 30.) In addition, plaintiffs' economic expert, Richard Barber, has consistently stated he is unaware of any evidence which suggests the alleged co-conspirators set prices pursuant to an express agreement to fix or adhere to the prices exchanged. (Barber Tr. 501-502, 8/14/87 Tr. 69-70, 84-85.)

Defendants argue to infer the existence of any agreement, whether express or tacit, is implausible because there was a high level of competition among business jet manufacturers throughout the relevant period of the lawsuit. [11] For example, the defendants have produced scores of advertisements relating to the price competitiveness of various aircraft. (Defendants' Reply at 47-48.) Additionally, two government reports have stated that the general aviation industry is highly competitive. (Defendants' Mem. at 4, 17, 28-29; *cf*. Plaintiffs' Mem. at 12 n. 22, 17 n. 42.) Intense rivalry is especially apparent between domestic and foreign business jet manufacturers. Defendants have introduced a mailing campaign initiated by American business jet manufacturers in an attempt to discredit and draw business away from foreign **[**13]** manufacturers including Falcon Jet. (Defendants' Mem. at 28 (citing DX-1600).) Defendants also have shown the market shares of the alleged co-conspirators fluctuated widely during the period in

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[9] Prior to 1980 the BJAR was published by Rockwell International. In that year, Rockwell ceased selling business jets, so the compilation and distribution of the BJAR was taken over by Falcon Jet.

[10] *See also*, Report of Plaintiffs' Economic Expert Richard J. Barber, dated June 28, 1985 ("Barber Report") at 31-34.)

[11] The relevant period of this lawsuit is roughly 1978 through 1982, the years during which defendants and other business jet manufacturers allegedly agreed to fix prices. (10/19/87 Tr. at 101.)

which the alleged conspiracy existed. (Defendants' Mem. at 31; Report of Defendants' Economic Expert, M.A. **[*1059]** Adelman ("Adelman Report") at Figure 1, Table 1, Figure 6, Table 6.)

Plaintiffs have argued that the information exchange was a *per se* violation of the antitrust laws because, as they claim, the exchange of price information had the anticompetitive effect of raising or stablizing business jet prices. (Plaintiffs' Mem. at 57.) As evidence of this anticompetitive effect, the plaintiffs have introduced the reports of their expert witnesses Richard Barber and Seymor Laskow. The Barber Report examines the prices recorded in the price list comparisons and concludes that new business jet prices rose or remained stable from 1979 to 1983 while the demand for business jets dropped by over 80%. Plaintiffs **[**14]** claim this fact is highly probative of the existence of a conspiracy to fix prices within the business jet aircraft industry. (Plaintiffs' Mem. at 34, 77.) The Laskow Report supports Mr. Barber's conclusion by showing that the majority of sales by Falcon Jet during this period were at or above the Falcon Jet prices as reported in the price list comparisons. (Plaintiffs' Mem. at 61.)

The defendants object to both these reports. They claim that not only are the conclusions reached by Barber and Laskow fallacious, but the methods which they employed to reach these conclusions are deceptive. (*See, e.g*., Defendants' Mem. at 17-25.) Defendants further offer the reports of their own economic experts, Morris Adelman and Bruce Stangle which show that discounts from list price occurred during periods of slackened demand, and prices in the industry actually dropped during the 1979 to 1983 period. (Defendants' Mem. at 18.)

The parties also debate a number of factual issues including whether the prices exchanged were actual prices charged to customers or merely list prices, whether the price information was publicly available, and whether the manufacturers exchanged "secret" pricing information. **[**15]** Both parties can support their factual assertions with cites to the voluminous record of documents and depositions which accompanies these motions, however the resolution of these issues is not material to the outcome of the parties' motions for summary judgment. Therefore, they are not considered at length in this opinion.

2. Count Seventeen

Plaintiffs' second antitrust claim alleges that four business jet manufacturers -- Falcon Jet, British Aerospace, Gates Learjet Corporation and Cessna Aircraft Company -- engaged in a conspiracy to deter the resale of new business jets by including in their contracts clauses which impede contract assignment and warranty transfers. This claim is based upon evidence that the four business jet manufacturers each had policies of deterring resales, that representatives of various aircraft manufacturers discussed the effect of business jet resales at "forecasting meetings," and that executives from Falcon Jet and British Aerospace contacted executives of other business jet manufacturers on two separate occasions to discuss their policies on deterring resales and the number of jets each manufacturer had up for resale. These facts will be considered **[**16]** in greater detail in the section of this memorandum granting defendants' motion for summary judgment on count seventeen.

Summary Judgment

HN1[] Under the Federal Rules of Civil Procedure, summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. Rule 56(c)*. Accordingly, to defeat a motion for summary judgment, the non-moving party must respond by setting forth "specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. Rule 56(e)*.

HN2[] On a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986)*; *See, Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 472* ***[*1060]*** *(3d Cir. 1985)*. Moreover, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for **[**17]** trial." *Anderson, 106 S. Ct. at 2511*. This determination "must be guided by the substantive evidentiary standards that apply to the case." *Id. at 2514*. Thus, a motion for summary judgment may be granted unless the evidence, construed in favor of the non-moving party, is sufficient for a reasonable jury to return a verdict for that party. *Id*.

Summary judgment is an appropriate means of disposing of complex cases where factual contentions lack support in the record. *See,* *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (antitrust action); *Anderson, supra* (libel action); *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (wrongful death action). Granting summary judgment is appropriate against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp., 106 S. Ct. at 2552*. Similarly, ***HN3***[] a summary judgment motion in an antitrust case should be granted if the plaintiff's allegations are unsupported or "if defendant has introduced probative evidence rebutting **[**18]** the antitrust allegations in the complaint, and plaintiff fails to come forward with factual support for his allegations." 10A Wright, Miller & Kane, *Federal Practice & Procedure*, § 2732.1, p. 328.

The Third Circuit has determined that ***HN4***[] the elements of a cause of action under section one of the Sherman Act [12] are:

> (1) that the defendants contracted, combined or conspired among each other [or with other co-conspirators]; (2) that the combination or conspiracy produced adverse, anti-competitive effects, within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Martin B. Glauser Dodge v. Chrysler Corp., 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, *436 U.S. 913, 56 L. Ed. 2d 413, 98 S. Ct. 2253 (1978)*; *Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 572 (3d Cir. 1986)*. ***HN5***[] Thus, concerted action is an essential element of a Section One claim. *Link v. Mercedes Benz of North America, Inc., 788 F.2d 918, 922 (3d Cir. 1986)*. Unilateral or independent action, irrespective of its intent, does not violate *Section 1*. *Monsanto* ***[**19]*** *Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; *Hudson's Bay Co. v. American Legend Co-op., 651 F. Supp. 819, 838 (D.N.J. 1986)*.

Because direct evidence of a conspiracy is often difficult to ***HN7***[] show, a conspiracy may be inferred from circumstantial evidence. However, the extent to which such inferences can be made is limited. *Matsushita, 106 S. Ct. at 1360*. For example, plaintiff has not provided evidence of the existence of a conspiracy if he has merely shown the existence of an opportunity to conspire, *Fragale & Sons, 760 F.2d at 473*, or consciously parallel business behavior, *Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 208 (3d Cir. 1980)*. In order for an antitrust plaintiff to carry his burden of proof upon a claim of concerted price fixing, he must provide evidence that "tends to exclude the possibility" of independent action on the parts of the alleged conspirators. *Matsushita, 106 S. Ct. at 1357* (quoting **[**20]** *Monsanto, 465 U.S. at 764*).

HN8[] Once the plaintiff establishes a conspiracy can be inferred from circumstantial evidence, the defendants may deny the existence of the conspiracy and "offer an innocent explanation of the questioned conduct." **[*1061]** *Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1488 (D.C. Cir. 1984)*. In some cases, sworn denials of the defendants may be sufficient to shift the burden of proof back to the plaintiff. *See,* *Apex Oil Co. v. DiMauro, 641 F. Supp. 1246, 1257 (S.D.N.Y. 1986)*; *aff'd in part*, *822 F.2d 246 (2d Cir. 1987)*, *cert. denied*, *484 U.S. 977, 98 L. Ed. 2d 487, 108 S. Ct. 489 (1987)*; *Zenith Radio Corp. v. Matsushita Electric Industrial Co., 513 F. Supp. 1100, 1141 (E.D. Pa. 1981)*, *rev'd in part*, *723 F.2d 238 (3d Cir. 1983)*, *rev'd*, *475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

Therefore, ***HN9***[] even if the plaintiffs present circumstantial evidence from which a conspiracy can be inferred, such evidence without more "is insufficient unless the circumstances under which it occurred make the inference of

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[12] ***HN6***[] *Section 1* of the Sherman Act states, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal.

rational, independent choice less attractive than that of concerted action." *Bogosian v. Gulf Oil, 561 F.2d 434, 446* (3d Cir.), *cert. denied*, *434 U.S. 1086,* ***[**21]*** *55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978)*; *accord* *Matsushita, 106 S. Ct. at 1357*. Moreover, "if the factual context renders [plaintiff's] claim implausible - if the claim is one that simply makes no economic sense - [plaintiffs] must come forward with morey persuasive evidence to support their claim than would otherwise be necessary." *Matsushita, 106 S. Ct. at 1356*.

Therefore, in order for plaintiffs to survive defendants' motion for partial summary judgment with respect to the price fixing claims and count seventeen of the instant complaints, plaintiffs must proffer evidence (to be construed in their favor) such that a reasonable jury might find that the inferences of conspiracy are stronger than the possibility of independent action by the defendants. This burden of proof may be heightened if the allegations of conspiracy make "no economic sense." *Matsushita, 106 S. Ct. at 1356*. ***HN10***[] Summary judgment will be entered against a plaintiff if he cannot show "the inference of conspiracy is reasonable in light of the competing inferences of independent action or colusive action that could not have harmed [plaintiff]." *Matsushita, 106 S. Ct. at 1357*.

Discussion

I. The Price Fixing Claims

The most **[**22]** probative evidence of a conspiracy to fix prices within the business jet industry is the reciprocal exchange of price information among the sales engineers of the various manufacturers, as evidenced by the Falcon Jet price list comparisons. (*e.g*., PX-147, PX-149), and reams of deposition testimony (*see*, Plaintiffs' Mem. at page "a", Table II). [13]

Plaintiffs cite *United States v. Container Corp., 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)* which states that ***HN11***[] the reciprocal exchange of price information among competitors "is of course sufficient to establish the combination or conspiracy, the initial ingredient of a violation of [section one] of the Sherman Act." *Id. at 335* (Plaintiffs' Mem. at 46.) Plaintiffs will be granted partial summary judgment with respect to this element of their claim. However, **[**23]** this fact alone does not entitle plaintiffs to complete summary judgment on the price fixing claims. As the *Container* case itself states, "price information exchanged in some markets may have no effect on truly competitive price." *Id. at 337*. [14] Thus, the mere showing of an exchange of price information among competitors, without more, is insufficient to establish a violation of the antitrust laws. Plaintiffs must also **[*1062]** show that the information exchange had an anticompetitive effect on prices. *Id. at 339* (Fortas, J. concurring); *United States v. United States Gypsum, 438 U.S. 422, 436 n. 13, 449 n. 16, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*.

[24]** This results from the rule that "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 106 S. Ct. at 1357* (citing *Monsanto, 465 U.S. at 764*). ***HN13***[] A plaintiff "should present direct or circumstantial evidence that reasonably tends to prove that the [defendants'] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto, 465 U.S. at 764* (quoting *Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981))*. In other words, the

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[13] Plaintiffs admit there is no direct evidence of an express agreement to fix prices in the industry (*see* 10/18/87 Tr. at 97); therefore, defendants are granted summary judgment with respect to the existence of an express agreement to fix prices. However, plaintiffs argue the information exchange itself facilitated a tacit agreement to adhere to the prices exchanged. (*Id. at 100*.)

[14] ***HN12***[] In markets which are oligopolistic, where the competition is for a fungible product, and demand is inelastic, the exchange of price information has the anticompetitive effect of stabilizing prices. *See* *Container, 393 U.S. at 337*; *Gypsum, 438 U.S. at 426, 457*. But, where the exchange of information takes place in a market which is competitive, where the product is not fungible, competition is based on quality rather than price, and the market is elastic, then no anticompetitive effect exists. *See*, Von Kalinowski, 16A *Business Organizations*, § 6A.02[2] n. 58.

plaintiffs may alternatively show the defendants had an anticompetitive intent in entering into the agreement. *Gypsum, 438 U.S. at 436 n. 13*. To support an inference of more than a mere exchange of information, that is a conspiracy in violation of section one of the Sherman Act, the plaintiffs must show "the inference of rational, independent choice [is] less attractive than that of concerted action." *Bogosian, 561 F.2d at 446*; *accord* *Matsushita, 106 S. Ct. at 1357*.

Before considering whether the plaintiffs have offered sufficient probative **[**25]** evidence that the agreement to exchange price information had an anticompetitive motive or effect, it is necessary to address the defendants' contention that the inference of conspiracy should not be drawn in this case because the factual context of the plaintiffs' claim renders such an inference implausible.

A. *The Existence of a Conspiracy to Fix Prices*

As ***HN14***[] mentioned, the extent to which an inference of a conspiracy can be drawn from circumstantial evidence is limited. One of these limits is the plausibility of the conspiracy claim. As the Supreme Court reemphasized in *Matsushita*, the jury should not be permitted "to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Matsushita, 106 S. Ct. at 1360* (citing *Monsanto, 465 U.S. at 762-764*). A court must consider the "practical obstacles" to the implementation of the alleged conspiracy in connection with defendants' motion for summary judgment. *Matsushita, 106 S. Ct. at 1357*.

Implausibility is established if the plaintiffs' claim "simply makes no economic sense." *Id. at 1356*. Although this standard is vague, *Matsushita* is **[**26]** instructive. In that case, American manufacturers of electronic products alleged a two-fold horizontal conspiracy among Japanese electronics manufacturers to drive the American competitors out of business. The first facet of the alleged conspiracy was an agreement among the Japanese manufacturers to charge artificially high prices for their products in Japan. The second step involved using those profits to support artificially low predatory pricing of Japanese electronics products in the United States.

The *Matsushita* Court held that the Japanese defendants "had no motive to enter into the alleged conspiracy" and affirmed the District Court's order of summary judgment for the defendants. *106 S. Ct. at 1360*. The Supreme Court based this conclusion in part on the fact that predatory pricing schemes are inherently risky because all the firms must agree together to forego short term profits for the sake of a long term uncertainty. *Id. at 1357*. Because this scheme had allegedly existed for over twenty years without reaching its intended goal of driving American manufacturers out of business, the *Matsushita* Court found the existence of such a conspiracy was implausible and required **[**27]** the plaintiffs to show "more persuasive evidence to support their claim than would otherwise be necessary" to infer a conspiracy. *Id. at 1356*.

Unlike *Matsushita*, the conspiracy alleged in this case involves raising prices rather than lowering them. This means the conspiracy alleged by plaintiffs is inherently **[*1063]** more plausible in terms of a motive for the defendants to enter into the agreement. Moreover, although the information exchange has existed for at least fifteen years, [15] the plaintiffs allege the price-fixing agreement existed only for a four year period. [16]

Notwithstanding these distinctions, defendants argue the conspiracy alleged by plaintiffs is implausible because of competition within the industry. For example, defendants cite two reports prepared by government agencies which define the general aviation industry as highly competitive. **[**28]** International Trade Commission, *Competitive Assessment of the U.S. Commuter and Business Aircraft Industries*, 1817 USITC Publication 5 (March 1986) ("ITC Report") [17]; Department of Commerce, *A Competitive Assessment of the U.S. General Aviation Aircraft Industry*,

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[15] *See*, Plaintiffs' Mem. at 13 ("Since at least the early 1970's, defendants and the other seven manufacturers of business jets sold in the United States exchanged among themselves on a regular *quid pro quo* basis large amounts of information on their current and future prices.")

[16] *See* 10/19/87 Tr. at 101.

xviii (June 1986) ("DOC Report"). These reports attribute the declining competitiveness of domestic aircraft producers in the business jet industry and market since the early 1980's in part to "strong competition from foreign manufacturers." ITC Report at ix; *accord* DOC Report at 34.

Rivalry between American and foreign business jet manufacturers, as separate groups, is also evident in the formation of the American Business Aircraft Committee ("ABAC") which was organized as a response to the pressures of foreign competition on the U.S. market. ITC Report at 108. Gulfstream Aerospace and Cessna Aircraft, both manufacturers of business jets and alleged co-conspirators along with defendants, were members of the ABAC. (DX-1600.) **[**29]** One of the tasks of the ABAC was to develop a large mailing campaign to encourage U.S. companies to buy American manufactured business aircraft. (Defendants' Mem. at 27-28.) A brochure mailed out by the ABAC specifically targeted Falcon Jet as one of the foreign business jet manufacturers which the members of the ABAC were trying to discredit. (DX-1600.) Defendants claim it is implausible that two of the alleged members of the conspiracy, Gulfstream Aerospace and Cessna Aircraft, would engage in a campaign designed to draw business away from another member of the conspiracy and expect the conspiracy to continue. This is especially so during the period of suppressed demand, 1980-82. [18]

[30]** Other evidence of competition in the business aircraft industry is the price competitive advertising of all the manufacturers throughout the relevant time period (Defendants' Reply at 47-48), as well as the fluctuating market shares of the alleged co-conspirators. [19] (Defendants' Mem. at 31; Adelman Report, Table 1, Table 6.) The fluctuating market shares of the business jet manufacturers suggest a significant **[*1064]** level of competition among the manufacturers. Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp*., *1983 Wis. L. Rev. 887, 906*; Richard A. Posner, ***Antitrust Law***, 62 (1976). These data also suggest the maintenance of a conspiracy among the business jet manufacturers would be prohibitively difficult because the co-conspirators would have to devise a formula for equalizing the differences in market share among the co-conspirators.

HN15[]

[31]** In markets where the products are heterogeneous, or where there is rapid technological change, in order for a price-fixing cartel to function "it may be necessary to establish and enforce a complex schedule of prices corresponding to gradations in actual or perceived quality attributes among the competing products." United States Department of Justice, *1984 Merger Guidelines*, 2Trade Reg. Rep. (CCH) para. 4493.401. There is no evidence in the record to support such a finding.

It therefore appears implausible that a conspiracy among business jet manufacturers could exist in an industry where there is direct evidence of a high level of competition among the manufacturers over price as well as the fluctuating market shares. To enter into such an agreement would not be economically feasible because the individual profits gained by artificially high prices would be offset by the competition over market share. There is no evidence present in the record to suggest that a conspiracy of the type which would be necessary to account for all

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[17] Both plaintiffs and defendants cite to the ITC Report. (Defendants' Mem. at 3, 16, 28; Plaintiffs' Reply to Defendants' Memorandum of 11/12/86, dated 12/10/86 ("Plaintiffs' Reply") at 15.)

[18] The one point on which plaintiffs' and defendants' experts agree is that demand for business jets rose steadily from 1976, peaked in 1979, and then declined steadily to a low in 1982. Plaintiffs' expert Barber reports that 346 aircraft were ordered by customers in 1979, while in 1982 that number dropped to 65 orders. (Barber Report at 20.) Defendants' expert Adelman measures demand by quarterly sales. In the first part of 1979, sales were approximately 130 contracts per quarter, while in the third quarter of 1982 sales hit a low of 15 planes. (Adler Report at 35.)

[19] The Barber Report does not present an analysis of the relative market shares of the competing business jet manufacturers. Although Mr. Barber recognizes the possibility of such an analysis, he relies solely upon abstract calculations to determine market concentration. (Barber Report at 13-17.) The Barber Report does not address directly the fluctuation of market shares. (p. 24, n. 11.) For example, according to the Adelman Report, Falcon Jet's market share in the years 1977 through 1983 was 19.0%, 12.3%, 16.4%, 28.3% (industry leader), 13.2%, 13.3% and 17.2%, assuming the plaintiffs' market definition (Table I), or 3.8%, 4.1%, 3.6%, 7.5%, 8.5%, 17.3% (industry leader), and 8.0%, including sales of used business jets. (Table 6.)

of these factors could have existed. [20] Nonetheless, plaintiffs have offered substantial evidence of both an anticompetitive purpose and effect based **[**32]** on the information exchange. Giving the plaintiffs the benefit of all inferences which can be drawn, a genuine issue of material fact exists as to whether the information exchange facilitated a tacit agreement among business jet manufacturers to adhere to the exchanged prices. Therefore, defendants' motion is granted with respect to the question of an express agreement to adhere to the exchanged prices, but plaintiffs' and defendants' motions are denied in all other respects.

B. *Anticompetitive Intent*

Evidence of an anticompetitive intent to enter into the agreement to exchange information in this case is offered through the testimony of plaintiffs' witness Mr. William Handy, a former Falcon Jet sales engineer and presently a close business associate of Mr. Rosefielde. Mr. Handy explained that by **[**33]** using the information obtained from the price list comparisons, Falcon Jet salesmen could "neutralize the competition" by eliminating the uncertainty as to what price and delivery date the competition was offering for a comparable model aircraft. (Handy Tr. 634-635; Plaintiff's Mem. at 76.) Plaintiffs have also introduced evidence that the senior executives of Falcon Jet and other business jet manufacturers were aware of the price information exchange and considered the data obtained by the sales engineers to set the price of business jets. (Plaintiffs' Mem. at 26-27, 76; *e.g.*, Rosanvallon Tr. 321-325, PX-1307, PX-896.)

Faced with this evidence, defendants have offered the sworn denials of the senior executives of all the aircraft manufacturers which are charged with participating in the conspiracy. (Defendants' Mem. at 30.) In addition, the defendants have offered an "innocent explanation of the questioned conduct." *Kreuzer, 735 F.2d at 1488*. Defendants cite the testimony of sales engineers from the various business jet manufacturers stating they only exchanged publicly available price information to compare their aircraft to those of their competitors and thereby assisted **[**34]** their salesmen to promote sales of their own aircraft. (Defendants' Mem. at 31.) Additionally, defendants note even plaintiffs' economic expert Richard Barber has stated **[*1065]** there was not a conspiracy to set prices. (Defendants' Mem. at 24; Barber Tr. at 501-502.)

A Court may not determine the credibility of these witnesses or weigh the evidence offered by the parties. *Anderson, 106 S. Ct. at 2513*. Giving the benefit of all favorable inferences, and assuming the facts cited by both parties are true, the inferences of rational, independent conduct appear equal to those of concerted action. "***HN16***[] It is not unlawful for a business to take the prices charged by its competitors into account when setting its own prices, or to follow or copy the prices of a competitor, if the decision to do so is the result of a unilateral business judgment, and not the result of collusive agreement." *Wilcox Development v. First Interstate Bank of Oregon, 605 F. Supp. 592, 595 (D. Or. 1985)*, *aff'd* *815 F.2d 522 (9th Cir. 1987)* (citing *United States v. International Harvester, 274 U.S. 693, 71 L. Ed. 1302, 47 S. Ct. 748 (1927)*.) However, in this case the inferences of independent action in setting prices does not outweigh the evidence **[**35]** of an anticompetitive objective to enter the agreement. Accordingly, defendants' motion for summary judgment on the intent issue is denied. [21]

[20] Because the opportunity to compete over factors other than price is present in this context, a complex system of discovering and penalizing such deviations would also have to be arranged. *Clark, supra*. There is no direct evidence of such a system; however, plaintiffs argue the alleged co-conspirators gave "mutual assurances" there would be no discounts. (10/19/87 Tr. at 109.)

[21] ***HN17***[] Granting summary judgment in an antitrust action is disfavored when issues of motive and intent are central to the case. *Poller v. CBS, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. *But see*, *Anderson, 106 S. Ct. at 2514*; *Zenith v. Matsushita, 513 F. Supp. at 1144*. In granting summary judgment for the defendants in an extremely complex antitrust litigation, Judge Becker in *Zenith v. Matsushita*, noted

> The number of antitrust cases the Supreme Court and courts in the Third Circuit have granted or upheld the grant of summary judgment on the merits, either partial or complete, since the *Poller* decision in 1962 is extremely large. It is now settled that summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in extensive discovery, fail to produce "significant probative evidence" in support of the allegations in their complaint.

[36]** Plaintiffs claim "the issues of motive and intent need not be reached in order to grant summary judgment in favor of plaintiffs on liability on the issue of an anticompetitive effect on prices." (Plaintiffs' Mem. at 11, n. 20.) The plaintiffs themselves have admitted that if summary judgment is to be granted in their favor it must be based entirely on the question of the effect of the information exchange on competition. Accordingly, plaintiffs' motion for summary judgment concerning anticompetitive intent is denied.

C. *Anticompetitive Effect*

Both parties in this case claim they are entitled to summary judgment as a matter of law based upon the effect of the information exchange on industry prices. The plaintiffs claim the business jet industry is oligopolistic and highly concentrated with price inelastic demand; therefore, they claim the reciprocal exchange of price information most likely has an anticompetitive effect and constitutes a *per se* violation of section one of the Sherman Act. *United States v. United States Gypsum, 438 U.S. 422, 457-458, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*; VI P. Areeda, ***Antitrust Law***, para. 1407e at 35 (1986). (Plaintiffs' Mem. at 45.)

Conversely, the defendants contend **[**37]** the business jet industry is highly competitive and non-oligopolistic. They claim the reciprocal exchange of price information among competitors does not have an anti-competitive effect in this case because the alleged co-conspirators only exchanged publicly available list price information, and the manufacturers did not adhere to these prices in making sales of business jets. (Defendants' Mem. at 18, 30-32.) Moreover, the prices exchanged were base prices which would not account for the fact that each of the jets were different in terms of range, passenger capacity, fuel consumption and standard equipment. (Defendants' Mem. at 2.)

For the reasons set forth below, neither of the moving parties has sufficiently established their position with regard to the effect of the information exchange on competition **[*1066]** as a matter of law without a genuine dispute over the material facts. The plaintiffs have failed to show that business jets are fungible goods. (See discussion of fungibility in sub-*section 1*, *infra*.) Therefore, their *per se* argument must be rejected, and their cross-motion with respect to the price-fixing claims must be denied. Questions of fact regarding the relevant product **[**38]** market of business jets, and the concentration of the business jet industry make it impossible to determine as a matter of law the effect of the information exchange on competition. Thus, the motions of both parties must be denied with respect to the effect of the information exchange.

1. Fungibility

Plaintiffs have misguidedly relied on two inapposite cases to support their argument that they are entitled to summary judgment because the exchange of price information in this case constitutes a *per se* violation of Section One of the Sherman Act. *United States Gypsum* affirmed a reversal by the Third Circuit of criminal convictions of several officials of major gypsum board manufacturers who had engaged in interseller price verification. *438 U.S. at 465*. This is a practice whereby competitors would call each other to determine the actual price currently being offered by a competing seller to a particular customer. *Id. at 429*. Plaintiffs also draw support for their *per se* argument from the *Container* case wherein the Supreme Court in a five page opinion struck down a scheme in which a seller of corrugated containers, upon the request of another seller, would furnish **[**39]** information as to the most recent price charged or quoted to an individual customer. *393 U.S. at 338*. The Court found as a matter of law that this arrangement stabilized prices in violation of Section One of the Sherman Act. *Id. at 336-37*.

The plaintiffs have attempted to mold the instant facts into the holdings of *Gypsum* and *Container*, however both cases are distinguished from the instant case by the fact that gypsum board and corrugated containers are ***HN18***[] fungible goods. *Gypsum, 438 U.S. at 426*; *Container, 393 U.S. at 337*. That is to say, the goods of competing manufacturers are virtually identical, so the primary, if not the only, source of competition among manufacturers is in price.

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513 F. Supp. at 1140 (footnote omitted). In the instant action, where the plaintiffs have met their burden of proof to support the inference of an anticompetitive intent to exchange prices *Poller* does prevent the grant of summary judgment for defendants with respect to the intent issue.

Competition for sales of business jets occurs on a variety of levels of which price is only one. Range, passenger capacity and fuel efficiency are among the factors which business jet buyers take into consideration when purchasing an aircraft. (Plaintiffs' Mem. at 36; Defendants' Mem. at 14; Defendants' Reply at 12-13.) As well, it is difficult to make comparisons among different models of business jets because their characteristics vary widely. (Defendants' Reply at 14; Taylor Tr. **[**40]** 53-54; Roden Tr. 137; Handy Tr. 654-655, 664.) Thus, the plaintiffs concede business jet aircraft are not fungible. (Plaintiffs' Post-Hearing Summary Judgment Memorandum at 36.) Because business jets are not fungible products, an exchange of price information among manufacturers of business jets cannot be found to be a *per se* violation of Section One of the Sherman Act under the rules of either *Container* or *Gypsum*. Plaintiffs' cross-motion for summary judgment must be denied. [22]

[41]** The *Container* Court found:

> the corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic, as buyers place orders only for immediate, **[*1067]** short-run needs. The exchange of price data tends toward price uniformity. For a lower price does not mean a larger share of the available business but a sharing of the existing business at a lower return.

393 U.S. at 337. The *Container* case is plainly inapposite to plaintiffs' price fixing claims because in addition to the facts that business jets are not fungible, that competition for sales relies on many factors of which price is only one, and that there is evidence of competition over market shares, factual disputes exist concerning the number of sellers in the industry (see subsection 2, *infra*), and the elasticity of demand for business jets. Plaintiffs claim demand is inelastic (Plaintiffs' Mem. at 36; Barber Supplemental Report at 26-31), while defendants argue demand is elastic. (Defendants' Reply at 15-16.) [23] **[**42]** These disputes create a second ground upon which to reject plaintiffs' *per se* argument. [24]

2. Market Definition

[22] Courts subsequent to the *Container* case have distinguished its *per se* rule when the facts of the instant dispute do not fit the *Container* holding because the product is not fungible. *See* *Belliston v. Texaco, Inc., 455 F.2d 175, 181* (10th Cir.), *cert. denied*, ***408 U.S. 928, 33 L. Ed. 2d 341, 92 S. Ct. 2494 (1972)***; *Flav-O-Rich, Inc. v. North Carolina Milk Comm'n, 593 F. Supp. 13, 15 (E.D.N.C. 1983)*. *Cf.* *L.C.L. Theatres, Inc. v. Columbia Pictures Industries, 421 F. Supp. 1090, 1096 (N.D. Tex. 1976)*, *aff'd*, *566 F.2d 494 (5th Cir. 1978)* (distinguishing *Container* where the product is *inter alia* not fungible). *See also* Note, *Antitrust Implications of the Exchange of Price Information Among Competitors*, 68 Mich. L. Rev. 720, 722 (1970).

[23] Elasticity is an economic concept reflecting the effect an increase in prices will have on the demand for a product. The concept of elasticity, like that of relevant market depends almost entirely upon the degree to which products are interchangeable. A product which is said to be price elastic has many substitutes. A slight increase in price of a price elastic product will result in a large drop in demand as customers begin to use the substitute product. Inelastic products do not have substitutes. An increase in price of an inelastic product will result in a relatively small drop in demand because most customers would rather use the product at a higher price than forego its use at all.

In this case, the elasticity of the business jet industry may depend upon the extent to which used business jets may be used for the same purposes as new business jets. If the two products are interchangeable, as defendants argue, (Defendants' Mem. at 28), then the demand for new business jets would most likely be price elastic; price increases for new business jets would simply compel purchasers to buy retrofitted used business jets. (*See* Adelman Report at 18-20.) The interchangeability of used and new business jet aircraft is one of the factual issues which cannot be resolved as a matter of law based on the evidence present in the record. Therefore, a determination of the demand elasticity of new business jets is impossible to make at this time.

[24] Subsequent to the *Container* decision, the Supreme Court explicitly stated "the dissemination of price information is not itself a per se violation of the Sherman Act." *United States v. Citizens & Southern National Bank, 422 U.S. 86, 113, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975)* (citing, *inter alia,* *Container, 393 U.S. at 338* (concurring opinion); *see also* *Gypsum 438 U.S. at 441 n. 16*; ***Zenith Radio v. Matsushita, 513 F. Supp. at 1152-53***. Therefore, if the *per se* rule of *Container* is to be followed, it must be closely tailored to the facts pattern of that case. *See* *Container, 393 U.S. at 338*.

Both of the parties have devoted considerable portions of their extensive submissions to forwarding contradictory definitions of the business jet industry. As stated, this is because the nature of the industry will often determine whether the exchange of information relating to price among competitors has an anticompetitive or procompetitive effect.

The anticompetitive effect of a price information exchange in an oligopolistic industry was discussed in the *Gypsum* case:

> "Regardless of its putative purpose, the most likely consequence of any such [reciprocal] **[**43]** agreement to exchange price information would be the stabilization of industry prices. . . . Especially in oligopolistic industries, . . . the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions."

Gypsum, 438 U.S. at 457. [25]

Plaintiffs offer evidence that the market for new business jets is a highly concentrated **[*1068]** oligopoly. For one thing, the two government reports cited earlier define it as **[**44]** such. ITC Report at 5. ("The general aviation industry is highly competitive . . . . The industry is also highly concentrated . . . ."); (DOC Report at 22.) However, these are the same reports which show there is a high level of competition in the business jet industry. Therefore, based upon these reports alone there is a genuine issue of a material fact sufficient to reject the arguments offered by plaintiffs and defendants in support of their respective motions on the issue of anticompetitive effect. This is not the only disputed evidence, however. Substantial issues of fact also exist concerning the relevant product market.

The relevant product market definition [26] is important in this case because it will determine the level of concentration in the industry. Plaintiffs define the relevant product market in this case as sales of new business jet aircraft in the United States. (Plaintiffs' Mem. at 32.) For this market, the plaintiffs' economic expert, Richard Barber, shows that the Herfindhal-Hirschman Index ("HHI") and the four firm concentration ratio, both of which measure the concentration of relevant markets, are well above established guidelines for highly concentrated markets. **[**45]** (Plaintiffs' Mem. at 32.) The defendants, to the contrary, show that if sales of used business jets and resales of new business jets are included in the definition of relevant product market, then the HHI is well below 1000, which is the Justice Department's limit for unconcentrated markets. (Defendants' Reply at 28-29.)

[46]** Both parties have amply supported their competing definitions of the relevant product market with cites to evidence from the record and other authorities. For example, plaintiffs' economic expert relies upon the perceptions of the business jet manufacturers as evidenced by the type of information exchanged among them, their testimony, and their internal documents. (Plaintiffs' Mem. at 17; see Barber Supp. Report at 10-12.) Defendants rely primarily upon the relationship between prices of new and used business jets, as well as the perceptions of purchasers of business jets to establish that new and used business jets compete in the same market. (Defendants' Reply at 28-35.) Thus, both parties have offered probative evidence of their opposing definitions of the relevant product market.

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[25] Plaintiffs' reading of *Gypsum* is strained when they argue that even in a non-oligopolistic market, the exchange of current and future prices constitutes a *per se* violation of section one of the Sherman Act. (Plaintiffs' Mem. at 57.) Plaintiffs cite *Gypsum, 438 U.S. at 441, n. 16*, in support of their proposition. However, the passage they quote clearly states the exchange of current price information is "not *per se* unlawful" without a showing of an anticompetitive effect. *Id*. As will be shown, there is sufficient dispute of material fact on the issue of anticompetitive effect to preclude establishing a *per se* violation.

[26] In *United States v. E.I. DuPont De Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*, the Supreme Court states that ***HN19***[] in determining what constitutes a relevant market "no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up" the relevant market. *Accord* *Rothery Storage and Van Co. v. Atlas Van Lines, 253 U.S. App. D.C. 142, 792 F.2d 210 (D.C. Cir. 1986)*, *cert. denied*, ***479 U.S. 1033, 107 S. Ct. 880, 93 L. Ed. 2d 834 (1987)***; *Hudson's Bay, 651 F. Supp. at 834-835*. The relevant market must be determined in terms of both product and geographic markets. *Brown Shoe Co. v. U.S., 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. Plaintiffs claim the geographic market in this case is the United States. (Plaintiffs' Mem. at 32.) The defendants do not appear to dispute this issue, however they vigorously contend plaintiffs' definition of the relevant product market.

Because the determination of the relevant product market in this case depends upon whether used business jets are reasonably interchangeable by consumers of new business jets for the same purposes, [27] and because both parties have offered evidence to support their positions, the determination of the relevant product market in this case is a finding of fact which cannot be determined on a summary judgment **[**47]** motion. *See Westman Commission Co. v. Hobart International, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*.

3. No Price Reductions Theory

Plaintiffs have shown there is a dispute over the material issue of whether the information exchange had an anticompetitive effect on price sufficient to preclude granting the defendants' motion. In considering defendants' motion, the court must believe all of the evidence of plaintiffs and draw all justifiable inferences of fact in their favor. *Anderson, 106 S. Ct. at 2513*. In this context, **[*1069]** it must be assumed the relevant market for business jets is oligopolistic and highly concentrated. Although the exchange of current price information is not a *per se* violation of Section One the Sherman Act, it carries great "potential" for such a violation. *Gypsum, 438 U.S. at 441, n. 16*. A mere potential violation of the Sherman Act, however, is not enough to permit the case to go to trial. The plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita, 106 S. Ct. at 1356*.

The Barber and **[**48]** Laskow reports conclude that the exchanged prices were adhered to by the various manufacturers thereby stabilizing the price of business jet aircraft. Specifically, Mr. Barber shows that during 1979 to 1983 while demand for business jets dropped over 80%, business jet prices remained at a constant level. The Report of Mr. Laskow shows that this level was at or above the Falcon Jet list prices in the great majority of Falcon Jet sales. (Plaintiffs' Mem. at 61.) Therefore, plaintiffs conclude these reports together are highly probative of the fact that the exchange of price information had the effect, whether by tacit agreement or not, of stabilizing the price of business jets at a point far above demand.

The defendants have waged numerous attacks on the Barber and Laskow reports; [28] however, if the reports are found to be admissible evidence, then their factual assertions must be accepted as true, and this would provide sufficient evidence to suggest that the exchange of price information would have an anticompetitive effect in stabilizing business jet prices. Even if the reports are not found to be admissible, the plaintiffs claim they have established their proposition that the prices **[**49]** exchanged became the actual prices "in no less than five different ways." (Plaintiffs' Mem. at 9, 60.)

The defendants have also introduced the reports of their economic experts, Morris Adelman and Bruce Stangle. These reports show that prices actually dropped during the 1979-1983 slump in demand and that non-price discounts and inducements such as free option packages were also given. (Defendants' Mem. at 18.) Therefore, the contradictory expert reports of the parties create a genuine issue of material fact concerning whether there was an anticompetitive effect on prices. The summary judgment motion of defendants with respect to the issue of effect must be denied.

D. *Damages and Standing*

Falcon Jet and AMB-BA have also argued for summary judgment on the price fixing claims in their favor because (1) plaintiffs cannot show they were injured by the exchange of price information among business jet manufacturers, and (2) plaintiffs do not have standing to assert their price-fixing claims with respect to all of the business jets purchased from Falcon Jet. The plaintiffs have not argued for summary judgment on the issue of damages.

[50]** 1. Damages

HN20[] It is an essential element of any antitrust claim that the plaintiff demonstrate injuries of the type the antitrust laws were meant to protect. *Associated General Contractors of California, Inc. v. California State Council*

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[27] As well, the impact of resales of new business jets appears to be a consideration.

[28] Defendants' Mem. at 32-37; Defendants' Reply at 17-25.

of Carpenters, 459 U.S. 519, 538-540, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). In alleging antitrust damages, the plaintiffs have a lesser burden of proof than they do on the other elements of their claim. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969); Out Front Productions, Inc. v. Magid, 748 F.2d 166, 169 (3d Cir. 1984). Antitrust damage calculations need not be proven with certainty, Zenith, 395 U.S. at 123-124. Moreover, plaintiffs have satisfied their burden with respect to the fact of damages if they (demonstrate merely a "causal relationship" between defendants' illegal acts and plaintiffs' alleged injuries. Out Front Productions, 748 F.2d at 169; Bogosian, 561 F.2d at 454.

[*1070] Defendants claim "summary judgment is appropriate because the opinion of plaintiffs' expert that the information exchange had an 'anti-competitive effect' lacks factual support in the record." (Defendants' Mem. at 41.) This argument not only ignores **[**51]** the relevant burdens of proof, but appears to be nothing more than an extension of defendants' previous attempts to discredit the expert report of plaintiffs' witness, Mr. Barber.

As to the fact of damages, the record demonstrates the Barber report is based upon a review of the contracts and exchanged prices of three of the alleged co-conspirators, and testimony from executive officers of the other companies that they adhered to their base prices. (Plaintiffs' Mem. at 61; *see* Plaintiffs' Mem. at 245, n. 59.) From this evidence, Mr. Barber finds (1) the prices exchanged were base prices (Barber Report at 22), (2) the business jet manufacturers adhered to the base prices in selling business jets (Barber Report at 26-29 [29]); and (3) the prices exchanged were the actual prices at which transactions were made. (Barber Report at 26.) The effect of the exchange, according to the Barber Report, was to "facilitat[e] stabilization [of prices] by providing each seller with knowledge that was not otherwise available and minimizing the risk of competitive price cutting." (Barber Report at 51.) Therefore, the Barber Report concludes that plaintiffs' injuries are equal to the percentage of the **[**52]** purchase price which they were overcharged as a result of the price stabilization of the information exchange.

Despite the asserted factual basis for Mr. Barber's conclusions, the defendants insist this report does not present significant probative evidence of an anticompetitive effect on prices because (1) Mr. Barber relied on improper evidence (Defendants' Mem. at 33), (2) Mr. Barber ignored relevant data (Defendants' Mem. at 34, 35), and (3) the evidence relied upon by Mr. Barber will also support conflicting interpretations. The defendants do not contend, however, that the evidence relied upon by Mr. Barber does not support his conclusion.

These arguments are directed at the credibility of Mr. Barber's Report, and the merit of the "no price reductions" theory as persuasive evidence of an anticompetitive effect. ***HN21***[] Although an antitrust plaintiff may not be allowed to defeat a motion for summary judgment with an expert report that lacks factual support in the record, Pennsylvania Dental Association v. Medical Service **[**53]** Association of Pennsylvania, 745 F.2d 248, 262 (3d Cir. 1984), *cert. denied*, *471 U.S. 1016, 85 L. Ed. 2d 303, 105 S. Ct. 2021 (1985)*, the credibility of the evidence submitted should not be a factor in deciding a motion for summary judgment. Anderson, 106 S. Ct. at 2513. In the Third Circuit it is even disfavored to give careful scrutiny to the assumptions underlying and inferences made in an expert report when considering the admissibility of the report. *See,* In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 279 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Therefore, Mr. Barber's reliance on the recorded contracts, price list comparisons and testimony of the alleged co-conspirators establishes sufficient probative evidence of a causal relationship between the defendants' acts and the plaintiffs' alleged injuries.

As to the amount of damages, defendants further object to Mr. Barber's damage calculation, which is based upon a comparison of isolated sales during the period when overcharges were incurred and post-complaint pricing behavior of the defendants. (Plaintiff's Mem. at 94.) From this comparison Mr. Barber concludes prices in the business jet industry were **[**54]** generally fifteen percent higher than they would have been under free competition and plaintiffs can claim damages of fifteen percent of the purchase price of the jets they purchased from Falcon Jet. (Barber Report at p. 59.) Defendants claim this damage calculation is "irrational," yet plaintiffs

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[29] Mr. Barber admitted in his deposition, however, that there was no express agreement among manufacturers to adhere to the exchanged prices. (Barber Tr. at 501-502.)

claim it is a common method of measuring the **[*1071]** quantum of damages in an antitrust conspiracy case. (Plaintiffs' Mem. at 95-95.)

Given the low threshold for admissibility of expert reports in the Third Circuit, *see* *Japanese Electronic Products, 723 F.2d at 279*, and the minimal burden of proof for showing damages, *see* *Zenith, 395 U.S. at 114 n. 9*, even assuming defendants arguments are true, the arguments concerning damage calculation will not warrant granting summary judgment for defendants where plaintiffs have presented significant probative evidence of a causal relation of their injuries to defendants' acts.

2. Standing

The issue of damages is closely related to defendants' standing argument. Defendants challenge the standing of plaintiffs to assert their price-fixing claims as to certain business jets they purchased from Falcon Jet. [30] Specifically, defendants contend the standing **[**55]** of plaintiffs with respect to four contracts which were either cancelled or terminated, and four contracts which plaintiffs assigned to third parties who are not plaintiffs in this action. (Defendants' Reply at 61-62.)

As to the cancelled or terminated contracts, defendants are correct. Plaintiffs could not possibly have incurred overcharge damages on contracts which were never consummated. In cases where plaintiffs have made deposits on their contracts, the deposits were returned. (Defendants' Reply at 55). Therefore, with respect to these contracts, plaintiffs have not established a "causal connection" of defendants' acts to plaintiffs' alleged injuries. It is interesting to note that although plaintiffs' opposition brief specifically lists the serial numbers of **[**56]** the Falcon Jet aircraft which were assigned to third parties, the aircraft contracts which were cancelled or terminated are referred to only as "a Gulfstream IV aircraft" or "a Gulfstream III aircraft," suggesting plaintiffs never even knew the serial numbers of those aircraft. (Plaintiffs' Mem. at 83.) Moreover, plaintiffs' brief fails to address defendants' challenges with respect to these aircraft. Therefore, plaintiffs cannot be allowed to assert their price-fixing claims with respect to the three Gulfstream IV options terminated by plaintiffs and for which plaintiffs received a full refund of their deposit, or the purchase agreement for a Gulfstream III, aircraft which was cancelled and the downpayment on which was returned.

As to the contracts of which plaintiffs were assignors, defendants raise the issue of duplicative recovery. Defendants assert it is inconsistent to allow plaintiffs to assert "price fixing damages *both* for aircraft purchase agreements which they assigned *to* others and for aircraft purchase agreements which were assigned to them *from* others." (Defendants' Mem. at 45, emphasis in original.) [31] Defendants then assert "the assignees should be considered **[**57]** the 'direct purchasers' of aircraft with standing to sue for price-fixing damages under *Illinois Brick v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*." (Defendants' Mem. at 46). Specifically, the defendants contest the standing of plaintiffs to assert their price-fixing claims with respect to the purchase agreements for Falcon 20-404, Falcon 50-69, Falcon 50-87 and Gulfstream III s/n 426, all of which were assigned to parties not represented in this action.

HN22[] The holding in *Illinois Brick* precludes indirect purchasers from bringing lawsuits alleging antitrust damages. *Id. at 728-729*. The *Illinois Brick* rule limits standing to assert price fixing claims to direct purchasers of the defendant's products. *Id. at 729*. The Supreme Court gave three reasons for this rule. First, the Court reasoned *Hanover **[*1072]** Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, which held it is no defense in an action brought by a direct purchaser that the indirect rather than the direct purchasers were the parties injured by the antitrust violation, **[**58]** must apply equally to plaintiffs and defendants.

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[30] Defendants do not claim that plaintiffs lack standing to assert their claims with respect to all of the aircraft they purchased from Falcon Jet. (Defendants' Reply at 60 ("Defendants have never challenged the standing of Rose Associates as a direct purchaser of Falcon 50-81. . . .")). Therefore, the standing argument is really a question of whether plaintiffs can show they were injured through certain transactions.

[31] The plaintiffs erroneously argue "there is no issue of duplicative recovery, since no other plaintiff has sued." (Plaintiffs' Mem. at 28.)

Illinois Brick, 431 U.S. at 729. Second, the Court noted that to permit both indirect and direct purchasers to sue would subject the defendants to the risk of multiple liability for the same antitrust violation. *Id. at 730*. Finally, the Court noted "the principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than in the economist's hypothetical model.'" *Id. at 731-732* (citing *Hanover Shoe, 392 U.S. at 493*.) Thus the Court decided direct purchasers, not indirect purchasers, should have standing to sue because if the plaintiff were an indirect purchaser, "the demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff." *Id. at 732-733* (footnote omitted). These calculations would be prohibitively complex; therefore, the antitrust laws are better served by allowing direct purchasers to recover fully for the defendant's overcharges. *Id. at 735*; **[**59]** *see, also* Gregory Marketing v. Wakefern Food Corp., 787 F.2d 92, 94 (3d Cir.), *cert. denied*, *479 U.S. 821, 93 L. Ed. 2d 40, 107 S. Ct. 87 (1986)*.

Standing in this case rests upon whether the plaintiffs or their subsequent assignees were the direct purchasers of the aircraft. The record demonstrates that the assignments to the non-plaintiffs were independently negotiated between plaintiffs and their customers. (Plaintiffs' Mem. at 86-87.) For example, Rosefield & Gitomer [32] purchased Falcon 20-404 from Falcon Jet on December 26, 1978 for a total price of $ 4,119,606. (PX-113.) The date of delivery was scheduled for November 1979. (*Id*.) Falcon 20-404 was later assigned to E.L. Cox on July 14, 1979 for $ 4,250,000 plus the cost of optional equipment and interest. (DX-628.) The price paid by Cox was not only more than that paid by Rosefielde & Gitomer, it was below the typical purchase price of $ 4,665,000 for a new Falcon 10F, as reported in the Falcon Jet internal pricing documents at that time. (PX-252, p. 9.) Therefore, if standing to sue were given to E.L. Cox rather than the plaintiffs, all of the difficulties inherent in the pass-on defense would squarely be raised in an attempt to trace the amount **[**60]** of overcharges passed on from Rosefielde & Gitomer to E.L. Cox. [33]

The fact Rosefielde & Gitomer charged E.L. Cox a higher price for the aircraft is not a reason to deny plaintiffs standing. As defendants argue, the Supreme Court in *Matsushita* stated that competitors could not recover damages for a conspiracy to raise prices artificially because competitors **[**61]** would "stand to gain from any conspiracy to raise the market price . . . ." *106 S. Ct. at 1354*. (Defendants's Reply at 57.) However, this reading of *Matsushita* does not apply to the plaintiffs in this case because they are not asserting their price-fixing claims as competitors, but as purchasers.

In *Hanover Shoe*, the Supreme Court directly addressed the issue of purchasers who compensate for artificially high prices by reselling their goods at even higher prices. In that case, the Supreme Court held, "the buyer is equally entitled to damages **[*1073]** if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits will be greater were his costs lower . . . ." *Hanover Shoe, 392 U.S. at 489*; P. Areeda, ***Antitrust Law***, para. 337c p. 186 (1978). Thus, defendants' contention that "if plaintiffs bought high, they sold their contracts at an even higher price" may create an issue of fact concerning the quantum of damages suffered by plaintiffs, but it is not a reason to deny plaintiffs standing.

[62]** Defendants' motion for summary judgment cannot be granted on the theory that plaintiffs do not have standing to assert their price fixing claims with respect to Falcon 20-404, Falcon 50-69, Falcon 50-87, or Gulfstream III s/n 426.

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[32] Rosefielde & Gitomer was a law firm which dissolved prior to the commencement of this action. (Plaintiffs' Mem. at 84.) Mr. Rosefielde, a plaintiff, was a partner in that firm and is the successor in interest to those parts of the Rosefielde & Gitomer business that dealt with business jet aircraft. (Plaintiffs' Mem. at 84, citing Rosefielde Affidavit, para. 1.) Therefore, Mr. Rosefielde will have standing to sue for any aircraft assigned by Rosefielde & Gitomer.

[33] The assignment to E.L. Cox does not fit within the narrowly defined exception to the rule of *Illinois Brick* which permits an indirect purchaser to sue when its purchase is made pursuant to a pre-existing, cost-plus contract. *See* *Illinois Brick, 431 U.S. at 736*; *Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573 (3d Cir. 1979)*.

II. Count Seventeen

The first essential element of plaintiffs' antitrust claim is an agreement among would-be competitors. Section One of the Sherman Act prohibits only a "contract, combination . . ., or conspiracy in restraint of trade." *15 U.S.C. § 1*. An agreement can be shown directly, or through inference from circumstantial evidence; however, if the plaintiff can provide only circumstantial evidence, it must tend "'to exclude the possibility' that the alleged conspirators acted independently." *Matsushita, 106 S. Ct. at 1357* (quoting *Monsanto, 465 U.S. at 764*). Independent action, no matter how egregious the restraint of trade, no matter how reprehensible the motivation, simply does not constitute a violation of the antitrust laws. *See* *Fragale & Sons, 760 F.2d at 473*.

With respect to count seventeen, although plaintiffs can show each of the four alleged conspirators took significant steps to deter the resale of new business jets, an **[**63]** anticompetitive objective under the Sherman Act, the plaintiffs cannot show these manufacturers acted pursuant to an agreement or conspiracy. Therefore defendant's motion for summary judgment with respect to count seventeen must be granted.

The plaintiffs direct their second antitrust claim at four business jet manufacturers: Falcon Jet, British Aerospace, Gates Learjet Corporation and Cessna Aircraft Company. All of these companies attempted to deter the resale of new business jets through severely restricting the assignability of purchase agreements or the transferability of warranties to third parties. Each manufacturer admits the purpose and effect of these policies was to deter or prevent competition from "speculators," such as the plaintiffs in this case, who would purchase new business jets and resell the delivery contracts to customers in the new business jet market. (Plaintiffs' Mem. at 38.) Oftentimes, speculators could make substantial profits in short periods of time by taking advantage of the sharply rising prices of business jets during the early 1980's. (*See e.g.*, Defendants' Reply at 57.)

The record substantiates plaintiffs' allegations that each of the four aircraft **[**64]** manufacturers took significant steps to deter competition from speculators; however, as the plaintiffs admit, the four alleged co-conspirators "attempted to prevent or impede resales by a variety of methods." (Plaintiffs' Mem. at 38.) For example, while Falcon Jet, British Aerospace and Gates Learjet incorporated "right of first refusal" clauses into their contracts, Cessna used a reassignment clause that it rarely enforced. (Plaintiffs' Mem. at 97-98; DX -16.) Prior to 1981, Gates Learjet charged $ 125,000 for a warranty transfer. After 1981, Gates Learjet made the contract non-assignable until six months after the buyer accepted delivery of the aircraft and retained the right of first refusal. (DX-16.) After 1982, Falcon Jet charged four percent of the purchase price of the aircraft to assign a contract and warranty, or one percent to transfer the warranty only. (PX-54.) British Aerospace charged from $ 10,000 to $ 50,000 to assign a contract but neither British Aerospace nor Cessna ever charged to transfer a warranty. (DX-16; Defendants' Mem. at 48-49.)

[*1074] Although Falcon Jet, Gates Learjet, British Aerospace and Cessna all adopted policies designed to prevent the resale of new business **[**65]** jet contracts, ***HN23***[] inferences of conspiracy made from ambiguous evidence of consciously parallel business behavior cannot be made without the existence of certain "plus factors". *Apex Oil*, 822 F.2d at 253.

A high level of interfirm communications is one of the "plus factors" which may indicate the defendants were engaged in collusive anticompetitive behavior. *See* *In re Plywood Antitrust Litigation, 655 F.2d 627, 634 (5th Cir. 1981)*, *cert. dismissed 462 U.S. 1125, 77 L. Ed. 2d 1358, 103 S. Ct. 3100 (1983)*. Presumably in an attempt to show a high level of interfirm communications, plaintiffs claim business jet manufacturers discussed the subject of resales and how to prevent them on numerous occasions. (Plaintiffs' Mem. at 102.) There are only two sources of evidence for this claim. First, plaintiffs point to notes taken at "forecasting meetings" of business jet manufacturers. (*e.g*. PX 1309, PX 835 p. 5, PX-1346.) The topic of speculators was discussed at forecasting meetings in Dallas on June 14, 1982 and in Washington D.C. on October 22, 1982. (PX-144A, B.) However, as the notes taken at these meetings show, the manufacturers in attendance [34] could only agree upon the fact that speculators existed. There **[**66]**

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[34] Falcon Jet did not attend these meetings, but received copies of the notes from participants at the meetings. (Plaintiffs' Mot. at 42, no. 81.)

was anything but agreement as to what should be done about them, or even whether they were beneficial or harmful to the industry. In fact, Mitsubishi and Canadair "were encouraging speculation in order to build their order books for their stockholders." (PX-151 pp. 4-5; Bergstron Tr. 154-157; Defendants' Mem. at 48.)

Second, plaintiffs point to surveys conducted by L.E.S. Tuck of British Aerospace in 1981, and Corwin Meyer, former president of Falcon Jet, in 1982. The Tuck survey was conducted in the Fall of 1981 for the purpose of finding out how many aircraft sold by competitors of British Aerospace were up for resale. (Plaintiffs' Mem. at 41.) Mr. Tuck obtained this information from his sales engineers who had contacted British Aerospace competitors. (*Id*.) On the basis of his findings, Mr. Tuck learned that Lear used warranty transfer fees and right of first refusal clauses to deter resales and recommended that British Aerospace adopt policies similar to those of Lear. (PX 1310; Plaintiffs' Mem. at 41, 99.)

Mr. Meyer's survey **[**67]** in May, 1982 involved direct contact with senior executives of most of Falcon Jet's competitors. (Plaintiffs' Mem. at 40.) Specifically, Mr. Meyer contacted his competitors to discuss their policies with respect to deterring resales. *Id*. [35] He set forth the results of his survey in a letter to his successor as president of Falcon Jet, Frank Wisekal. (DX-16.)

The plaintiffs claim these communications indicate Falcon Jet was engaged in a conspiracy to deter business jet resales. To the contrary, the record demonstrates that the Meyer and Tuck surveys were commenced because of unfamiliarity with competitors' policies. Mr. Meyer's letter clearly states the survey was commenced in response to "pressure from our customers who wanted to liquidate their excess aircraft after the recession started, and asked us to help them eliminate this onerous contract clause . . . ." DX-16, p. 1. The letter goes on to suggest Falcon Jet had even lost customers as a result of their policies. DX-16, p. 2.

[68]** Despite the allegation that only four manufacturers participated in the conspiracy, none of the evidence proffered by plaintiffs shows *only* Falcon Jet, British Aerospace, Gates Learjet and Cessna communicated about transfer and assignment policies. Rather, the evidence presented shows that communications among business jet manufacturers concerning "speculation" **[*1075]** consistently involved non-conspirators. For instance, Mr. Meyer contacted Gulfstream American, Westwind, and Canadaire in addition to the three alleged co-conspirators to conduct his survey. Similarly, Mr. Tuck included information gathered from Westwind in his survey. (PX-1309.) Additionally, the forecasting meetings were attended by all business jet manufacturers, except Falcon Jet. It is unlikely the four alleged co-conspirators would routinely discuss warranty transfer policies with competitors who are not alleged to be members of the illegal conspiracy.

The only evidence of a conspiracy among the four alleged co-conspirators is their common desire to deter business jet resales. This evidence is insufficient to meet the plaintiffs' burden of proof under the *Monsanto* standard. *See* *465 U.S. at 764*. Drawing all **[**69]** inferences of fact in their favor, the documentary evidence introduced by plaintiffs is barely sufficient to draw the inference of consciously parallel business behavior among the four alleged co-conspirators. Moreover, plaintiffs have not presented evidence which tends to exclude the possibility that Falcon Jet, British Aerospace, Gates Learjet and Cessna acted independently in designing their policies to deter the resale of new business jets. Because plaintiffs have failed to present evidence of any concerted action on the parts of the alleged co-conspirators, an essential element of their claim, the defendants' motion for summary judgment with respect to count seventeen is granted. *Celotex Corp., 106 S. Ct. at 2553*.

SO ORDERED, this 11th day of January, 1988.

End of Document

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[35] Mr. Meyer has denied the existence of the alleged conspiracy in a sworn affidavit (Corwin H. Meyers Aff., para. 5), as have the other alleged co-conspirators. (Defendants' Reply at 65, n. 82.)

Anitora Travel, Inc. v. Lapian

United States District Court for the Southern District of New York

January 20, 1988, Decided

No. 87 CIV. 0015 (PKL)

Reporter
677 F. Supp. 209 *; 1988 U.S. Dist. LEXIS 656 **

Anitora Travel, Inc., Plaintiff, v. Zvi (Steve) Lapian, Defendant

Core Terms

tickets, travel, amended complaint, enterprise, airline, pattern of racketeering activity, alleges, fraudulent, discount, customer, mail, commissions, defrauded, schemes, discount fare, predicate act, wire fraud, purposes, coupons, pleaded, sales, plaintiff's claim, returning, boarding, dummy, common purpose, communications, violations, invested, damages

LexisNexis® Headnotes

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

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

On a motion to dismiss, the complaint must be read generously and every reasonable inference drawn in favor of the plaintiffs. The complaint should only be dismissed if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

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

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

Securities Law > RICO Actions > General Overview

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

HN2[ ] **Racketeer Influenced & Corrupt Organizations, Remedies**

18 U.S.C.S. § 1964(c) provides a civil remedy to any person injured in his business or property by reason of a violation of *§ 1962* of this chapter. To claim a violation of *18 U.S.C.S. § 1962(c)*, a plaintiff must allege 1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity. To claim a violation of *§ 1962(a)*, a plaintiff must allege that 1) income derived from a pattern of racketeering activity 2) has been used or invested 3) to acquire an interest in, or establish or operate 4) an enterprise. *18 U.S.C.S. § 1962(a)*.

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

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

Securities Law > RICO Actions > General Overview

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

HN3[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A viable claim for damages under the RICO statute requires a proper allegation that the defendant has committed two or more "predicate" acts, *18 U.S.C.S. § 1961(1)*, constituting a "pattern of racketeering activity." *18 U.S.C.S. §§ 1961(5)*, *1962*, *1964(a)*, *1964(c)*.

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

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

Securities Law > RICO Actions > General Overview

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

HN4[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Where mail and/or wire fraud violations are treated by a plaintiff as "predicate acts" constituting a pattern of racketeering activity, those fraud violations must be pleaded with the specificity and particularity required by *Fed. R. Civ. P. 9(b)*.

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

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

HN5[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b), an exception to the generally liberal pleadings allowed by *Fed. R. Civ. P. 8*, requires that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Pleadings of fraud, in order to satisfy *Rule 9(b)*, must specify the time, place, speaker, and sometimes even the content of the alleged misrepresentations. More generally, the complaint's fraud allegations must be specific enough to allow the defendant a reasonable opportunity to answer the complaint and must give adequate information to allow the defendant to frame a response.

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

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

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

HN6[] **Heightened Pleading Requirements, Fraud Claims**

The mail and wire fraud statutes also require a showing of intentional fraud. Although *Fed. R. Civ. P. 9(b)* provides that intent and "other condition of mind" may be averred generally, plaintiffs must nonetheless provide some factual basis for conclusory allegations of intent. These factual allegations must give rise to a "strong inference" that the defendants possessed the requisite fraudulent intent. A common method for establishing a strong inference of scienter is to allege facts showing a motive for committing fraud and a clear opportunity for doing so. Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.

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

Securities Law > RICO Actions > General Overview

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1964(c) only authorizes a private suit by any person injured in his business or property by reason of a violation of *§ 1962*. It is by now well established that a plaintiff thus only has standing if, and can only recover to the extent that, he has been injured in his business or property by conduct constituting the violation of *§ 1962*.

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

Securities Law > RICO Actions > General Overview

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

HN8[] **Racketeer Influenced & Corrupt Organizations, Claims**

The language of *18 U.S.C.S. § 1964(c)* makes clear that a party must actually have been injured -- that is, subject to injury or inevitably to be subject to a future injury -- in order to have standing to bring a civil RICO claim. Mere speculation that some injury might occur -- for example, that an injury might be inflicted if some third party would choose to bring a lawsuit to determine potential liability of the plaintiff -- is insufficient to state a civil RICO claim.

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

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

Securities Law > RICO Actions > General Overview

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

A civil RICO suit must allege an injury resulting from a violation of *18 U.S.C.S. § 1962*. *Section 1962(a)* makes it unlawful to use money derived from a pattern of racketeering activity to invest in or operate an enterprise; *18 U.S.C.S. § 1962(c)* makes it unlawful to conduct an enterprise through a pattern of racketeering activity.

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

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

Securities Law > RICO Actions > General Overview

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

HN10[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1961(4) defines an "enterprise" as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *18 U.S.C.S. § 1961(4)*.

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

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

Securities Law > RICO Actions > General Overview

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

HN11[] **Pleadings, Heightened Pleading Requirements**

In the context of *18 U.S.C.S. § 1962(c)*, an "enterprise" is a group of persons associated together for a common purpose of engaging in a course of conduct and is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. Under *§ 1962(c)*, the enterprise be a continuing operation and that the predicate acts be related to the common purpose. A civil RICO pleading must allege the common purpose of the "enterprise" and allege that the predicate acts are related to that common purpose.

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

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

Securities Law > RICO Actions > General Overview

HN12[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

With respect to 18 U.S.C.S. § 1962(c)--as opposed to 18 U.S.C.S. § 1962(a)--the enterprise and the defendant cannot be the same person or entity.

Counsel: **[**1]** J. Owen Zurhellen, III, Esq., Attorney for Plaintiff.

Wistendahl & Folkenflik, Max Folkenflik, Esq., Douglas Capuder, Esq. of counsel, Attorneys for Defendant.

Judges: Leisure, District Judge.

Opinion by: LEISURE

Opinion

[*211] OPINION AND ORDER

LEISURE, District Judge

Plaintiff filed an amended complaint (the "amended complaint") in this action on April 23, 1987, seeking damages for breach of an employment contract, and treble damages pursuant to the civil provisions of the RICO statute, 18 U.S.C. §§ 1961-1964. Plaintiff also seeks injunctive relief directing defendant to return any business records he took from plaintiff and impressing a constructive trust on the proceeds of certain moneys obtained by defendant.

This Court has federal question jurisdiction over plaintiff's RICO claim. 28 U.S.C. § 1331. All other claims are pendent state law claims.

Defendant has moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6).

FACTUAL BACKGROUND

HN1[] On a motion to dismiss, the complaint must be read generously and every reasonable inference drawn in favor of the plaintiffs. Pross v. Katz, 784 F.2d 455, 457 (2d Cir. 1986); Yoder v. Orthomolecular Nutrition Institute, Inc., 751 F.2d 555, 558 (2d Cir. 1985); **[**2]** Metzner v. D.H. Blair & Co., Inc., 663 F. Supp. 716, 719 (S.D.N.Y. 1987) (Weinfeld, J.). The complaint should only be dismissed if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Stone v. Chung Pei Chemical Industry Co. Ltd., 790 F.2d 20, 22 (2d Cir. 1986).

So reading the complaint for purposes of defendant's motion, the relevant facts are as follows:

Plaintiff, Anitora Travel, Inc., is a New York corporation. Plaintiff is a registered travel agency selling tickets for interstate passenger air travel.

Defendant is a resident of New York. Beginning in May 1983, defendant was employed by plaintiff as an "outside sales agent." The parties entered into an agreement **[*212]** (the "Employment Agreement") which provided, *inter alia*, that:

a) plaintiff would provide office, local telephone, and other facilities to defendant;
b) defendant would arrange for and sell travel services to customers under plaintiff's name;

c) commissions earned for services sold by defendant would be shared, 62% to defendant and 38% to plaintiff, with the exception of one client, **[**3]** Emerson Radio Corporation, to which a different arrangement applied;
d) defendant would pay, or reimburse plaintiff for, certain expenses, including messenger and courier charges and long-distance telephone charges;
e) defendant would repay to plaintiff any commission share previously paid to defendant when later events, such as a ticket refund by an airline, required plaintiff to refund the commission to the vendor;
f) all sales of travel services made by defendant would be subject to the commission-sharing arrangement; and

g) defendant would be responsible for the payment of all airline or "ARC" debit memos for unpaid tickets, under-paid tickets, or any ticket irregularities, as well as any fines resulting therefrom, and for payment of like amounts due to suppliers other than airlines, such as hotel and car rental services.

Defendant resigned from his employment as plaintiff's outside sales agent in October 1986. During the same period in late 1986, plaintiff became aware that defendant had engaged in certain conduct which plaintiff believed breached defendant's obligations under the employment agreement, breached defendant's fiduciary and implied obligations to plaintiff, **[**4]** and violated the federal mail and wire fraud statutes. Plaintiff determined that defendant's improper conduct involved four general types of activity.

First, plaintiff determined that defendant had sold travel services, while acting under the terms of the Employment Agreement, solely for defendant's own account and that defendant had failed to pay to plaintiff its share of commissions on such sales. Amended Complaint at para. 6(a).

Second, plaintiff determined that defendant, in order to prevent disclosure of his wrongful activities, had intercepted mail addressed to plaintiff. Amended Complaint at para. 6(c).

Third, plaintiff determined that defendant had taken possession of business records belonging to plaintiff and had refused to return them, despite plaintiff's demand to do so. Amended Complaint at para. 6(d).

Fourth, plaintiff determined that defendant, apparently acting in concert with certain customers, defrauded certain airlines by selling discount fare tickets and thereafter converting the tickets to non-discounted, or lesser discounted, tickets without obtaining the price differential. Plaintiff determined that these fraudulent acts were committed through **[**5]** three types of schemes.

In one type of scheme allegedly used by defendant, upon receipt of a request for an airline ticket, defendant would prepare and issue a ticket (which consists of multiple copies, or coupons) for travel on a date sufficiently in the future to permit a discounted fare, but would call in to the relevant airline reservations for travel on a different date actually requested by the customer. The ticket would state the correct price for travel on the dates shown. Defendant then would put stickers on the "flight coupons" (the portions which are presented to, and kept by, the airlines) providing for travel on the false future travel date, and would issue a boarding pass for the actual travel date. The price of travel on the actual travel date was greater than the discounted price charged to, and paid by, the customer. The ticket portions, or "coupons", given to plaintiff (the "agency coupon") and sent by mail to the Airline Reporting Corporation (the "auditor's coupons") for audit purposes, were not changed to show the actual travel dates.

Plaintiff alleges, for example, that on or about October 1, 1984, defendant received a **[*213]** request from United Feather & Down Co., **[**6]** of Brooklyn, New York, for tickets for a Mr. Belfer and Mr. Palmer to travel from New York City to Chicago on October 2, 1984, and return on October 3, 1984. Defendant issued two tickets for travel from New York to Chicago for October 10, 1984, with return tickets for October 16, 1984, at the discount price appropriate for such travel. On October 10, 1984, defendant caused an invoice to be issued to United Feather & Down Co., showing travel on October 2 and 3, 1984, but listing tickets which were written for travel on October 10 and 16, 1984.

Plaintiff alleges that when defendant himself was unable to issue a boarding pass, defendant employed a slightly different scheme. Upon receipt of a request for a ticket, defendant would issue a ticket to his customer showing the correct date(s) of travel -- but also showing a discount fare not actually available for that travel date. Defendant would also create a "dummy" ticket showing travel on the same date(s) at the correct price, and would show the "dummy" ticket at the airline office in order to obtain a boarding pass. Upon returning to plaintiff's office, defendant would then "void" the dummy ticket and affix the boarding pass to the discount **[**7]** ticket issued to the customer. The customer would pay the discounted price.

For example, plaintiff alleges that on or about May 1, 1985, defendant received a request for two tickets, one for a Mrs. Rosenbrand and the other for a Mrs. Asoulay, for travel from new York to West Palm Beach on May 2, 1985, and returning May 5, 1985. Defendant issued two "dummy" tickets for that travel showing a correct price ($ 278 per ticket), and defendant used those "dummy" tickets to obtain boarding passes from Delta Airlines. The same day, and very shortly after issuing the "dummy" tickets, defendant issued two other tickets, which bore the very next two serial numbers, but which showed a price of $ 178 each -- the price actually paid by the customers.

In a third type of scheme, defendant would issue tickets out of sequence by back-dating the tickets, in order to take advantage of advance purchase discounts. Defendant would issue tickets for a discount fare, and the customers would pay the discount fare, even though in fact the tickets were not purchased sufficiently in advance of travel to permit the discount fare. Auditors coupons would be sent by mail to the Airline Reporting Corporation showing **[**8]** dates of travel which would allow the discount fare.

For example, plaintiff alleges that during the week of May 18, 1986, defendant submitted "auditors coupons" for 5 members of the Azouly family for travel from New York to Florida and back in late May 1986. However, the tickets themselves all show an issue date of April 28, 1986.

DISCUSSION

HN2[] *18 U.S.C. § 1964(c)* provides a civil remedy to "any person injured in his business or property by reason of a violation of *section 1962* of this chapter." In its complaint, plaintiff alleges that the fraudulent schemes employed by defendant violated " *18 U.S.C.A. § 1962(a)* and/or *(c)*." Amended Complaint at para. 8.

It is well established that to claim a violation of *18 U.S.C. § 1962(c)*, a plaintiff must allege 1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity. *Sedima, S.P.L.R. v. Imrex, 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)*. To claim a violation of *§ 1962(a)*, a plaintiff must allege that 1) income derived from a pattern of racketeering activity 2) has been used or invested 3) to acquire an interest in, or establish or operate 4) an enterprise. *18 U.S.C. § 1962(a)*.

Defendant argues that plaintiff's amended complaint must **[**9]** be dismissed because plaintiff has failed properly to plead the existence of a pattern of racketeering activity; has failed to plead the existence of an enterprise; and has failed to plead that it has been injured in its person or property by the conduct constituting the RICO violation. Additionally, defendant argues that plaintiff has not shown a violation of *18 U.S.C. § 1962(a)*, because plaintiff has not **[*214]** alleged that any income derived from a pattern of racketeering activity was invested or used to purchase an interest in any enterprise engaged in interstate or foreign commerce.

A. Pattern of Racketeering Activity: Adequacy of the Mail Fraud and Wire Fraud Pleadings

HN3[] A viable claim for damages under the RICO statute requires a proper allegation that the defendant has committed two or more "predicate" acts, *18 U.S.C. § 1961(1)*, constituting a "pattern of racketeering activity." *18 U.S.C. §§ 1961(5)*, *1962*, *1964(a)*, *1964(c)*. *Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51 (2d Cir. 1987)*; *see also* *Sedima, 473 U.S. at 495-96*.

In its complaint, plaintiff claims that defendant engaged in a pattern of racketeering activity within the meaning of *§ 1961(1)* because, on at **[**10]** least two occasions between January 5, 1984 and October 1986, defendant's airline ticket sale schemes were "in violation of, *inter alia*, *18 U.S.C.A. § 1341* ('mail fraud') and § 1343 ('wire fraud')." [1] Amended Complaint at para. 8.

HN4[] Where mail and/or wire fraud violations are treated by a plaintiff as "predicate acts" constituting a pattern of racketeering activity, those fraud violations must be pleaded with the specificity and particularity required by *Fed. R. Civ. P. 9(b)*. *See* *Beck, 820 F.2d at 49-51*; *see also* *Connors v. Lexington Ins. Co., 666 F. Supp. 434, 450 (E.D.N.Y. 1987)*; *Equitable Life Assurance Society v. Alexander Grant & Co., 627 F. Supp. 1023, 1028 (S.D.N.Y. 1985)*; *Rich-Taubman Associates v. Stamford Restaurant Operating Co., Inc., 587 F. Supp. 875, 878 (S.D.N.Y. 1984)*.

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[1] Nowhere in the complaint does plaintiff mention any other state or federal laws to which the term "*inter alia*" might refer. Thus, the complaint can only be read, at this stage, to allege predicate acts of mail fraud and wire fraud.

HN5[] Fed. R. Civ. P. 9(b), an exception to the generally liberal pleadings allowed by Rule 8, requires that "in all averments of fraud or mistake, **[**11]** the circumstances constituting fraud or mistake shall be stated with particularity." As Judge Winter recently explained, pleadings of fraud, in order to satisfy Rule 9(b), must specify the time, place, speaker, and sometimes even the content of the alleged misrepresentations. Luce v. Edelstein, 802 F.2d 49, 54 (2d Cir. 1986). More generally, the complaint's fraud allegations must be specific enough to allow the defendant "a reasonable opportunity to answer the complaint" and must give "adequate information" to allow the defendant "to frame a response." Ross v. A.H. Robins Co., 607 F.2d 545, 557-58 (2d Cir. 1979), *cert. denied*, *446 U.S. 946, 64 L. Ed. 2d 802, 100 S. Ct. 2175 (1980)*.

Moreover, **HN6**[] the mail and wire fraud statutes also require a showing of *intentional* fraud. Beck, 820 F.2d at 49. As Judge Newman has explained:

> Although Rule 9(b) provides that intent and "other condition of mind" may be averred generally, plaintiffs must nonetheless provide some factual basis for conclusory allegations of intent. These factual allegations must give rise to a "strong inference" that the defendants possessed the requisite fraudulent intent. A common method for establishing a strong inference of scienter **[**12]** is to allege facts showing a motive for committing fraud and a clear opportunity for doing so. Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.

Beck, 820 F.2d at 49-50 (citations omitted).

The acts of mail or wire fraud mentioned in the amended complaint have been pleaded with adequate particularity to satisfy the requirements of Rule 9(b). Specifically, plaintiff has detailed the three types of fraudulent schemes alleged to have been employed by the defendant; plaintiff has stated the general time period during which these schemes are alleged to have been employed; and for each of the three types of schemes, plaintiff has provided at **[*215]** least one specific example specifying not only the time, place, and the fraudulent speaker, but also the content of the misrepresentations. For example, with regard to the first type of fraudulent scheme listed -- where defendant would himself issue a boarding pass -- plaintiff alleges in paras. 11(a) and 11(b) that:

> a. For example, on October 1, 1984, or shortly **[**13]** before, defendant received a request from United Feather & Down, of 77 Commercial Street, Brooklyn, New York for tickets for a Mr. Belfer and Mr. Palmer to travel from LaGuardia (NYC) airport to O'Hare (Chicago) airport on October 2, 1984, and returning on October 3, 1984. Defendant issued two tickets for travel from LaGuardia to O'Hare for October 10, 1984, and returning October 16, 1984, at the discount price appropriate for such travel. On October 10, 1984, defendant caused an invoice to be issued to United Feather & Down showing travel on October 2nd and 3rd, 1984, listing tickets which were written for travel for October 10th and 16th, 1984.
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> b. And for another example, on November 8, 1984, or shortly before, the defendant received a request from Belgo Diamond Co., 2 West 46th Street, New York, New York, for a ticket for a Mr. Avital to travel from Kennedy (NYC) airport to Los Angeles (Calif.) for November 11, 1984, and returning to Kennedy airport for November 14, 1984. Defendant issued a ticket for travel from Kennedy for November 15, 1984, and returning November 22, 1984, at the discount price appropriate for such travel. On November 8, 1984, defendant caused an invoice to **[**14]** be issued to Belgo Diamond Co. showing travel on November 11th and 14th, 1984, listing a ticket written for travel for November 15th and 22nd, 1984.

These paragraphs, read in conjunction with paras. 10-11, give adequate information to allow the defendant to frame a response to the fraud allegations. Plaintiff has provided two dates on which the alleged fraud occurred. The amended complaint makes clear that this scheme involved wire communications to the airlines to report the reservations involved, communications which are alleged to have been made across state lines. Amended Complaint at para. 11. The transactions described in these paragraphs clearly indicate that these communications were made on or about October 1, 1984, and November 8, 1984; that defendant performed the fraudulent acts; that the acts occurred from plaintiff's office; that the fraudulent communications misrepresented the travel dates in order to provide a discount fare not actually allowed by the airline involved; and that these communications were used in a scheme which allowed defendant to defraud certain airlines and plaintiff. [2] **[**16]** While no airline is named specifically with regard to the examples of the first **[**15]** fraudulent scheme, the plaintiff has identified five airlines that were the subject of defendant's schemes. [3] Plaintiff has sufficiently indicated details of a fraud against the travel agency.

Moreover, plaintiff, with regard to the scheme, has sufficiently alleged that the fraud was *intentional*. Plaintiff has alleged facts showing a motive for committing fraud -- namely to sell tickets to his **[*216]** customers at a discounted price, allowing him to earn commissions on sales he might otherwise not have made -- and showing a clear opportunity for doing so. *See* *Beck, 820 F.2d at 49-50*. Moreover, even were defendant's motive not clearly apparent, plaintiff has properly pleaded the scienter requirements of the mail and wire fraud statutes because the facts alleged indicate conscious behavior by the defendant to misrepresent travel information and allow sale of tickets at an improper discount price. *See id*.

Similarly sufficient detailed allegations have been made with regard to the two other types of schemes alleged in the complaint. *See* Amended Complaint at paras. 12-13.

B. INJURY

HN7[] *18* ***[**17]*** *U.S.C. § 1964(c)* only authorizes a private suit by "any person injured in his business or property by reason of a violation of *§ 1962*." It is by now well established that a plaintiff thus "only has standing if, and can only recover to the extent that, he has been injured in his business or property by conduct constituting the violation [of *§ 1962*]." *Sedima, 473 U.S. at 496*.

Defendant correctly argues that plaintiff will only have standing if it alleges the existence of an actual, present injury, not some speculative injury that might only possibly occur in the future. Generally, courts have treated as unripe for adjudication claims that involve contingent future events that may not occur as anticipated, or indeed may not occur at all. *See, e.g.,* *Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 580-81, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985)* (where a party, for example, wants to challenge constitutionality of jurisdiction of a court, standing exists only if claimant can demonstrate that it *has been or inevitably will be* subject to such unconstitutional jurisdiction); *see also* 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984).

Similarly, ***HN8***[] the language of **[**18]** *§ 1964(c)* makes clear that a party must actually have been injured -- that is, subject to injury or inevitably to be subject to a future injury -- in order to have standing to bring a civil RICO claim. Mere speculation that some injury might occur -- for example, that an injury might be inflicted if some third party would choose to bring a lawsuit to determine potential liability of the plaintiff -- is insufficient to state a civil

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[2] *See, e.g.,* *Connors v. Lexington Insurance Co., 666 F. Supp. 434*, E.D.N.Y. 1987). Where information similar to that in the present complaint was provided, Judge Glasser found that the pleadings were sufficient to satisfy the requirements of *Rule 9(b)*. As Judge Glasser there observed:

> With respect to the allegations of mail fraud, plaintiff's complaint satisfies the particularity requirements of *rule 9(b)*. Specifically, plaintiff has described where and how the alleged scheme occurred, given the approximate dates of his transactions with IGBE and thus, by inference, the approximate dates of mailings, and identified the alleged misrepresentations and omissions, as well as the "speakers." It is not necessary for plaintiff to provide more detail at this stage of the proceedings. As one court has noted, *rule 9(b)* is satisfied if enough information is given to allow the defendants to frame a responsive pleading and to assure the court that a sufficient basis exists for the allegations made.

Id. at 450-51 (citations omitted).

[3] The Court does note, however, that if plaintiff chooses to file a new amended complaint, as provided by this Order, allegations naming the airlines involved in each example of the fraudulent schemes would bolster the complaint's compliance with the requirements of *Rule 9(b)*.

RICO claim. *See, e.g., Bank Leumi Le Israel, B.M. v. Lippe*, slip op. No. 84 C. 9700 (N.D. Ill. Dec. 16, 1986); [4] *see also Jones v. Baskin, Flaherty, Elliot and Mannino, P.C., 670 F. Supp. 597, 598-600 (W.D.Pa. 1987)*.

[19]** The language of plaintiff's amended complaint makes reference to two types of "injuries": first, plaintiff claims to be subject "to liability to the defrauded carriers for the price differential [created by defendant's fraudulent ticket sales], which is believed to amount to $ 175,000," Amended Complaint at para. 6(b); second, the complaint makes reference to commissions lost by plaintiff as a result of defendant's actions, Amended Complaint at para. 6(a).

Plaintiff's claim that it is subject "to liability to the defrauded carriers", as pleaded in the amended complaint, is insufficient to meet the "injury" requirement of **[*217]** *§ 1964(c)*. Nowhere in the amended complaint does plaintiff allege that it has been sued by any defrauded airline; nor does plaintiff allege that such a suit is reasonably certain to occur. Nor does plaintiff allege that it has actually been made liable to the airlines either by court order, agreement, or any other instrument or set of facts. That some airline might seek to collect funds from plaintiff at some future date is an insufficient basis for an "injury" claim -- especially where it is mere speculation that any airline will actually seek to collect any funds. **[**20]** [5]

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[4] Where a RICO counterclaim alleged predicate act violations of § 10(b) of Securities and Exchange Commission Rule 10(b)(5), the court found:

> even if the Bank did owe a duty to Lippe to disclose material information, his alleged "injury" is not adequately pled. He alleges that Tomcat is now an entity of questionable financial viability based solely on the fact that at some future date two investors may have a defense to notes that may be outstanding. The problem with this allegation is that it is too speculative. Essentially, Lippe is alleging that his partnership interest has been tarnished. It is significant that Lippe does not allege that the two investors actually have outstanding loans or that the Bank has unsuccessfully demanded payments on these notes. Hence, his allegation that Tomcat is of a questionable financial viability as a result of the Bank's failure to disclose material facts is not adequately pled.

Bank Leumi Le Israel, B.M. v. Lippe, slip. op. No. 84 C. 9700 (N.D. Ill. Dec. 16, 1986).

[5] Plaintiff correctly points out that a party can recover present damages for injuries that will accrue in the future. But none of the cases cited by plaintiff stands for the principle that a plaintiff can recover speculative damages. For example, plaintiff states in its brief that:

> Similarly, plaintiff [sic] under the antitrust laws can recover damages for future injuries. In *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), the plaintiff was put out of business by the anticompetitive conduct of the defendant. The court permitted recovery of damages for future lost profits against the defendant's assertion that future injuries could not be compensated under the Sherman Act. To the extent that recovery of damages for yet-to-be-sustained injuries injects a measure of uncertainty, both in whether injury will be suffered at all and in the amount, the court held that "the wrongdoer must bear the risk of the uncertainty in measuring the harm he causes." *464 F.2d, at 45*. So long as future injuries are "proved with reasonable certainty", an antitrust plaintiff can recover damages for them. *Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962)*, cert. denied [372] U.S. 907, *83 S. Ct. 721 [9 L. Ed. 2d 717]* (1963).

Plaintiff's Memorandum of Law at 4-5.

Whether or not plaintiff's interpretation of ***antitrust law*** is correct, plaintiff's claim that it is liable to airlines cannot be considered similar in this context to the lost profits claim in *Lehrman* which plaintiff discusses. In *Lehrman*, the court determined that as a result of the antitrust violations of defendant, plaintiff had lost future profits, and an award of damages for those lost profits could be made, even if the exact amount of those losses could not be ascertained at the time of trial. Indeed, the court in *Lehrman* claimed only to be applying "the familiar rule that a wrongdoer is responsible for uncertainty in calculating the damages proximately caused by his own wrongdoing." *464 F.2d at 45*. In contrast, in the present case, it would not be possible, based on the allegations in the complaint, for this Court to determine at trial that plaintiff had in fact, or will in the future, become subject to liability to the airlines. While in *Lehrman*, the court could determine, with reasonable certainty, that future profits would be lost, in the present case plaintiff can only speculate that any of the defrauded airlines would seek to collect damages from plaintiff or, for that matter, anyone else.

[21]** In contrast, plaintiff can claim to have been "injured" to the extent it alleges that, as a proximate result of defendant's predicate acts, plaintiff was denied its proper share of commissions on ticket sales. As defendant correctly points out, however, the only damages sought in the amended complaint under plaintiff's RICO claim are damages relating to plaintiff's alleged liability to the defrauded airlines. Plaintiff claims, in para. 6(b) of the Amended Complaint, that its liability to the defrauded airlines "is believed to amount to $ 175,000." With respect to the RICO claim, plaintiff's second claim for relief, plaintiff only seeks an award of "$ 175,000, and trebled damages and attorneys fees." Amended Complaint at para. 18(b). While plaintiff does state that it "is liable to the airlines for the difference between the price charged to defendant's clients and the correct price, less any additional commission to which plaintiff would be entitled," Amended Complaint at para. 10, this only mention of the commissions in the RICO claim makes them conditional on plaintiff's speculative liability to the airline. Indeed, the discussion of lost commissions in para. 6(a) of the amended **[**22]** complaint only relates to plaintiff's first claim for relief, which concerns defendant's alleged violations of the "obligations, terms and conditions of his employment." Amended Complaint at para. 7. Thus, while plaintiff may wish to read the amended complaint to imply that defendant's fraudulent activities had the proximate result of denying plaintiff its proper share of commissions on airline ticket sales, the language of the complaint itself simply makes no such allegation. Absent such an allegation, or some other allegation of an injury to plaintiff's business or property that was the proximate result of defendant's predicate acts, the amended complaint fails to state a civil **[*218]** cause of action under the RICO statute. *18 U.S.C. § 1964(c)*.

C. ENTERPRISE REQUIREMENT

HN9[] A civil RICO suit must allege an injury resulting from a violation of *§ 1962*. In the present case, plaintiff claims to have been injured by acts which violated *§ 1962(a)* and/or *§ 1962(c)*. *Section 1962(a)* makes it unlawful to use money derived from a pattern of racketeering activity to invest in or operate an enterprise; *§ 1962(c)* makes it unlawful to conduct an enterprise through a pattern of racketeering activity. **[**23]** *See, generally, Sedima, 473 U.S. at 479*.

In response to defendant's argument that the amended complaint fails to allege properly the existence of the "enterprise" required by both *§ 1962(a)* and *§ 1962(c)*, plaintiff claims:

> The enterprise requirement of the RICO statute is here met in two ways. First, plaintiff (a corporation) is clearly an "enterprise" within the literal terms and underlying purpose of the RICO statute. Defendant's scheme was, equally clearly, perpetrated "in connection with the conduct" (*Sedima, supra*) of plaintiff's business. Second, defendant himself, especially by virtue of the nature and persistence of his conduct, was an "enterprise."

Plaintiff's Memorandum at 8.

§ 1962(a)

HN10[] *Section 1961(4)* defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*. Whatever the term "enterprise" may mean in the context of *§ 1962(a)*, it is clear that the amended complaint does not identify an enterprise, engaged in interstate commerce, in which defendant purchased an interest, or which defendant established **[**24]** or operated, through the use or investment of funds derived from the alleged pattern of racketeering activity.

Certainly, plaintiff, which claims to have been defrauded and *deprived* of moneys illegally obtained by defendant in his pattern of racketeering activity, cannot also claim that such moneys were invested or used by defendant to purchase an interest in or to operate plaintiff; thus, plaintiff cannot allege that plaintiff itself is the enterprise for purposes of stating a civil claim relating to violations of *§ 1962(a)*.

As to plaintiff's argument that defendant himself is the "enterprise", the complaint fails to allege that any moneys obtained by defendant, through his pattern of racketeering activity, were invested or used by defendant to operate, or obtain an interest in, "himself." While plaintiff does state, in para. 6(a) of the Amended Complaint, that defendant "sold travel services . . . solely for his own account and failed to pay plaintiff its share of commissions on such sales," Amended Complaint at para. 6(a), it is clear that this activity is not alleged to be included in the predicate acts, involving fraud against the airlines, which are actually alleged to constitute **[**25]** the pattern of racketeering activity in the civil RICO claim. Amended Complaint at paras. 8-17.

Thus, the Amended Complaint fails to state a civil RICO claim based upon an alleged violation of *§ 1962(a)*.

§ 1962(c)

In *Beck, supra*, the Second Circuit explained that, ***HN11***[] in the context of *§ 1962(c)*, an "enterprise" is "'a group of persons associated together for a common purpose of engaging in a course of conduct' and 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.' *United States v. Turkette, 452 U.S. 576, 583 [69 L. Ed. 2d 246, 101 S. Ct. 2524]* (1981)." *Beck, 820 F.2d at 51*. The Court in *Beck* then explained that, "this circuit requires that, under *section 1962(c)*, the enterprise be a *continuing operation* and that the [predicate] acts be related to the common purpose." *Beck, 820 F.2d at 51* (citing *United States v. Ianniello, 808 F.2d 184, 191 (2d Cir. 1986)*, *cert. denied, Cohen v. United States, 483 U.S. 1006, 107 S. Ct. 3229, 97 L. Ed. 2d 736 (1987))* (emphasis in original).

[*219] At the very least, *Beck* requires that a civil RICO pleading allege the common purpose of the "enterprise", and allege **[**26]** that the predicate acts are related to that common purpose. *See, e.g., Newman v. L.F. Rothschild, 662 F. Supp. 957, 958 (S.D.N.Y. 1987)* (Sweet, J.). [6]

As to plaintiff's argument, in its brief, that plaintiff itself is the "enterprise" whose affairs defendant conducted through a pattern of racketeering activity under *§ 1962(c)*, it should first be observed that nowhere in the amended complaint does plaintiff identify itself as an "enterprise." But **[**27]** even if the amended complaint is read to identify plaintiff as the "enterprise" for purposes of a violation of § 196 (c), the complaint still fails to allege a "common purpose" of the enterprise to which defendant's predicate acts were related. Thus, with respect to plaintiff itself being the "enterprise", defendant has failed to properly allege that defendant "conducted the affairs of an enterprise through a pattern of racketeering activity."

For purposes of violations of *§ 1962(c)*, plaintiff has also failed to state a civil RICO claim even if the complaint is read to allege that defendant himself is the enterprise. It is well established in this Circuit that ***HN12***[] with respect to *§ 1962(c)* -- as opposed to *§ 1962(a)* -- the enterprise and the defendant cannot be the same person or entity. *See Bennett v. United States Trust Co. of New York, 770 F.2d 308, 315 (2d Cir. 1985)*, *cert. denied*, *474 U.S. 1058, 88 L. Ed. 2d 776, 106 S. Ct. 800 (1986)*; *see also Haroco, Inc. v. American National Bank & Trust Company of Chicago, 747 F.2d 384, 399-403 (7th Cir. 1984)*.

Plaintiff states in its brief that "recent authority affirms that the enterprise may be the defendant-perpetrator of the predicate criminal conduct himself. **[**28]** *DeMuro v. E.F. Hutton & Co., 643 F. Supp. 63 (S.D.N.Y. 1986)*," Plaintiff's Memorandum at 8; yet the *Demuro* case, cited by plaintiff, actually only addresses the question of whether the defendant in that action could "be both the person and enterprise for purposes of a cause of action pursuant to *18 U.S.C. § 1962(a)*," *DeMuro, 643 F. Supp. at 65* (emphasis added). In fact, in *DeMuro*, Judge Knapp recognizes that the very cases which have indicated that the defendant and the enterprise can be the same for purposes of *§ 1962(a)* have also held that under *§ 1962(c)* "the person and the enterprise must be distinct." *Id*.

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[6] In *Newman*, plaintiffs alleged that:

> Defendant L. F. ROTHSCHILD is an enterprise as that term is defined in *18 U.S.C. 1961* engaged in interstate commerce and the activities of which affect interstate commerce. Such activities in and affecting interstate commerce include, among other things, the purchase and sale of securities, which have moved in interstate commerce.

Judge Sweet dismissed the complaint, stating that "missing are allegations of common purpose, as well as allegations that the alleged predicate acts are related to that common purpose. Consequently, under *Beck*, the Amended Complaint fails to allege 'enterprise' properly, and the RICO count will be dismissed." *Newman, 662 F. Supp. at 958*.

CONCLUSION

Thus, plaintiff's amended complaint fails to state a civil RICO claim pursuant to *18 U.S.C. § 1964(c)*, and thus plaintiff's second claim for relief must be dismissed.

Plaintiff's remaining claims are pendent state law claims. Because these pendent claim provide no other basis for federal jurisdiction, and because no considerations of judicial economy would be served at this stage of the litigation by retaining jurisdiction over the pendent claims, those claims are likewise dismissed. *See United Mine Workers of America v. Gibbs,* ***[**29]*** *383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*; *see also Mastercraft Industries Inc. v. Breining, 664 F. Supp. 859, 861 (S.D.N.Y. 1987)*; *In Re Investors Funding Corp. of N.Y. Securities Litigation, 523 F. Supp. 550, 560 (S.D.N.Y. 1980)*.

Plaintiff is hereby given leave to serve a second amended complaint, consistent with this order, within twenty days.

SO ORDERED.

End of Document

[United States v. Seville Industrial Machinery Corp.](#)

United States District Court for the District of New Jersey

January 20, 1988, Decided ; January 21, 1988, Filed

Cr. No. 87-31

Reporter
696 F. Supp. 986 *; 1988 U.S. Dist. LEXIS 392 **; 1988-1 Trade Cas. (CCH) P67,979

United States of America v. Seville Industrial Machinery Corporation, et al., Defendants

Subsequent History: **[**1]** Sentencing Opinion Reported at: *696 F. Supp. 986 at 993*.

Core Terms

bid, indictment, auction, defraud, rigging, bankruptcy court, Sherman Act, conspiracy, Defendants', charges, compete, prices, antitrust, restraint of trade, per se violation, alleged scheme, public auction, multiplicitous, impermissibly, competitors, conspiring, courts

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

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

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

Under *15 U.S.C.S. § 1*, 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 > ... > 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 U.S. Supreme Court narrows the reach of the Sherman Act, *15 U.S.C.S. § 1*, to restraints of trade which are unreasonable: *Section 1* necessarily calls for the exercise of judgment which requires that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute has or has not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it is intended that the standard of reason which has been applied at the common law and in this country in dealing with subjects of the character embraced by the statute is intended to be the measure used for the purpose of determining whether in a given case a particular act has or has not brought about the wrong against which the statute provided.

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

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

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

Certain patterns of anticompetitive business conduct provide conclusive presumptions of unreasonableness. Application of this conclusive presumption of unreasonableness to certain anticompetitive behavior is known as the "per se doctrine."

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

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Bid rigging is a per se violation of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN5[] **Antitrust & Trade Law, Sherman Act**

A simple agreement not to bid is itself a per se antitrust violation, even in the absence of prior price fixing. Where two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint of trade which violates the Sherman Antitrust Act, *15 U.S.C.S. § 1*.

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

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

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

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

HN6[] **Criminal Actions, Intent**

Action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws. Thus, general intent rather than specific intent is the mens rea standard for antitrust crimes.

Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > Elements

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

Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > Penalties

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

HN7[] **Conspiracy to Defraud, Elements**

18 U.S.C.S. § 371 provides that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $ 10,000 or imprisoned not more than five years, or both.

Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > General Overview

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

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

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

HN8[] **Conspiracy to Defraud, Elements**

The use of *18 U.S.C.S. § 371* is endorsed against schemes directed at the deprivation of intangible rights to governmental integrity.

Bankruptcy Law > Procedural Matters > Jurisdiction > Federal District Courts

Governments > Courts > Authority to Adjudicate

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

HN9[] **Jurisdiction, Federal District Courts**

A bankruptcy court is a unit of the United States District Court charged with jurisdiction of any case arising under the bankruptcy code. *28 U.S.C.S. § 151*. A bankruptcy trustee is an agent and officer of the bankruptcy court.

Criminal Law & Procedure > ... > Defective Joinder & Severance > Multiplicity > General Overview

HN10[] **Defective Joinder & Severance, Multiplicity**

Counts of a complaint are multiplicitous if each count requires proof of the same facts as each other count.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

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

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Criminal Law & Procedure > Defenses > General Overview

Criminal Law & Procedure > Defenses > Selective Prosecution

HN11[] **Freedom of Religion, Free Exercise of Religion**

A defendant claiming impermissibly selective prosecution by the government bears a heavy burden of proof. He or she must overcome the principle that the choice of whom to prosecute and the strategy of prosecution are generally matters left wholly to the government's control. Thus, defendants must make the twin showing (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against them, they have been singled out for prosecution, and (2) that the government's discriminatory selection of them for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent their exercise of constitutional rights.

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Beatriz Souviron D'Amico, Federal Defender.

Judges: H. Lee Sarokin, United States District Judge.

Opinion by: SAROKIN

Opinion

[*988] H. LEE SAROKIN, UNITED STATES DISTRICT JUDGE.

The defendants in this criminal antitrust case move for dismissal of the indictment. The motion is denied.

BACKGROUND

On September 10, 1987, a grand jury indicted nineteen corporate and seventeen individual defendants [1] for violating federal ***antitrust law*** and for conspiring to defraud the United States. The court has accepted guilty pleas from, and sentenced, a number of the defendants. The remaining **[**2]** defendants now move to dismiss the indictment for legal insufficiency. Because defendants contend that the facts alleged in the indictment, even if proved beyond a reasonable doubt, do not charge a violation of federal law, the court must review the allegations.

On December 2, 1985, a company called S & S Corrugated was declared bankrupt under Chapter 7 of the bankruptcy code. The United States Bankruptcy Court for the Southern District of New York entered an order on February 12, 1986 authorizing the trustee to hold an auction of S & S Corrugated's commercial equipment. That auction, administered by the Daley-Hodking Corporation under the trustee's supervision, occurred on March 11, 1986. The bankruptcy court entered an order on March 14 confirming and approving the auction and authorizing the trustee to execute documents consummating the sale.

According to the indictment, the defendants agreed before the public auction not to bid against one another, and implemented their plan at the auction. Then, immediately **[**3]** after the auction, the defendants held their own private auction of the equipment they had just purchased. Once all items were resold at the private auction, the defendants divided up and shared the difference between the higher prices paid at the private auction and the lower prices paid at the public bankruptcy auction. That difference was in excess of $ 75,000.

Count One of the indictment charges a violation of the Sherman Act, *15 U.S.C. § 1*. The defendants' plan, according to the indictment, was a "combination and conspiracy in unreasonable restraint of interstate trade and commerce." It had the effects of restraining and eliminating competition among the defendants, enabling the defendants to pay artificially low prices for equipment at the public auction, and depriving S & S Corrugated and its creditors of full compensation and the benefits of free competition.

Count Two charges a violation of *18 U.S.C. § 371*, which forbids conspiracies to defraud the United States. The theory of the indictment is that the defendants defrauded the United States "by impeding, impairing, obstructing and defeating the lawful government function of the Bankruptcy Court in the due administration **[**4]** and enforcement of the Bankruptcy Code," and by deceiving the bankruptcy court into believing that the bids submitted at the auction were products of full and fair competition. The indictment charges the commission of a large number of overt acts in furtherance of the conspiracy, including defendants' attendance at the auction, agreement not to bid competitively, agreement to rebid privately any item bought at the public auction, attendance at the private auction, bidding at the private auction, payment for items, and sharing of the second auction's profits.

DISCUSSION

[1] The nineteen corporate defendants are dealers of commercial equipment. Most of the seventeen individual defendants are top officers or employees of the corporate defendants.

Moving to dismiss the indictment in its entirety, the defendants now argue that the indictment fails to charge a violation of *15 U.S.C. § 1* or of *18 U.S.C. § 371*, that the counts of the indictment are multiplicitous, and that the indictment represents an impermissibly selective prosecution. The court considers each contention in turn.

[*989] I. *The Sherman Act*

A. Bid Rigging as a Per Se Violation

HN1[] Under *15 U.S.C. § 1*, "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." **[**5]** As written, the Sherman Act is of extraordinary breadth. Indeed, it would appear to render illegal even the simplest commercial contract, since the contracting parties' agreement to trade with one another entails, for the purposes of their transaction, an implicit agreement to trade with no other. Despite the Act's breadth, the Supreme Court has upheld the Sherman Act over the objection that it is unconstitutionally vague. *See* *Nash v. United States, 229 U.S. 373, 57 L. Ed. 1232, 33 S. Ct. 780 (1913)*.

HN2[] The Court, however, has also narrowed the reach of the Sherman Act to restraints of trade which are unreasonable:

> *[Section 1* of the Act] necessarily 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. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the *standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether in a given **[**6]** case a particular act had or had not brought about the wrong against which the statute provided.

Standard Oil Co. v. United States, 221 U.S. 1, 60, 55 L. Ed. 619, 31 S. Ct. 502 (1911) (emphasis added). Applying this "rule of reason" over the years, the courts became so familiar with ***HN3***[] certain patterns of anticompetitive business conduct that they began to apply to those patterns conclusive presumptions of unreasonableness. *See* *Northern Pacific Railway v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)* ("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"). Application of this conclusive presumption of unreasonableness to certain anticompetitive behavior has become known as the "*per se* doctrine." *See also* *United States v. Trenton Potteries, 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927)*.

It is beyond question that ***HN4***[] bid rigging is a *per se* violation of the Sherman Act. *See, e.g.,* *United States v. H & M, Inc., 565 F. Supp. 1, 2 (M.D.Pa. 1982)* (bid rigging is a "*per se* violation[] which **[**7]** go[es] to the heart of the Sherman Act"); *United States v. Koppers Co., 652 F.2d 290, 294 (2d Cir. 1981)*, *cert. denied*, *454 U.S. 1083, 70 L. Ed. 2d 617, 102 S. Ct. 639 (1981)*; *United States v. Brighton Building and Maintenance Co., 598 F.2d 1101, 1106 (7th Cir. 1979)*, *cert. denied*, *444 U.S. 840, 62 L. Ed. 2d 52, 100 S. Ct. 79 (1979)*; *United States v. Portsmouth Paving, 694 F.2d 312, 317 (4th Cir. 1983)*; *United States v. Rubbish Removal, Inc., 602 F. Supp. 595, 602 (N.D.N.Y. 1984)*. Indeed, "in cases involving behavior such as bid rigging, which has been classified by courts as a *per se* violation, the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'" *United States v. Koppers Co., 652 F.2d at 294* (quoting *United States v. Brighton Building, 598 F.2d at 1106*).

Defendants attempt to distinguish their alleged behavior from classic bid rigging on the grounds that their alleged scheme involved no pre-auction fixing of prices and allowed for unfettered competition at the second, private auction. However, neither of these features, even if true, removes the alleged scheme from the domain of the *per se* violation. In the first place, courts have repeatedly held that ***HN5***[] a simple **[**8]** agreement not to bid is itself a *per se* antitrust violation, even in the absence of prior price fixing. "Where two or more persons agree that one will submit a bid for a **[*990]** project higher or lower than the others *or that one will not submit a bid at all*, then there has been an unreasonable restraint of trade which violates the Sherman Antitrust Act." *United States v. W.F. Brinkley and Son, 783 F.2d 1157, 1161 (4th Cir. 1986)* (emphasis added). *See also* *United States v. Portsmouth Paving, 694 F.2d 312, 325 (4th Cir. 1982)* ("any agreement between competitors pursuant to which contract offers are to be submitted to *or withheld from* a third party constitutes bid rigging *per se* violative of *15 U.S.C. § 1*" (emphasis added)); *Swift & Co. v. United States, 196 U.S. 375, 400, 49 L. Ed. 518, 25 S. Ct. 276 (1905)* ("the defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete").

More importantly, the alleged scheme of the defendants is indistinguishable from schemes which courts have held *per se* violative of the Sherman Act. In *Addyston Pipe & Steel Co v. United States, 175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899)*, six manufacturers of cast-iron **[**9]** pipe formed an "association" to protect themselves from the adverse effects of the competition that normally existed between them. The association first divided their sales region into "pay" territory, in which each association member had to pay a bonus to the other members for his sales, and "free" territory, in which the members could sell freely without paying a bonus. However,

> the system of bonuses, as a means of restricting competition and maintaining prices, was not successful. A change was therefore made by which prices were to be fixed for each contract by the association, and, except in reserved cities, *the bidder was determined by competitive bidding of the members, the one agreeing to the highest bonus for division among the others getting the contract*.

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898) (emphasis added), *mod. and aff'd*, *175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899)*. In other words, the members of the association bid for the right to be the low bidder, and the association split the premium that each member was willing to pay for the advantage of no competition from other association members. The scheme in *Addyston Pipe* is therefore the mirror **[**10]** image of the alleged scheme of the defendants in this case; the only important distinction is that the *Addyston Pipe* conspirators competed *before* the public bidding, while these defendants allegedly competed *after* the public bidding.

The Supreme Court held that the association's scheme was an illegal combination in restraint of trade. In doing so, the Court emphasized that the illegality of the association's activity flowed from the scheme's effect not only on the actual public bidding, but on the members' freedom to compete at that bidding:

> It is also urged that as but one contract would be awarded for the work proposed at any place, and therefore only one person would secure it by virtue of being the lowest bidder, the selection by defendants of one of their number to make the lowest bid as among themselves could not operate as any restraint of trade. . . . This takes no heed of the purpose and effect of the combination *to restrain the action of the parties to it so that there shall be no competition among them to obtain the contract for themselves. . . . It is the effect of the combination in limiting and restricting the right of each of the members to transact* ***[**11]*** *business in the ordinary way*, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded.

175 U.S. at 244-45 (emphasis added). It is crucial to note that in *Addyston Pipe*, as in the case before the court, *there was free competition among the members of the association*; the Supreme Court did not view this private competition as salvaging the corrupt agreement. Similarly, this court cannot attach any legal significance to the defendants' post-auction competition. That competition has no effect whatever on the illegality of the agreement not to compete at the public auction.

United States v. Walker, 653 F.2d 1343 (9th Cir. 1981), *cert. denied*, *455 U.S. 908, 71 L. Ed. 2d 446, 102 S. Ct. 1253 (1982)*, is **[*991]** another case which presents facts virtually indistinguishable from the case before the court. In *Walker*, the defendant made payments to a number of his competitors to prevent them from bidding competitively at a timber sale administered by the United States Forest Service. The defendant was convicted of conspiring to defraud the United States through bid rigging. The economic effect of the scheme in *Walker* is identical to the effect of the scheme charged in **[**12]** this case. Whether would-be competitors split the economic premium which results from restrained competition before or after the bidding process is a matter only of timing, not of legality. Both schemes are equally violative of the Sherman Act.

Any argument that the unlawfulness of the agreement not to bid competitively was cured by the defendants' alleged post-auction competition is refuted by *United States v. Bensinger Co., 430 F.2d 584 (8th Cir. 1970)*. In *Bensinger*, a restaurant twice accepted bids for the sale and installation of a dishwasher. It rejected all of the bids received in the first round, and then accepted a bid after reopening the bidding process. The government prosecuted defendant for rigging bids at the *first* bidding. The defendant argued that it could not be convicted of rigging bids at the first bidding, since the restaurant rejected all of the rigged bids. The court rejected this argument. *Bensinger* therefore reinforces the proposition that a Sherman Act violation occurs when competitors agree to bid non-competitively. Just as the *Bensinger* defendant could not escape criminal liability by the fortuity that its corrupt plan did not succeed, the **[**13]** defendants in this case cannot escape criminal liability by the fortuity that other innocent bidders attended the public auction or that the alleged co-conspirators valued the purchased equipment sufficiently to trigger competitive bidding at their private auction. Their alleged crime was nothing more and nothing less than their agreement not to compete.

B. Mens Rea

Defendants contend that the indictment fails to allege specific intent, and that this deficiency requires dismissal of the indictment. The answer to this contention is that the indictment's failure to allege specific intent is not a deficiency. In *United States v. United States Gypsum Co., 438 U.S. 422, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*, the Supreme Court held that ***HN6***[] "action undertaken with *knowledge* of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws." *438 U.S. at 444* (emphasis added). The Court thus chose general intent as the *mens rea* standard for antitrust crimes, explicitly rejecting a specific intent standard. This court therefore concludes that the indictment adequately charges the requisite level of criminal intent **[**14]** by alleging an "agreement, understanding and concert of action" to refrain from bidding "for the purpose of purchasing commercial equipment at artificially low and noncompetitive prices." Indictment at para. 14.

II. *Conspiracy to Defraud the United States*

Defendants attack Count Two of the indictment on the grounds that it fails to charge a violation of *18 U.S.C. § 371*. ***HN7***[] That statute provides that

> if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $ 10,000 or imprisoned not more than five years, or both.

Defendants' theory is that their alleged scheme defrauded, if anyone, only the creditors of S & S Corrugated, but not "the United States or any agency thereof."

Defendants rely on two recent Supreme Court decisions: *McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987)*, and *Tanner v. United States, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90* ***[*992]*** *(1987)*. In *McNally*, the Supreme Court resolved an issue long debated in the district and circuit courts by holding that **[**15]** the mail fraud statute, *18 U.S.C. § 1341*, is "limited in scope to the protection of property rights," as opposed to the intangible right of the citizenry to good government. *107 S. Ct. at 2880*. In *Tanner*, the Court held that a conspiracy to defraud a private entity that receives "financial assistance and some supervision" from the United States is not a conspiracy to defraud the United States under *§ 371*. *107 S. Ct. at 2752-53*.

Neither of these cases is of any assistance to defendants. Defendants argue that the indictment is prohibited by *McNally* because it charges a deprivation only of an intangible right to the integrity of the bankruptcy courts, rather than of a tangible property interest. However, the *McNally* opinion will not support such a contention. The statute at issue in that case was *18 U.S.C. § 1341*, the mail fraud statute. The Supreme Court was careful to note in its opinion that the scope of the mail fraud statute is *narrower* than the scope of *18 U.S.C. § 371*, the statute at issue in this case. *107 S. Ct. at 2881 n.8*. Indeed, the *McNally* Court *endorsed* ***HN8***[] the use of *18 U.S.C. § 371* against schemes directed at the deprivation of intangible rights to governmental **[**16]** integrity. *Id*. Defendants' reliance on *McNally* is therefore wholly misplaced. *See also* *Tanner v. United States, 107 S. Ct. at 2751* ("the fraud covered by the statute 'reaches "any conspiracy for the purpose of impairing obstructing, or defeating the lawful function of any department of Government"" (citations omitted)).

Tanner is of no greater help to defendants. In *Tanner*, the defendants fraudulently obtained a loan from a private bank. That loan was guaranteed by the federal Rural Electrification Administration. The government obtained an indictment of defendants for conspiring to defraud the United States by fraudulently procuring the loan. The Court held that the defrauded private bank did not, by virtue of a limited amount of supervision by a federal agency, become "the United States or any agency thereof" for the purposes of *§ 371*.

Tanner is readily distinguishable from the case before the court. In the first place, the target of the fraud in *Tanner* was a private intermediary between the government and the defendants. In this case, by contrast, the target of the alleged fraud was the government agency itself, which functioned as intermediary between **[**17]** the defendants and the private creditors. *See* Indictment, Count Two at paras. 2, 3. More importantly, unlike the charge in *Tanner*, this indictment charges that the defendants directly impaired government agents in their carrying out of the bankruptcy court's lawful functions. ***HN9***[] A bankruptcy court is a unit of the United States District Court charged with jurisdiction of any case arising under the bankruptcy code. *28 U.S.C. § 151*. A bankruptcy trustee is an agent and officer of the bankruptcy court. *See* *Callaghan v. Reconstruction Finance Corporation, 297 U.S. 464, 468, 80 L. Ed. 804, 56 S. Ct. 519 (1936)*; *Red Carpet Corporation v. Miller, 708 F.2d 1576, 1579 (11th Cir. 1983)*; *In re Power, 115 F.2d 69, 72 (7th Cir. 1940)*. In this case, the bankruptcy court is the actual seller of a debtor's property at a bankruptcy auction. *In re Blue Coal Corporation*, 59 Bankr. 157, 160 (Bkrtcy. M.D. Pa. 1986). Furthermore, the bankruptcy trustee was appointed by the bankruptcy court and was explicitly authorized by bankruptcy court order to hold the auction of S & S Corrugated's equipment. Defendants' argument based on *Tanner* must therefore fail, since the alleged fraud in this case was perpetrated directly **[**18]** on an agency of the United States. Count Two of the indictment properly charges a violation of *18 U.S.C. § 371*.

III. *Multiplicity and Selectivity*

Defendants argue that the two counts of the indictment are multiplicitous and that the indictment itself represents an impermissibly selective prosecution. Both arguments are meritless.

HN10[] Counts of a complaint are multiplicitous if each count requires proof of the **[*993]** same facts as each other count. That is simply not the case here, for

> an overt act is required for a *§ 371* conviction, but not for a Sherman *§ 1* violation. The two statutes, besides requiring proof of a fact that the other does not, serve separate and distinct purposes. Sherman *§ 1* is aimed at avoiding collusive activity to restrain trade; the United States need not be the victim. In contrast, *§ 371* forbids fraud practiced against any federal government agency. Because the essence of one offense is anti-competitive activity and of the other, deceptive acts, each of which impose diverse social harms, . . . the two charges are not multiplicitous.

United States v. Walker, 653 F.2d 1343, 1351 (9th Cir. 1981), *cert. denied*, *455 U.S. 908, 71 L. Ed. 2d 446, 102 S. Ct. 1253 (1982)*. The court finds the reasoning **[**19]** of *Walker* persuasive, and concludes that the two counts of the indictment are not multiplicitous.

HN11[] A defendant claiming impermissibly selective prosecution by the government bears a heavy burden of proof. He or she must overcome the principle that "the choice of whom to prosecute and the strategy of prosecution are generally matters left wholly to the government's control." *United States v. Herman, 589 F.2d 1191, 1210 (3rd Cir. 1978)*, *cert. denied*, *441 U.S. 913, 60 L. Ed. 2d 386, 99 S. Ct. 2014 (1979)*. Thus defendants must make the twin showing

> (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against [them], [they have] been singled out for prosecution, and (2) that

> the government's discriminatory selection of [them] for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent [their] exercise of constitutional rights.

United States v. Berrios, 501 F.2d 1207, 1211 (2nd Cir. 1974).

Defendants do not advance the slimmest piece of evidence suggesting bad faith in their prosecution. Nor have they identified others similarly **[**20]** situated who have not been proceeded against for the same conduct. Accordingly, the court must reject the contention that the indictment must be dismissed as the product of impermissibly selective prosecution.

CONCLUSION

The court finds no deficiency in the indictment. Defendants' motion to dismiss it must therefore be denied. [2]

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[2] Defendants have also moved for extensive discovery from the government. The court concludes, however, that the government is under no obligation to provide the defendants with any materials or information other than that which it must disclose under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, the Jencks Act, *18 U.S.C. § 3500(b)*, and *F.R.Crim.P. 16*, and that which it has already promised to disclose voluntarily.

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In re Super Premium Ice Cream Distribution Antitrust Litigation

United States District Court for the Northern District of California

January 23, 1988, Decided and Filed

MDL Docket No. 682

Reporter
1988 U.S. Dist. LEXIS 7366 *

In Re Super Premium Ice Cream Distribution Antitrust Litigation; This document relates to: ALL CASES

Core Terms

ice cream, distributor, termination, summary judgment, products, brands, summary judgment motion, cause of action, parties, relevant market, manufacturers, genuine, monopoly power, conspiracy, distribute, geographic, interbrand, antitrust, dealer, material fact, Sherman Act, customers, marketing, compete, retail, cases, alleged conspiracy, antitrust claim, anti trust law, allegations

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

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

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

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

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

HN1[] **Summary Judgment, Opposing Materials**

The parties opposing summary judgment must do more than simply show that there is some doubt as to material facts. They must come forward with specific facts showing that there is a genuine issue for trial. And where the record taken as a whole could not lead a rational trier of fact to find for the opposing parties, there is no genuine issue for trial.

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

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

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

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

HN2[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Alleged vertical restraints which do not constitute price fixing are to be judged under the rule of reason. The per se illegality rule does not apply to such non-price restraints. In such a setting interbrand competition is the primary concern of the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN3[] Antitrust & Trade Law, Sherman Act

Injury to competition, rather than injury to a competitor, is indispensable to a claim under § 1 of the Sherman Act, 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > Defenses

Evidence > Inferences & Presumptions > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Sherman Act, Defenses

Once allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, the plaintiff must come forward with specific factual support of its allegations of conspiracy.

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

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

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

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

HN5[] Vertical Restraints, Nonprice Restraints

A manufacturer is free to impose a non-price restraint on a dealer so long as there is no pernicious economic effect on interbrand competition. A manufacturer's attempt to prevent "free riding" on its marketing efforts for the benefit of other lines which the distributor is selling is both legitimate and lawful. It is widely recognized that in most circumstances dealer terminations or substitutions do not adversely affect competition in a market.

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

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

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

HN6[] **Monopolies & Monopolization, Actual Monopolization**

The elements of a monopolization claim are: (1) possession of monopoly power in the relevant market, (2) willful acquisition or maintenance of that power, and (3) causal "antitrust" injury. The elements of a claim of attempted monopolization are: (1) specific intent to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success.

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN7[] **Regulated Practices, Market Definition**

The issue of relevant market is generally a fact question for a jury.

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

HN8[] **Regulated Practices, Market Definition**

In analyzing the relevant product market, the appraisal is one of cross-elasticity of demand; that is, the reasonable interchangeability of commodities.

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

HN9[] **Regulated Practices, Market Definition**

Courts reject efforts to define markets by price variances or product quality variances. Such distinctions are economically meaningless where the differences are actually a spectrum of price and quality differences.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN10[] **Antitrust & Trade Law, Sherman Act**

An alleged conspiracy between a corporate parent and its wholly owned subsidiary is legally insufficient to support a claim of conspiracy under the Sherman Act, *15 U.S.C.S. § 1 et seq.*

Counsel: [*1] PILLSBURY, MADISON & SUTRO, William C. Miller, Reginald D. Steer, Brian D. Bellardo, San Francisco, CA

Opinion by: LEGGE

Opinion

OPINION AND ORDER FOR SUMMARY JUDGMENT

CHARLES A. LEGGE, UNITED STATES DISTRICT JUDGE

Cross motions for summary judgment have been made by all of the present parties to this litigation, Haagen-Dazs, Double Rainbow and Two Count. The motions were briefed, argued and submitted. The court has reviewed the moving and opposing papers, the factual record on which the motions and oppositions are based, the record in the case, the arguments of counsel, and the applicable authorities. The court directs that summary judgment be entered in favor of Haagen-Dazs and against Double Rainbow and Two Count, as discussed below.

The Cases

This multi-district litigation presently consists of three actions. No. C-05-6553 is brought by Haagen-Dazs against Double Rainbow and Two Count. Haagen-Dazs seeks a declaration that its arrangements with its distributors do not violate law, and that certain acts of Double Rainbow constitute unfair competition under California law. No. C-86-0853 is brought by Double Rainbow against Haagen-Dazs, It alleges violations of sections 1 and 2 of the Sherman Act **[*2]** *and two common law torts. Action No. C-87-2471 is brought by Two Count against Haagen-Dazs. It alleges violations of California's Cartwright Act; breach of contract, unfair business practices under California statute, and three state law torts.*

All three of these actions have one central issue: Whether Haagen-Dazs can lawfully have exclusive distribution. That is, whether Haagen-Dazs can sell only to distributors who agree not to sell competing brands of ice cream. The central facts are simple and undisputed. Two Count was formerly a Haagen-Dazs distributor. When Two Count decided to sell other brands of ice cream competing with Haagen-Dazs, including Double Rainbow ice cream, Haagen-Dazs advised Two Count that it would terminate Two Count as a distributor unless Two Count agreed to handle only Haagen-Dazs. Two Count declined to do so. Haagen-Dazs then terminated Two Count and obtained another distributor. Haagen-Dazs believes that exclusive distribution is in compliance with law, while Two Count and Double Rainbow contend that exclusive distribution violates state and federal antitrust laws.

The Summary Judgment Motions

Discovery is virtually completed. A trial date had been **[*3]** *set, but was vacated for the making and determination of these summary judgment motions.*

In its summary judgment motion, Haagen-Dazs in essence seeks complete summary judgment against Double Rainbow and Two Count on their claims against Haagen-Dazs. In No. C-86-0853, it seeks summary judgment on Double Rainbows' three antitrust claims and two common law claims. It also seeks summary judgment in No. C-87-2471 on Two Count's state antitrust claims, breach of contract claim, and three common law claims. In its own action, No. C-85-6553, Haagen-Dazs seeks a declaration that its distribution arrangements do not violate law. [1]

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[1] *The court does not interpret Haagen-Dazs' motion to seek summary judgment on its second cause of action in No. C-85-6553.*

Double Rainbow and Two Count oppose Haagen-Dazs' motion, and seek summary judgment of their own declaring (a) that the relevant market is "super premium" ice cream, and (b) that by virtue of collateral estoppel, Haagen-Dazs' policy of exclusive distribution is coercive.

The Factual Record

Since discovery has been completed, the parties have been able to submit to. the court an extensive factual record. In evaluating that factual record, **[*4]** *and its effect on these summary judgment motions, the court is guided by the principles for evaluating summary judgment motions in antitrust cases stated by the United States Supreme Court in Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 585-588 (1986)*. ***HN1***[] The parties opposing summary judgment, here primarily Double Rainbow and Two Count, must do more than simply show that there is some doubt as to material facts. They must come forward with "specific facts showing that there is a *genuine issue for trial." Id. at 587* (emphasis in original). And where the record taken as a whole could not lead a rational trier of fact to find for the opposing parties, there is no genuine issue 'for trial. [2] Id. The record in this case demonstrates that most of the material facts are indeed undisputed.

Haagen-Dazs [3] manufactures and sells ice cream products and other frozen deserts, including **[*5]** Haagen-Dazs brand ice cream. Its products are sold to distributors, who in turn resell them to grocery stores, restaurants and other retailers. Haagen-Dazs ice cream is (a) made of high quality natural ingredients, (b) contains a low volume of air, and (c) is high in butterfat. These three characteristics cause Haagen-Dazs' ice cream to be referred to in the industry as "super premium" or "luxury" ice cream. Haagen-Dazs was the first such high quality ice cream to be distributed throughout the United States.

Two Count is a wholesale distributor of ice cream. It sells to retail outlets located throughout Northern California. It buys products from various manufacturers and resells them to retailers for Two Count's own account.

Double Rainbow manufacturers and sells its own brands of ice cream product's, which are of a quality that competes with Haagen-Dazs' ice cream.

Haagen-Dazs' marketing strategy is that its products be distributed only in accordance with its announced marketing policies and procedures. Pursuant to its marketing **[*6]** policies, Haagen-Dazs refuses to sell its products to any distributor who also sells another brand of ice cream that Haagen-Dazs regards as comparable and competitive, based on such considerations as quality, image, packaging, price, and public perception. Haagen-Dazs' policy of distributor loyalty, or exclusive distribution, was announced to its distributors as early as 1981.

Two Count became a distributor of Haagen-Dazs ice cream in Northern California in 1976. The arrangements between Two Count and Haagen-Dazs were oral. No term of duration was stated or agreed upon by implication. For many years, Two Count exercised its best efforts to establish and build sales of Haagen-Dazs products in Northern California. However, in February 1985 Two Count entered into a written distribution agreement with Double Rainbow, providing for Two Count's distribution of Double Rainbow's ice cream. Two Count was aware of Haagen-Dazs' policy that if a distributor represents brands competing with Haagen-Dazs, that would create a conflict of interests unacceptable to Haagen-Dazs. Two Count was aware, prior to agreeing to distribute Double Rainbow's products, of Haagen-Dazs' distribution policies and **[*7]** that Haagen-Dazs was concerned about Two Count's handling competitive lines such as Double Rainbow. The agreement between Two Count and Double Rainbow required Two Count to exert its best efforts in distributing Double Rainbow products, and contained a minimum purchase requirement of one million pints in the years 1985 and following. Two Count did not inform

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[2] Haagen-Dazs has filed objections to certain portions of Double Rainbow's and Two Count's factual record. The objections are based on various evidentiary grounds. The court has reviewed each of the objections, and believes that each is well taken. The objections are therefore sustained.

[3] Haagen-Dazs is a wholly owned subsidiary of The Pillsbury Company. Haagen-Dazs and The Pillsbury Company are collectively referred to here as Haagen-Dazs.

Haagen-Dazs of this arrangement until after Two Count and Double Rainbow executed their written contract. Two Count then advised Haagen-Dazs that it intended to distribute Double Rainbow products, in order to generate additional sales volume for Two Count.

In March 1985, Haagen-Dazs confirmed that Two Count was undertaking distribution of Double Rainbow products. In May 1985 Haagen-Dazs notified Two Count that effective August 1, 1985, the distribution arrangements between Haagen-Dazs and Two Count would end. The distribution arrangements did end on that day. Haagen-Dazs terminated Two Count because, in Haagen-Dazs' opinion, Two Count's distribution of Double Rainbow created a conflict of interests that impaired Haagen-Dazs' ability to effectively compete, and permitted Double Rainbow to "free ride" on Haagen-Dazs' goodwill, reputation, **[*8]** and distribution.

Haagen-Dazs initially replaced Two Count with another distributor, but that arrangement was terminated in 1986, and Haagen-Dazs now does its own distributing in this area. Two Count has continued to represent Double Rainbow. Two Count also handles Steve's, Perche No!, and Bud's brands of quality ice creams. Two Count's sales have "substantially increased since Haagen-Dazs ceased dealing with Two Count and Two Count has devoted itself to the other brands. Double Rainbow has also been able to find distributors in other areas of the United States where it competes with Haagen-Dazs.

Haagen-Dazs makes other assertions of fact which Double Rainbow and Two Count oppose. It is therefore necessary to examine the record of those asserted facts, using the standard defined by the U.S. Supreme Court in *Matsushita.* The inquiry is of course whether there is a genuine issue of material fact to be tried. Most of Haagen-Dazs' record is based upon documents and witness testimony which it obtained from Double Rainbow and Two Count. In addition, Haagen-Dazs has submitted an affidavit of Jerry A. Hausman, a professor of economics, which sets forth his findings from the record that **[*9]** he reviewed. Double Rainbow and Two Count have not submitted an affidavit by an expert witness, and they base their opposition upon testimony and documents obtained in discovery.

Vertical Restraints and Dealer Terminations

Subsequent to the filing of these cases, several important appellate decisions have been made regarding vertical restraints under the antitrust laws.

The United States Supreme Court recently discussed the issue in *Business Electronics Corp. v. Sharp Electronics Corp., __ U.S. __ 99 L.Ed.2d 808 (1988)*. The Court reaffirmed its position that ***HN2***[] alleged vertical restraints which do not constitute price fixing are to be judged under the rule of reason. The Court said that the *per se* illegality rule does not apply to such non-price restraints. [4] The Court also noted that in such a setting *interbrand* competition is the primary concern of the antitrust laws.

This court also has the guidance of the recent Ninth Circuit decision *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729 (9th Cir. 1987)*. *Rutman* was a dealer termination case, involving non-price commercial activities, which were **[*10]** alleged to be violations of *sections 1* and *2* of the Sherman Act. The court of appeals affirmed the district court's dismissal of the action for failure to state a cause of action. The court of appeals stated that the applicable analysis was under the rule of reason, and not under the *per se* rule. *Id. at 734*. The court also reaffirmed the principle that ***HN3***[] injury to *competition,* rather than injury to a *competitor,* is indispensable to a claim under *section 1*. *Id.* The court recognized that harm to a terminated distributor can result from termination, but that harm does not necessarily mean that there has been an antitru+st violation. The court also affirmed dismissal of the *section 2* allegations, because the defendant did not possess monopoly power in the relevant geographic market, and the plaintiff had not sufficiently alleged a specific intent to monopolize. *Id. at 736*. The analysis of the

[4] Price restraints are not involved in this case.

Ninth Circuit in *Rutman* is particularly relevant to the antitrust claims between Haagen-Dazs and Two Count, and this court is particularly guided by the discussion on pages 734-736 of *Rutman.*

In another recent decision, *OSC Corp. v. Apple Computer Inc., 792 F.2d 1464* **[*11]** *(9th Cir. 1986)*, the Ninth Circuit again affirmed a summary judgment in a dealer termination case. The termination was challenged under *section 1* of the Sherman Act. Summary judgment was granted and was affirmed on the ground that the claimants had not presented a record sufficient to support a reasonable finding in their favor. In regard to the burden of proof, the court stated: ***HN4***[] "Once allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, the plaintiff must come forward with specific factual support of its allegations of conspiracy." *Id. at 1467*. The court reaffirmed that dealer termination cases involve the rule of reason and not the *per se* rule, and that injury to the terminated dealer is not enough to prove injury to competition. *Id. at 1469*.

The Ninth Circuit specifically stated in *OSC* that ***HN5***[] a manufacturer "is free to impose a non-price restraint on a dealer so long as there is no pernicious economic effect on interbrand competition." *Id.* The court also stated that a manufacturer's attempt to prevent "free riding" on its marketing efforts for the benefit of other lines **[*12]** which the distributor is selling is "both legitimate and lawful" *Id. at 1468*.

In addition, in *A. H. Cox Co. v. Star Machinery Co., 653 F.2d 1302, 1306-1307 (9th Cir. 1981)*, the Ninth Circuit affirmed a summary judgment against a distributor, stating that it is widely recognized that in most circumstances dealer terminations or substitutions do not adversely affect competition in a market.

Two Count and Double Rainbow attempt to avoid the application of the above principles by reliance on *Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1971)*. From that case they contend that this court should look beyond the. termination of the distributorship and view the charges in the context of an attempt to monopolize and a conspiracy. However, as will be discussed below, there is no evidence to support the allegation of conspiracy. In addition, the insufficiency of the monopoly charges are also discussed below.

In any event, it is clear from a reading of the Ninth Circuit cases together that the mere discharge of a distributor is not itself a violation of the antitrust laws. Double Rainbow and Two Count must establish more. Basically they must establish **[*13]** an injury to competition. However, they have not done so. They have not made a sufficient showing of a genuine issue of fact regarding an antitrust injury. In fact, the record establishes that there is increasing interbrand competition. Two Count continues to represent Double Rainbow and other manufacturers, and has prospered. Double Rainbow has been able to obtain other distributors nationwide. Haagen-Dazs' market share, on the other hand, has declined in several respects. Two Count and Double Rainbow have not established that competition has suffered because Haagen-Dazs terminated Two Count, whether the relevant geographic market is a nationwide market or the San Francisco Bay Area. Separate distribution has led to increased and successful interbrand competition.

Monopoly

Two Count and Double Rainbow argue that Haagen-Dazs has a monopoly, or is attempting to monopolize, in violation of section 2 of the Sherman Act and the California Cartwright Act.

HN6[] *The elements of a monopolization claim are: (1) possession of monopoly power in the relevant market, (2) willful acquisition or maintenance of that power, and (3) causal "antitrust" injury.* *Rutman, 829 F.2d at 736*. The elements **[*14]** of a claim of attempted monopolization are: (1) specific intent to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success. *Id.* The claims of Two Count and Double Rainbow fail here because there is no genuine issue of material fact that Haagen-Dazs has monopoly power in a relevant market, or any intent to control prices or destroy competition in a relevant market, or any dangerous probability of success.

The first factor is the 'necessity to define the relevant product market. Haagen-Dazs contends that the relevant product market is all frozen desserts, or at least all ice creams. Two Count and Double Rainbow contend that it is super premium ice creams. While ***HN7***[] the issue of relevant market is generally a fact question for a jury, *Syufy Enterprises v. American Multi Cinema Inc., 783 F.2d 878, 882 (9th Cir. 1986)* in this case there is no genuine issue of material fact for the jury in that regard.

The U.S. Supreme Court has said that ***HN8***[] in analyzing the relevant product market, the appraisal is one of cross-elastcity of demand; that is, the reasonable **[*15]** interchangeability of commodities. *United States v. DuPont & Co., 351 U.S. 377, 394-95, 404 (1956)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)*. As stated, Haagen-Dazs ice creams are distinguishable, at least for purposes of marketing, by the fact that they have higher butterfat content, lower air volume, and more natural ingredients. Haagen-Dazs' internal documents support the claim that its products have high customer recognition and sales because of those characteristics. However, it is clear from the record that gradations among various qualities of ice cream are not sufficient to establish separate relevant markets for the purposes of determining market power. ***HN9***[] Courts have repeatedly rejected efforts to define markets by price variances or product quality variances. Such distinctions are economically meaningless where the differences are actually a *spectrum* of price and quality differences. *See, e.g, Brown Shoe, 370 U.S. at 326*; *United States v. Jos. Schlitz Brewing Co., 253 F.Supp. 129, 145-6 (N.D. Cal. 1966)*, *affm'd* *385 U.S. 37 (1967)*; *Ron Tonkin Grand Tourismo v. Fiat, 637 F.2d 1376, 1379-80 (9th Cir. 1981)* *cert. denied, 454 U.S.* ***[*16]*** *831 (1981)*; *JBL Enterprises v. Jhirmack Enterprises, Inc., 509 F.Supp. 357, 371-2 (N.D. Cal. 1981)*; *Beatrice Foods v. FTC, 540 F.2d 303*. 309-310 (7th Cir. 1976).

That is this case. The record demonstrates that all grades of ice creams compete with one another for customer preference and for space in the retailers' freezers. Double Rainbow and Two Count have not shown that any of the differences among ice cream products, such as physical or price differences, have antitrust significance. They have not presented sufficient facts to create an issue of fact that people who buy so called "super premium" or "luxury" ice creams do not buy others which are lower in the spectrum of price or quality. And to the contrary, Haagen-Dazs has established a record that permits no reasonable inference other than that the relevant market is ice cream generally. There is significant overlap among the various grades and brands. All grades of ice cream compete for both retail shelf space and for consumers' attention. The various adjectives used to describe brands of ice creams do not alone establish separate markets.

Because of this conclusion regarding the product market, the court need not discuss **[*17]** the relevant geographic market extensively. In fact, the 'parties mention the geographic market only in passing. Since the relevant product market is all ice creams, what evidence there is before this court establishes no meaningful distinctions in result depending upon whether the geographic market is nationwide or the San Francisco Bay Area. That is, Haagen-Dazs has too small a share of either geographic market to approach monopoly power or to establish any dangerous probability of such monopoly power. For example, Haagen-Dazs' statistics indicate that its share of the ice cream market in the San Francisco area is only four to five percent. The parties present no direct statistics on a nationwide market. And Two Count and Double Rainbow's statistics do not demonstrate any monopoly power, or reasonable probability of monopoly power, in any geographic market. [5]

[*18] The record also demonstrates the absence of any power on the part of Haagen-Dazs to exclude competitors. It instead affirmatively demonstrates that competitors are entering the market and obtaining significant market shares. These facts are evidenced in part by the success which Two Count, Double Rainbow, and other manufacturers of alleged super premium ice cream have had in obtaining market shares. As noted from the above authorities, one of the key elements for analysis is the degree of interbrand competition. The record is abundantly clear, beyond any contrary determination which could reasonably be made by a jury, that there is extensive interbrand competition, and that such competition has been increasing.

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[5] Double Rainbow's and Two Count's statistics refer to the San Francisco Bay Area, using only super premium ice creams as the product market. Those statistics appear to be flawed, because of their exclusion of some alleged super premium brands. And even those statistics show that Haagen-Dazs' share of the alleged super premium market has dropped from 1984 through 1987.

Estoppel

Double Rainbow and Two Count argue that Haagen-Dazs is collaterally estopped from denying that its exclusive distribution policy is illegal, and from denying that its conduct is coercive. In doing so, they rely upon a decision of the United States District Court for the District of Massachusetts, Ben and Jerry's Homemade v. Haagen-Dazs, Civil Action No. 87-2785-C (1987). However, that decision does not have the collateral estoppel effect that Two Count and **[*19]** Double Rainbow seek. First, that decision was made on the application by that plaintiff for a preliminary injunction. It was not a final adjudication which is entitled to collateral estoppel effect. *Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1350-51 (9th Cir. 1982)*. In addition, the decision was based primarily, if not entirely, upon the breach of a written settlement agreement between the plaintiff there and Haagen-Dazs. It was not an adjudication of alleged violations of the antitrust laws. The settlement agreement at issue there is not at issue in this case.

Conspiracy

Two Count and Double Rainbow also argue that there was a conspiracy between Haagen-Dazs and other parties, and that the existence of a conspiracy is a defense to Haagen-Dazs' summary judgment motion.

However, the record does not establish any genuine issue of material fact on the existence of any conspiracy. One argument is that there was a conspiracy between Haagen-Dazs and its parent Pillsbury. However, ***HN10***[] *an alleged conspiracy between a corporate parent and its wholly owned subsidiary is legally insufficient. Copperweld Corp. v. Independence Tube Corp., 467 US. 752 (1984)*. In addition, Double Rainbow **[*20]** and Two Count have apparently conceded in their briefs that there is insufficient evidence to establish any conspiracy between Haagen-Dazs and any other manufacturer or distributor to keep Double Rainbow or Two Count out of the market. Two Count and Double Rainbow have simply not come forward with a specific factual showing to support their allegations of conspiracy, as required by the Ninth Circuit's holding in *OSC. 792 F.2d at 1467*.

Based upon the relevant authorities, and upon the record in this case, which established either undisputed facts or facts as to which there is no genuine issue, the court concludes that summary judgment should be granted (a) in favor of Haagen-Dazs and against Two Count on Two Count's two antitrust claims, and against Double Rainbow on Double Rainbow's three antitrust claims, (b) and in favor of Haagen-Dazs against Two Count and Double Rainbow on the first cause of action in C-85-6553

Common Law Claims

Two Count has also alleged common law claims. One is an alleged breach of the distribution agreement between Haagen-Dazs and Two Count. However, that contract was oral, contained no term of duration, and was terminable at will. Two Count argues that **[*21]** *the agreement was to last in perpetuity because Two Count was "assured that it would grow with Haagen-Dazs." But that is legally insufficient. See Alpha Distrib. Co. v. Jack Daniel Distillery, 454 F.2d 442, 447-8 (9th Cir. 1972) cert. denied, 419 U.S. 842 (1974)*; *Connelly v. Venus Foods, Inc., 174 Cal.App.2d 582, 585-6 (1959)*. Even if the agreement were interpreted as being more than "at will," and required good cause for termination, the record establishes that there was good cause. Two Count's taking on competitive lines of ice cream was good cause. Two Count's obligation was at least to use its best efforts on behalf of Haagen-Dazs, and when Two Count agreed to also use its best efforts on behalf of competitor Double Rainbow, Haagen-Dazs was justified in terminating the distribution agreement. There is no doubt that Haagen-Dazs gave reasonable notice to Two Count of the termination, and the court does not understand Two Count to be complaining about the method or reasonableness of the notice of termination.

Two Count's other state law allegations are unfair business practices, interference with prospective advantages, interference with contractual relationships, and **[*22]** breach of the covenant of good faith. They are based upon

Two Count's allegation that Haagen-Dazs somehow interfered with Two Count's relationships with its customers and suppliers. However, discovery has not substantiated those allegations. There is not sufficient evidence in the record to support an allegation of such interference. And as stated, Two Count has increased its number of brands, its customers and its revenues.

Double Rainbow also makes common law allegations of interference with prospective advantages and interference with contractual relationships. Again, however, there is not sufficient evidence to support those allegations. [6] The undisputed record shows that although Haagen-Dazs is in competition with Double Rainbow, it has not unlawfully interfered with Double Rainbow's contractual relationships or its prospective business advantages. There is no material evidence that the contract between Double Rainbow and Two Count has been interfered with by Haagen-Dazs. Nor is there any evidence of interference with any contract that Double Rainbow had with any other customers. Double Rainbow's general argument of possible inference with *potential* distributors, retail **[*23]** customers or franchisees is not legally sufficient. Such general expectations do not constitute economic relationships sufficient for protection. *Blank v. Kirwan, 39 Cal.3d 311, 330 (1985)*; *Buckaloo v. Johnson, 14 Cal.3d 815, 828 (1975)*.

Conclusion

In summary, Haagen-Dazs terminated Two Count because Haagen-Dazs has a marketing policy of requiring exclusive distribution, which Two Count violated by agreeing to distribute the ice creams of Double Rainbow, as well as other brands that compete with Haagen-Dazs. Haagen-Dazs was legally entitled to terminate Two Count. Double Rainbow and Two Count have not provided sufficient evidence from which a reasonable trier of fact could find any violation of Section 1 of the Sherman Act, Section 2 of the Sherman Act, or the California Cartwright Act, or could find in favor of Double Rainbow and Two Count on their state law claims.

Competition in the ice cream market is flourishing, and interbrand competition is intense. Antitrust lawsuits **[*24]** *are no substitute for such true competition. The public interest is protected by such competition, and antitrust suits are only an adjunct to promoting that public interest in cases where competition has been improperly curtailed. When there is, as here, real and intense competition, antitrust suits are simply not for the purpose of protecting a distributor's or a competitor's economic desires.*

IT IS THEREFORE ORDERED as follows:

(1) The motion for summary judgment by Double Rainbow in action C-86-0853 is denied.

(2) The motion for summary judgment by Two Count in action C-87-247l is denied.

(3) The motion of Haagen-Dazs for summary judgment is granted as follows:

(a) In C-86-0853, in favor of Haagen-Dazs and against Double Rainbow on all causes of action.

(b) In C-87-2471, in favor of Haagen-Dazs and against Two Count on all causes of action.

(c) In C-85-6553, in favor of Haagen-Dazs and against Double Rainbow and Two Count on the first cause of action.

(4) The court understands that there is a second cause of action in C-85-6553 by Haagen-Dazs alleging unfair competition. But the court does not interpret Haagen-Dazs' motion for summary judgment to address that cause of action. If **[*25]** *Haagen-Dazs wishes to proceed with that cause of action, it should advise the court and the*

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[6] From the briefs in the summary judgment motions, the court does not understand Double Rainbow to argue that it has shown sufficient facts to contest Haagen-Dazs' motion on these common law claims.

parties, and a status conference will be scheduled to set dates for the prosecution of that cause of action. If, in view of the above rulings, Haagen-Dazs wishes to abandon that cause of action, it should file with this court and serve on the parties a proposed form of judgment which is consistent with this opinion and which states that Haagen-Dazs is dismissing the second cause of action of C-85-6553.

Dated: June 23, 1988.

[Stead v. GTE Directories Corp.]

United States District Court for the Northern District of California

January 27, 1988, Decided ; January 27, 1988, Filed

No. C-85-20364 WAI

Reporter

1988 U.S. Dist. LEXIS 18323 *

BERT STEAD, d/b/a/ YELLOW PAGES COST CONSULTANTS, et al., Plaintiffs, v. GTE DIRECTORIES CORPORATION, et al., Defendants.

Core Terms

relevant market, summary judgment, Directories, consultants, advertising, collateral estoppel effect, monopoly power, Sherman Act, courts, summary judgment motion

Judges: [*1] INGRAM

Opinion by: WILLIAM A. INGRAM

Opinion

ORDER

Defendants' motions for summary judgment are DENIED as set forth below. Defendants' motion pursuant to *Rule 43(e), Fed. R. Civ. P.*, is DENIED. Defendants' alternative motion for a bifurcated trial pursuant to *Rule 42(b), Fed. R. Civ. P.*, is GRANTED. The issue of relevant market will be tried separately before the remaining issues.

DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT

Defendants first submitted a motion for summary judgment based upon the following grounds: (1) Yellow Page consulting service is not a separate relevant market, (2) Plaintiffs have failed to show any conspiracy to monopolize a relevant market, (3) There can be no tying claim as plaintiffs allege because Yellow Page consulting and the sale of Yellow Page advertising all relate to a single product, (4) There can be no Section 1 Sherman Act violation setting forth an unreasonable restraint of trade, since no party is restricted or prevented from dealing with any other party, and (5) State pendent claims (alleged violations of state antitrust laws) must be dismissed because none of the federal Sherman Act violations can stand.

Relevant Market: The parties have cited **[*2]** a number of cases in support of their respective positions. [1] The court finds this issue is best governed by the decision of the United States Supreme Court in *Jefferson Parish Hospital*

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[1] For cases supporting defendants' position, *see* *MAP Oil Company v. Texico, 691 F.2d 1303 (9th Cir. 1982)*; *RFD Publications v. Oregonian Publishing Co., 749 F.2d 1327 (9th Cir. 1984)*; and *Grason Electric Company v. Sacramento Municipal Utility District, 571 F. Supp. 504 (E.D. Cal. 1983)*.

District No 2 v. Hyde, 466 U.S. 2 (1984). In that case, the Supreme Court set forth what were similar or separate products in a tying case. The hospital had a contract with a firm of anesthesiologists to provide all anesthesiology services for patients of the hospital. The issue was whether anesthesiology services were a separate product from other hospital services. The court held that this did not depend on the nature of the services, but rather whether there was a separate demand for the services. It then found that there was a separate demand for anesthesiology services and it was a separate product.

[*3] In the present case, the record clearly demonstrates that there is a separate demand for the services of Yellow Page consultants by advertisers in Yellow Pages. The record shows that there are Yellow Page customers who clearly desire the services of the consultants. The court finds therefore that Yellow Page consultants can constitute a separate relevant market.

The court takes note of the case of *Best Advertising Corp v. Illinois Bell Telephone Co., 229 F. Supp. 275 (S.D. Ill. 1964)*, *aff'd* *339 F.2d 1009 (7th Cir. 1965)*. There, under facts similar to the present case, no Section 1 or Section 2 Sherman Act violations were found. However, that decision was based on the finding that the Yellow Page company and the Yellow Page consultants were not in competition with each other and the relevant market issue was substantially ignored by the courts. This court finds that the Supreme Court decision in *Jefferson Parish Hospital District No 2 v. Hyde, supra*, mandates a different result on the relevant market issue and Section 2 of the Sherman Act.

Both parties have cited the recent decision of the Court of Appeals for **[*4]** the Eleventh Circuit in *Ad-Vantage Telephone Directory Consultants v. GTE Directories Corporation*, F.2d , 56 U.S.L.W. 2161, 7987-2 Trade Cas. (CCH) P67,683 (11th Cir. August 27, 1987). There, national advertisers wished to place their ads in a number of directories simultaneously rather than bargaining separately with each publisher of a directory. The directories formed a national association called The National Yellow Pages Service Association (NYPSA) and a classification entitled Authorized Selling Representative (ASR). An ASR could sell advertising to a national advertiser on behalf of any directory that was a member of NYPSA.

The plaintiff was an ASR who became embroiled in a dispute with GTE and brought suit under Federal and Florida antitrust laws. Plaintiff could not prove his monopoly claims because GTE Directories had very little market power with respect to national advertising. He was permitted at trial to amend his complaint to allege that GTE Directories had a monopoly with respect to local advertising, the same issue that is present in the instant case.

On the local advertising issue, the Eleventh Circuit found in **[*5]** favor of GTE Directories. However, its decision was based on the finding that the ASRs (including plaintiff in that case) were not in competition with GTE Directories but rather were agents of the advertisers. Thus, there was no relevant market or monopoly issue. In that respect, the issue before the Eleventh Circuit differs from the case before this court.

For the above reason, summary judgment on the issue of relevant market in the present case is denied.

Monopoly Power. On the present record, this court is unwilling to grant summary judgment on the issue of monopoly power. There is a material factual conflict in the exhibits, declarations and deposition testimony on this issue. A trial is necessary to resolve the differences assuming there is a separate relevant market for Yellow Page consultants.

Assuming *arguendo* that defendant possess monopoly power, [2] the issue still exists as to whether defendants had a legitimate business reason for refusing to deal directly with Yellow Page consultants. *Aspen Skiing Company v.*

For cases tending to show the existence of a separate relevant market, *see* *Cass Student Advertising, Inc., v. National Educational Advertising Services, Inc., 516 F.2d 1092 (7th Cir. 1975)*; and *Twenty-Nine Productions v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966)*.

[2] The court finds it unnecessary at this time and on the present record to determine whether defendants possess monopoly power.

Aspen Highlands, 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). On the present record, this **[*6]** court cannot determine this issue.

Further, still assuming that defendants had monopoly power, there would remain an issue as to whether the alleged defendant monopolists would have a duty to aid their competitors. Such a duty may exist in a proper case. *Oahu Gas Service, Inc., v. Pacific Resource, Inc., 829 F.2d 1471 (9th Cir. 1987)*. This is a further issue which the present record cannot resolve for purposes of summary judgment.

Summary judgment will be denied to defendants on the issue of monopoly power.

Tying. For the reasons set forth above with respect to the relevant market, summary judgment is denied to defendants on this issue.

Plaintiffs are entitled to go to trial on the issues of relevant market, monopoly power and tying under Section 2 of the Sherman Act.

Competition. In view of the above ruling that a separate relevant market may exist for **[*7]** Yellow Page consultant services, the court cannot find on the present record that plaintiffs and defendants are not in competition with each other. The material facts in the record are in conflict as to whether such competition exists. *Best Advertising Corp. v. Illinois Bell Telephone Co., supra*, and *Ad-Vantage Telephone Directory Consultants v. GTE Directories Corporation*, *supra*, would tend to support a holding that such competition does not exist, but this court finds a trial is necessary to determine whether the facts in this proceeding meet the criterion of those cases. On the present conflicting record, this cannot be answered. Summary judgment is denied on the Section 1, Sherman Act claims.

Pendent Claims. For the reasons set forth above, the court finds it is not appropriate to rule on the state antitrust issues at this time.

DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Defendants have filed a further motion for summary judgment based upon a state court decision in the state of Florida which defendants claim has collateral estoppel effect in the matter before this court.

The Florida case was brought **[*8]** in the Circuit Court of Pinellas County, a trial court. Plaintiffs were GTE Directories Corporation, a defendant in this proceeding, and General Telephone Company of Florida who is not a party to this action. The defendants were Tel-Ad Advisors, a Florida corporation who is not a party to this proceeding and Tel-Ad Advisors, an Oregon corporation, who is a plaintiff in this proceeding.

The Florida litigation had two counts. Count 1 alleged interference with and between GTE Directories and its customers. Count 2 alleged restraint of trade in violation of Florida's ***antitrust law***. The Florida court granted plaintiffs in that action summary judgment on Count 1. It held that trial was required on the issue of liability and damages under Count 2.

In the case before this court, defendants have based an answer and counterclaim in part on alleged interference with contractual relations with their customers by the Yellow Page consultants. Defendants assert that the Florida decision constitutes collateral estoppel before this court on the issue of whether Yellow page consultant Tel-Ad has interfered with the contracts between defendants and Yellow Page advertisers. Defendants maintain **[*9]** further that the Florida decision constitutes a holding that defendants had good reason to cease doing business directly with Yellow Page Consultants.

Under Florida law, a judgment pending appeal is entitled to collateral estoppel effect unless it is subject to *de novo* review on appeal. *Reese v. Domato, 44 Fla. 692, 33 So. 462 (1902)*. The defendants in the Florida case have appealed the Circuit Court decision to higher courts in that state. However, *de novo* is not involved since the review is based upon the record in the Circuit Court. Therefore, under Florida law, the Circuit Court decision would be entitled to collateral effect.

Also under Florida law, a partial summary judgment on a separate and independent cause of action is given collateral estoppel effect. *Mendez v. West Flagler Family Association, 303 So. 2d 1 (1974)*. Plaintiff would distinguish the *Mendez* decision on the ground that, there, the appeal was from a partial summary judgment dismissing a claim where in the present situation, the appeal in the Florida courts is from a partial summary judgment granting a claim. This court finds however that **[*10]** no distinction can be made.

This court must conclude that the Florida courts would give collateral estoppel effect to the partial summary judgment of the Circuit Court of Pinellas County regardless of the fact that decision is on appeal.

The United States Supreme Court has held that federal courts should give collateral estoppel effect to state court decisions. *Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 84 L. Ed 2d 274, 105 S. Ct. 1327 (1985)*.

However, the Court of Appeals for the Ninth Circuit has held that federal courts will not give collateral estoppel effect to state court decisions which are not final orders until the completion of appellate review. *Luben Industries v. United States, 707 F.2d 1037 (9th Cir. 1983)*.

This court finds no necessary inconsistency between the Supreme Court and the Ninth Circuit decisions cited above. Following the law of this circuit, the court declines to give collateral estoppel effect at this time to the decision of the Circuit Court of Pinellas County of the State of Florida in *GTE Directories et al. v. Tel-Ad Advisors et al.*, Circuit Civil No. 84-4387-20, **[*11]** until such time as the appellate process in Florida has been completed.

Defendants' motion for summary judgment on the basis of collateral estoppel is denied.

DEFENDANTS' MOTIONS UNDER RULES 43(e) and 42(b), FED. R. CIV. P.

Defendants have filed a motion in the alternative, either (1) under *Rule 43(e), Fed. R. Civ. P.* to have an oral hearing on the issue of whether plaintiffs and defendants compete, or (2) at trial under *Rule 42(b), Fed. R. Civ. P.*, the issues be bifurcated and that the court try separately first the issue of relevant market.

Defendants' alternative motion for a bifurcated trial is granted. The court finds that judicial economy would best be served by first trying the issue of relevant market.

DATED: January 27, 1988

WILLIAM A. INGRAM, United States District Judge

End of Document

Boise Cascade Corp. v. FTC

United States Court of Appeals for the District of Columbia Circuit

March 2, 1987, Argued ; January 29, 1988, Decided

No. 86-1240

Reporter

837 F.2d 1127 *; 1988 U.S. App. LEXIS 1256 **; 267 U.S. App. D.C. 124; 1988-1 Trade Cas. (CCH) P67,870

Boise Cascade Corporation, Petitioner v. Federal Trade Commission, Respondent

Subsequent History: **[**1]** As Amended January 29, 1988. Petition for Rehearing Denied February 29, 1988.

Prior History: Petition for Review of an Order of the Federal Trade Commission.

Core Terms

discounts, wholesalers, dealers, manufacturers, retailers, buyer, price discrimination, products, sales, Salt, competitive injury, distributors, arbitrage, prices, favored, disfavored, competitors, purchasers, customers, Robinson-Patman Act, seller, jobbers, differential, dual, cases, slip opinion, resale, functions, costs, Big

LexisNexis® Headnotes

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

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

Section 2(f) of the Robinson-Patman Act , *15 U.S.C.S. § 13(f)*, makes it unlawful for any person knowingly to induce or receive a discrimination in price which is prohibited under the Robinson-Patman Act. Since the Act directly proscribes only a seller's activities, the liability of a buyer under § 2(f) depends on whether the seller discriminated in the buyer's favor in violation of § 2(a) of the Act.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

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

HN2[] Robinson-Patman Act, Claims

Section 2(a) of the Robinson-Patman Act , *15 U.S.C.S. § 13(a)*, prohibits price discrimination between different purchasers 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 > Regulated Practices > Price Discrimination > Buyer Liability

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

HN3[] Price Discrimination, Buyer Liability

See *15 U.S.C.S. § 13(f)*.

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

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

See *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 > Regulated Practices > Price Discrimination > Buyer Liability

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

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

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

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

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN5[] Defenses, Cost Justification Defense

To establish a prima facie case under *15 U.S.C.S. §13(f)*, the Federal Trade Commission must establish two things: first, that the buyer received a lower price than its competitors, and second, that the price discrimination caused, or reasonably might cause, competitive injury. The statute also specifies two defenses to a seller's and therefore to a buyer's derivative liability. No violation exists where the discount reflects the lower cost to the seller of selling to the favored customer the "cost-justification" defense, nor where the seller granted the discount in good faith to meet a competing seller's price the "meeting competition" defense. *15 U.S.C.S.§ 13(a)-(b)*.

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

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

HN6[] Antitrust & Trade Law, Robinson-Patman Act

See *15 U.S.C.S. § 13(b)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

HN7[] Robinson-Patman Act, Claims

The Robinson-Patman Act is directed to the preservation of competition. Indeed, the terms of the statute itself mandate that, in order for a price differential to be unlawful, it must tend to injure, destroy, or prevent competition. *15 U.S.C.S.§ 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Evidence > Inferences & Presumptions > Inferences

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

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

HN8[] Robinson-Patman Act, Claims

A sustained and substantial price discrimination raises an inference, but it manifestly does not create an irrebuttable presumption of competitive injury. Specific, substantial evidence of absence of competitive injury is, in the court's view, sufficient to rebut what is, after all, only an inference.

Counsel: Victor E. Grimm, with whom John T. Loughlin, R. Clifford Potter, Scott M. Mendel and Donald Mitchell were on the brief for Petitioner.

Arnold C. Celnicker, Attorney, Federal Trade Commission, with whom Ernest J. Isenstadt, Assistant General Counsel, Jerold D. Cummins, Deputy Assistant General Counsel and Chris M. Couillou, Attorney, Federal Trade Commission were on the brief, for Respondent.

R. Bruce Rich was on the brief for Amicus Curiae, National Association of Service Merchandising, urging reversal of the Federal Trade Commission decision on functional discounts.

Judges: Mikva, Starr and Williams, Circuit Judges.

Opinion by: STARR

Opinion

[*1128] *R, Circuit Judge:

This case comes before us on petition for review of a decision of the Federal Trade Commission holding Boise Cascade Corporation in violation of section 2(f) of the Robinson-Patman Act, *15 U.S.C. § 13(f) (1982)*. The Commission determined that Boise's receipt of price discriminations, in the form of discounts on office products **[**2]** it purchased for resale to consumers, tended to cause competitive injury to dealers in the office products industry with whom Boise competes. In so concluding, the Commission relied upon the "inference" of competitive injury, articulated by the Supreme Court in *FTC v. Morton Salt, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)*, that arises when a substantial price discrimination exists over time. For the reasons to **[*1129]** be set forth, we grant the petition for review.

I

A

Before examining the facts in this case, we first pause briefly to describe the pertinent statutory framework. Section 2(f) of the Robinson-Patman Act ***HN1***[] makes it unlawful for any person "knowingly to induce or receive a discrimination in price which is prohibited [under the Robinson-Patman Act]." [1] *15 U.S.C. § 13(f)*. Since the Act directly proscribes only a *seller's* activities, the liability of a *buyer* under section 2(f) depends on whether the seller discriminated in the buyer's favor in violation of section 2(a) of the Act. *See, e.g.,* **[**3]** *Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 76-77, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979)*; *Automatic Canteen Co. v. FTC, 346 U.S. 61, 70-71, 97 L. Ed. 1454, 73 S. Ct. 1017 (1953)*. Section 2(a) ***HN2***[] prohibits price discrimination between different purchasers "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." [2] *Id. § 13(a)*.

[4]** ***HN5***[] To establish a *prima facie* case under section 2(f), the Commission must establish two things: *first*, that the buyer received a lower price than its competitors, and *second*, that the price discrimination caused, or reasonably might cause, competitive injury.

The statute also specifies two defenses to a seller's (and therefore to a buyer's derivative) liability. No violation exists where the discount reflects the lower cost to the seller of selling to the favored customer (the "cost-justification" defense), nor where the seller granted the discount in good faith to meet a competing seller's price (the

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[1] Section 2(f) provides:

> ***HN3***[] 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.

15 U.S.C. § 13(f).

[2] Section 2(a) ***HN4***[] provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, 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[.]

15 U.S.C. § 13(a).

"meeting competition" defense). [3] *Id.* *§ 13(a)-(b)*; *see also* *Automatic Canteen, 346 U.S. 61, 97 L. Ed. 1454, 73 S. Ct. 1017* (interpreting "cost-justification" defense); *FTC v. Sun Oil Co., 371 U.S. 505, 9 L. Ed. 2d 466, 83 S. Ct. 358* ***[*1130]*** *(1963)* (interpreting "meeting competition" defense). In addition to these statutory defenses, the Commission recognizes a defense, or more precisely, finds an absence of competitive injury, where the discounts are generally and practically available to competitors of the favored customer **[**5]** (the "practical availability" defense). *See, e.g., FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1025-26 (2d Cir. 1976)*, *cert. denied*, *429 U.S. 1097, 51 L. Ed. 2d 545, 97 S. Ct. 1116 (1977)*.

[6] B**

On April 23, 1980, the Commission issued a complaint, over vigorous dissent, charging that Boise, as a "dual distributor" (both wholesaler and retailer) of office products, had violated section 2(f) of the Robinson-Patman Act. The complaint alleged that Boise's receipt of *wholesale* discounts from manufacturers on products that it then resold in a *retail* capacity to consumers constituted price discrimination for purposes of section 2(a). (No charge as to wholesale discounts for products that Boise thereafter sold in a wholesale capacity was pursued). The complaint alleged that Boise received these discounts knowingly and that the effect of Boise's receipt of such favorable pricing (and the resulting differential in prices) "has been or may be substantially to lessen, injure, destroy, or prevent competition" with dealers that were ineligible for the wholesale discounts. *See* Complaint, *Boise Cascade Corp.*, FTC No. 9133 (Apr. 23, 1980), Joint Appendix ("J.A.") at 3-4.

In issuing the complaint, the Commission directed the Administrative Law Judge to receive evidence and to make findings of fact sufficient for disposition of the case under the competing standards **[**7]** of two FTC cases, namely *Mueller Co., 60 F.T.C. 120 (1962)*, *aff'd*, *323 F.2d 44 (7th Cir. 1963)*, *cert. denied*, *377 U.S. 923, 12 L. Ed. 2d 215, 84 S. Ct. 1219 (1964)*, and an earlier FTC case that *Mueller* had overruled, *Doubleday & Co., 52 F.T.C. 169 (1955)*. *Doubleday*, in brief, had articulated an additional defense under section 2(f) when the amount of the price disparity was reasonably related to the buyer's cost (as distinguished from the seller's cost savings) of providing additional marketing services. As we shall presently see in fuller detail, *Mueller* rejected entirely Doubleday's rationale, but both cases nonetheless seemed to live on within FTC chambers as competing strains of Robinson-Patman thought.

II

At the outset of our examination of the office products industry, it is appropriate to sound a note of caution as the applicable law meets the rich web of facts. The voluminous record of this case eloquently attests to the fact that the manufacture and sale of office products have given rise to a complex, dynamic industry with a variety of players performing discrete but interrelated **[**8]** roles. Resolving the controversy at hand requires applying to this complex

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[3] Section 2(a) provides with regard to the cost justification defense:

> 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[.]

15 U.S.C. § 13(a).

Section 2 (b) contains the meeting competition defense:

> ***HN6***[] 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.

15 U.S.C. § 13(b).

business environment a set of legal ground rules which are in a state of considerable uncertainty. We are therefore well advised to follow the lead of courts which, confronted with cases arising under Robinson-Patman, have found it necessary to map out in some detail the competitive terrain upon which the players do battle. *See, e.g., FLM Collision Parts, 543 F.2d 1019*; *see also* *Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105 (3d Cir. 1980)*, *cert. denied 451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)*. We hasten to observe that this fact-intensive approach is dictated by the statute itself, which as we indicated at the outset calls for an inquiry into whether the effect of a price discrimination has been or "may be substantially to lessen . . . injure, destroy or prevent competition." *15 U.S.C. § 13(a)*.

A

The office products industry involves the manufacture, distribution, and sale of stationery, office supplies and office furniture. [4] ALJ Finding 6, J.A. at 46. A wide **[*1131]** range of items falls within **[**9]** the broad compass of "office products," including, to name just a few, business forms, appointment books, portfolios, address books, file cabinets, desk stands, ring binder notebooks, work sheet pads, and paper punches. *See generally* *id. 103-06, 157-59, 202-20, 252, 287-90, 330-40*; J.A. at 66, 76, 83-85, 89-90, 95, 102-04.

The sale of office products has traditionally occurred at three levels: manufacture, wholesale, and retail.

Manufacturers. Manufacturers in this industry sell their goods to wholesalers, dealers, and, on occasion, directly to end-users. *Id.* 7, J.A. at 46. Although the record provides no precise numbers, *compare id.*, J.A. at 46 with *id. 65*, J.A. at 59, office products are apparently produced by at least 1,000 manufacturers in the United States. *Id.* 7, **[**10]** J.A. at 46. These manufacturers produce and market a bewildering array of products. For instance, Shaeffer Eaton, a division of Textron Inc., one of the six manufacturers that the Commission selected in its effort to demonstrate that Boise had violated section 2(f), produces writing instruments, social stationery, record books, typewriter paper, and other sundry items. Transcript at 1059. These products are, of course, manufactured in a wide variety of colors and sizes, creating hundreds of separate Shaeffer Eaton items. This proliferation of products and product lines is apparently not at all unusual in the industry.

Wholesalers. Wholesalers are defined as firms or individuals that buy goods for resale to dealers. *Id.* 23, J.A. at 50. There are approximately 100 wholesalers in the industry. Most are small, privately-owned businesses. *Id.* 27, J.A. at 51; Transcript at 6587-88. Sales at the wholesale level are dominated by five nationwide companies (the largest of which is Boise). These "Big Five" firms account for about 60 % of the total volume of wholesale sales. ALJ Findings 26, 28, J.A. at 50-51. Boise, as we shall presently see, fits within the category of "dual distributors, **[**11]** " that is to say an integrated wholesaler that carries on retail as well as wholesale functions.

Dealers. Dealers, by definition, purchase office products from manufacturers or wholesalers (or both) for resale to consumers. *Id. 43*, J.A. at 54. Within the broad genus of dealers (also referred to as "retailers"), one finds a number of species. Take, for example, the "contract stationer," a title generally used to denote large dealers (but sometimes employed to refer to any dealer that has on-going contracts with industrial customers). *Id. 44*, J.A. at 54. There is also (1) the "rack jobber," a specialized breed that maintains the stock of one line of products on a lease-type basis with retail stores; (2) the more familiar "mass marketer," which is a food or variety chain store, such as K-Mart or Walmart; (3) the "mail order house," which advertises and sells to consumers through the mail; and (4) the "converter," which buys component parts, assembles them, and markets them under the manufacturer's or its own label. *See, e.g.*, Transcript at 1209, 1292-95. In addition, formal and informal dealer "buying groups" -- coalitions of dealers formed in order to garner advantageous **[**12]** discounts -- exist in most areas of the country. ALJ Finding 455, J.A. at 129. There are approximately 8,000 dealers in the industry. *Id. 47*, J.A. at 55.

Dual Distributors. In addition to these three major categories of participants, there is another player on the office products field, as we alluded to above. The "dual distributor" purchases products for resale to both dealers and end-

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[4] Although "office products" may be defined also to include office equipment and office machines, the ALJ expressly excluded those items from consideration of the industry in this case. ALJ Finding 6, J.A. at 46.

users. *Id.* 5, J.A. at 46. Although the record does not specify how many wholesalers engage in dual distribution, Boise contends that most do. Boise's Brief at 5; Transcript at 5090. Of the "Big Five" wholesalers, however, only Boise (and possibly one other) is a dual distributor. Commission's Brief at 5. Due to the understandable reluctance of dealers to buy from their competitors, dealers rarely move into the class of dual distributors. *See* Transcript at 3597; *see also* ALJ Findings 63, JA. at 58.

[*1132] B

In the office products industry, price is typically expressed in the form of a "manufacturer's suggested list price," less a discount, if any. To illustrate by way of a simple example, suppose the manufacturer's suggested list price for a product is $ 1.00. If **[**13]** the manufacturer offers a buyer a 50 % discount, the list price is reduced by 50 % and the product is thus sold to that buyer for 50 cents. If the manufacturer offers a 50-20 % discount, the list price is reduced first by 50 %. A 20 % discount is then applied to that amount (50 cents), thus leaving 40 cents as the net price to the buyer. *Id.* 8, J.A. at 46.

Manufacturers' discounts take many forms. [5] Perhaps best-known are quantity and volume discounts. To state the obvious, quantity discounts are lower per unit prices charged for large orders of a product or group of products, as opposed to smaller orders. *Id.* 9-10, J.A. at 47. Volume discounts, on the other hand, are tied to the aggregate annual amount purchased from the manufacturer by a particular buyer. *Id.* 10, J.A. at 47. In addition, promotional discounts, which range from additional year-end discounts to extension of payment deadlines, are prevalent in the industry. *Id.* 20-22, J.A. at 49-50.

[14]** To a more limited extent, manufacturers also offer bid discounts. These may arise when large end-users -- typically government entities -- that need substantial quantities of office products solicit bids from marketing intermediaries (wholesalers and retailers) and seek prices different from those normally offered to end-users. *Id.* 15-19, J.A. at 49. Manufacturers offer the same "bid" discounts to all distributors submitting bids to these end-users, regardless of their identity as wholesalers or dealers.

Most significant for purposes of this case, however, are functional and trade discounts. A trade discount is one given to purchasers on the basis of the level of trade at which they operate. The discount depends solely on to whom the purchaser resells; it is entirely independent of marketing functions performed by the purchaser. *Id. 517*, J.A. at 141. A functional discount, in contrast, is offered by a manufacturer to a purchaser for assuming and performing a function that would otherwise be performed by the manufacturer. *Id. 518*, J.A. at 141. The pure functional discount operates independently of the purchaser's level of trade. In other words, any purchaser that performs **[**15]** the required functions would be eligible for the discount regardless of whether it is nominally a wholesaler or retailer.

At issue in this case is the validity of a hybrid discount which partakes of both a trade and functional discount. This discount, which for purposes of clarity and consistency we will call a "wholesale discount," has existed, without change, for many years in the office products industry. Indeed, the wholesale discount has been extended by most manufacturers of office supplies since well before Boise entered the industry. [6] *Id. 489*, J.A. at 136. Its purpose is to induce wholesalers to undertake distribution and marketing functions on behalf of manufacturers. *Id. 447, 460*, J.A. at 127, 130. Manufacturers therefore extend the discount to *any* company, regardless of size, that meets the objective criteria contained in their respective definitions of "wholesaler. "

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[5] The breadth and variety of discounts led one witness to observe that "pricing in this industry is a jungle. Any given person in any given city on any given day could buy equal to, better than, or worse than someone else." Commission's Exhibit 672-Z-94, 95.

[6] Boise's expert witness, Dr. Kenneth Elzinga, a professor of economics at the University of Virginia, opined that these discounts are not prevalent in the office products industry. The ALJ, however, found Dr. Elzinga's testimony outweighed by that of knowledgeable industry members who estimated that 50 % to 70 % of manufacturers offer such discounts. *Id.* 11-13, J.A. at 47-48.

[16]** In defining "wholesaler," all manufacturers in this industry require that the candidate resell products to dealers. Significantly, however, manufacturers do not require that the candidate resell exclusively to dealers (or other non-end-users). Nor do **[*1133]** manufacturers limit the availability of the discount to those goods that are resold to dealers. Instead, manufacturers typically consider membership in the Wholesale Stationers Association (which, as its name suggests, is a trade association for wholesalers of office products) determinative of eligibility to receive the wholesale discount. Transcript at 1219, 1280-82, 1691-92, 2334. Under the Association's guidelines, *any company that resells at least 20 % of its office products to dealers qualifies as a wholesaler*. Commission's Exhibit 2002D. As a result of this generous definition, most "dual distributors" clear the first definitional hurdle for wholesale discount eligibility, whereas those dealers which sell exclusively to end-users naturally do not. ALJ Findings 449, 454, J.A. at 128, 129.

Beyond the universal requirement that a buyer resell (at least 20 %) to dealers, manufacturers differ in their respective criteria **[**17]** for granting wholesale discounts. To illustrate with the Commission's six selected manufacturers in this case, both Rediform Office Products, a division of Moore Business Forms, Inc., and Sheaffer Eaton define a wholesaler as a purchaser which not only sells to dealers but also warehouses and promotes their products, publishes a catalog, and employs and trains salespeople who call on dealers. *Id. at 447, 450*, J.A. at 127, 128. Kardex Systems, Inc. defines a wholesaler as a purchaser which maintains inventory on a variety of product lines for resale to dealers, publishes a price list, may (but apparently does not have to) publish a catalog, and employs outside salespeople. *Id. 449*, J.A. at 128. In contrast, the sole criterion imposed by both Boorum & Pease Company and Master Products Manufacturing Co. is that the purchaser resell to dealers and contract stationers. *Id. at 451, 453*, J.A. at 128, 129. Finally, Bates Manufacturing Company requires that the purchaser resell to dealers, carry an inventory of Bates' products, and publish a catalog. *Id. 452*, J.A. at 128-129.

Thus, wholesale discounts are trade discounts insofar as they are awarded on the basis of the identity **[**18]** of those to whom the marketing intermediary resells. To the extent that these manufacturers require the recipient to perform functions (such as publication of a catalog and warehousing) in order to qualify for the discount, the wholesale discount partakes of a functional discount. *See generally* Transcript at 6838-71.

III

With this overview of the office products industry and its pricing structure in mind, we turn to the specifics of the case before us.

A

Boise is an integrated forest products company. It entered the office products industry in 1964 as a dual distributor through the acquisition of Associated Stationers Company. ALJ Finding 3, J.A. at 45. From this beginning, Boise's Office Products Division quickly grew, to the point where today its combined wholesale and retail sales make it the largest distributor of office products in the United States. *Id.* 5, 52, J.A. at 46, 56. From 1976 to 1980, Boise's sales in its wholesale capacity amounted to slightly over half its total sales. *Id. 54-58*, J.A. at 56-57. Excluding the Division's retail sales, Boise is one of the two largest wholesalers in the United States. *Id. 53*, J.A. at 56. Notwithstanding **[**19]** its considerable size, Boise's purchases typically account for less than 5 % of any single manufacturer's total sales. *See* Transcript at 6087.

Headquartered in Itasca, Illinois, Boise's Office Products Division operates through distribution centers located in 27 cities. ALJ Finding 2, J.A. at 45. Each distribution center is responsible for marketing, inventory management, purchasing, warehousing, sales, and customer service. *Id.* 4, J.A. at 46. Accordingly, the purchasing department at each of the 27 locations places its orders directly with manufacturers, which in turn ship the goods directly to and bill the individual distribution center. *Id. 67, 463*, J.A. at 59, 131. Likewise, each distribution center employs its own sales force to call on Boise's dealer and commercial **[*1134]** (end-user) accounts. [7] *Id. 76*, J.A. at 60a.

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[7] Boise's distribution centers typically focus their sales efforts either on dealers or on consumers. Thirteen of the 27 distribution centers, for example, do not solicit end-user accounts. *Id. 59*, J.A. at 57-58. Of the eight centers that the Commission selected

[20]** Although in its capacity as a dealer Boise performs essentially the same marketing functions for manufacturers as do other dealers, Boise is, by virtue of being a dual distributor, able to obtain wholesale discounts unavailable to the 23 dealers selected by the Commission for review in this case. *Id. 95*, J.A. at 64. These discounts are received on goods of like grade and quality that Boise sells in competition with those dealers. *Id. 95-100*, J.A. at 64-66. As we previously indicated, *see* supra text at 8-9, all six manufacturers studied in this case extend to companies (including Boise) that qualify as wholesalers, wholesale discounts that represent reductions in list prices beyond those offered to dealers. [8] **[**21]** As a result of the difference between dealer and wholesaler discounts, the 23 selected dealers pay between 5 % and 33 % more for their purchases from manufacturers than does Boise. [9]

[22]** At the same time, Boise played no role in the adoption or formulation of the manufacturers' standards for offering wholesale discounts. Transcript at 1660-61, 2004, 2345. And, although the Commission points to evidence of Boise's successful negotiation for the discounts, Commission's Brief at 20 n.19, the Commission candidly **[*1135]** admits that the ALJ did not find that Boise had in any way coerced or pressured the manufacturers into extending it the wholesale discounts. *Id.* at 16-17.

B

The office products industry is characterized by intense competition. *Id. 408*, J.A. at 117. The industry, moreover, has flourished during the period in question. From 1976 to 1982, there was a steady rise in the number of dealers in the industry, both nationwide and in the individual States where the FTC's selected dealers are located. *Id. 47*, J.A.

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for study in this case, seven made over 80 % of their sales to consumers (the eighth center made less than half of its sales to consumers). *Id. 60-61*, J.A. at 58. As might be expected, the proportion of its sales force devoted to dealer and end-user sales at each of the eight distribution centers roughly mirrors the percentage of dealer and consumer sales at the respective center. *Id. at 77-82*, J.A. at 60a.

In part because Boise's distribution centers are, for all practical purposes, autonomous, the marketing functions that Boise performs for manufacturers in its capacity as a dealer are similar to those performed by other dealers in the industry. *Id. 522*, J.A. at 142. For instance, like most dealers, the Boise distribution centers with substantial commercial sales tend to stock only those products that are frequently purchased. *Id. 70*, J.A. at 60. In addition, based on his review of the 23 selected dealers, the ALJ found that the dealers, like Boise, incur storage and resale expenses that reduce manufacturers' inventory costs, distribute catalogs that they produce or purchase from wholesalers, and employ outside salespeople to make regular calls on accounts. *Id. 503-14*, J.A. at 139-40. While noting these similarities, the ALJ did not expressly find that any of the individual dealers provide the quality and quantity of services that Boise does.

[8] Specifically, Rediform extends dealers a 50 % discount and wholesalers a 50-20 % discount. ALJ Findings 116-17, J.A. at 67-68. Sheaffer Eaton gives dealers a 50 % discount, contract stationers a 50-10 % discount, and wholesalers a 50-20 % discount. *Id. 165-70*, J.A. at 77. On its "visible equipment" line, Kardex grants dealers a 40 % discount, "key" dealers (those with annual purchases of $ 5,000) a 50 % discount, and wholesalers a 50-10 % discount. *Id. 224-26*, J.A. at 85. On its "insulated files" line, Kardex extends dealers a 40-5 % discount, "key" dealers (those with annual purchases of $ 15,000) a 50 % discount, and wholesalers a 50-10 % discount. *Id. 227-30*, J.A. at 85-86. Boorum & Pease gives dealers a 50 % discount, contract stationers a 50-10 % discount, and wholesalers a 50-10-5 % discount. *Id. 261-64*, J.A. at 91. Bates extends discounts to dealers between 40 % and 50 % (based on quantity purchased) on most of its products, and contract stationers and wholesalers a 50-10 % discount on those items. ***Id. 293-300***, J.A. at 96-97. Finally, Master Products gives dealers product- and quantity-specific discounts ranging from 40 % to 60 %, and wholesalers product-specific discounts ranging from 50 % to 60 %. ***Id. 343-345***, J.A. at 104-05.

[9] Although Boise played no part in instituting this pricing system, the ALJ concluded that Boise knew or should have known that the price disparity existed. *Id. 368-69, 383*, J.A. at 109, 112. Among other evidence of such knowledge were schedules in Boise's files documenting the size of dealer discounts and the reporting of dealer discounts in Boise's Buyer's Guide. *Id. 148-49, 151, 195, 241, 243, 280-82, 326, 363-64*, J.A. at 75, 82, 88, 94, 102, 108. In addition Boise's salespeople and those of the selected dealers call on many of the same accounts, and Boise acquired dealers that had previously purchased at the less favorable dealer discounts. Moreover, Boise received complaints from disfavored dealers, *id.*, 36, J.A. at 52-53, and knowledge of the range of discounts is common within the industry. *Id. 194, 276-78*, J.A. at 82, 93-94. And, of course, Boise knew that the manufacturers classify it as a wholesaler for purposes of wholesale discounts even as to goods that Boise resells to end-users. *Id. 367*, J.A. at 109. Based on these findings, the Commission determined that Boise had the requisite knowledge that its receipt of the discounts was not cost-justified.

at 55. Boise's economic expert, Dr. Kenneth Elzinga, *see supra* note 6, interpreted this upward trend as indicating an absence of anti-competitive forces operating in the market. Transcript at 6103-6114.

More relevantly for Robinson-Patman purposes, an analysis of the financial condition of 18 of the selected dealers revealed **[**23]** that *all 18 had enjoyed an increase in sales during the period in question*. Phoenix-based Wist Supply & Equipment Co., for instance, increased total sales from $ 1.6 million in 1977 to $ 4 million in 1980. Boise's Exhibits 300, 804. Yorkship Business Supply of Cherry Hill, New Jersey similarly increased sales from $ 1.3 million in 1977 to $ 3.5 million in 1980. *Id.* Pomerantz & Company in Philadelphia increased sales from $ 14.6 million in 1977 to $ 36.3 million in 1980. *Id.* Overall, the average annual growth and increase in gross profits of the dealers from 1977 to 1980 was in excess of 22 %. *Id. 431*, J.A. at 121-22. What is more, this substantial growth occurred during a period of recession in the economy. ALJ Finding 431-32, J.A. at 121-23.

Along with their growth, the selected dealers' credit ratings with Dun & Bradstreet were, on the whole, quite favorable. *Id. 432*, J.A. at 122-23. And those companies that experienced a change in credit rating from 1977 to 1980 generally improved, again in the teeth of a recessionary economy. *Id.*, J.A. at 122-23.

Data compiled by the National Office Products Association, the major industry trade association, revealed **[**24]** that in each year from 1967 to 1980, dealers' median net profit before taxes as a percent of sales ranged from 3.0 % to 3.9 % (except in 1974, when the median net profit was a heftier 4.3 %). *Id. 423-29*, J.A. at 120-21. According to Mr. Ronald Rowe, the Commission's accounting expert, the median net profit for the selected dealers ranged from 2.3 % to 3.5 % for the years 1976 to 1981. *Id. 430*, J.A. at 121. From 1976 to 1979, Boise's combined wholesale and retail median net profit before taxes as a percent of sales ranged from 3.1 % to 5.6 %. *Id. 87*, J.A. at 62. This return on sales, as Boise's 1979-83 Business Plan explained, was comparable to the leading industrial stationers in the industry. *Id.*, J.A. at 62.

C

In addition to this undisputed evidence of competitive health of the selected dealers and in the industry as a whole, there is another aspect of this case that is relevant to resolution of this controversy and unusual in the context of a Robinson-Patman proceeding -- a virtually complete absence of sales lost to Boise by the selected dealers traceable to the price differential caused by wholesale discounts to Boise. Although the Commission aggregated **[**25]** 23 dealers, each of which carries hundreds, and in some cases thousands, of accounts, the record shows only 162 specific accounts identified by the dealers as lost to Boise. Commission's Brief at 33. This stability of dealer accounts is of especial note in an industry where switching of accounts is common. *Id. 422*, J.A. at 120. Significantly, none of the selected dealers that lost accounts in whole or in part to Boise was able to conclude that the losses were due to the fact that Boise received a greater discount from the six manufacturers. *Id. 407*, J.A. at 117.

To be more specific, the Commission's selected dealers testified that they lost accounts to Boise, in whole or in part, due to Boise's lower prices, better service, or a combination of these factors. *Id. 384*, J.A. at 112-13. For example, Victoria Station, a restaurant chain headquartered near San **[*1136]** Francisco, switched from one dealer, Gilbert-Clarke, to Boise because of the latter's pricing and services. *Id. 390*, J.A. at 114. The City of Seattle switched the majority of its business from the incumbent dealer to Boise because of Boise's sophisticated invoicing system, depth of inventory, high fill **[**26]** rates, and usage reports. *Id. 393*, J.A. at 114. G. E. Stimpson, another dealer, lost the account of one valued customer to Boise's lower prices. *Id. 396*, J.A. at 115. New England Telephone switched from Union Office Supply to Boise because the latter had a computerized backup system that Union did not possess at the time. *Id. 398*, J.A. at 115. *See also id. 385-406*, J.A. at 113-17.

In addition to the small number of lost accounts, the record shows many instances where accounts shifted not because of price or service, but because sales representatives shifted. *See, e.g.*, Transcript at 3855-56, 3276-78, 2498-99, 2527, 2544-45, 2953, 2041, 2071, 3467, 2444-45, 3170-74, 3188, 3402-03. The ALJ quoted Dr. Elzinga's testimony in this respect:

> If you were trying to develop a theory of account shifting in the office products industry, probably the most robust theory you could develop is that accounts shift when salespeople shift. Over and again, as I am reading testimony about account shifting, I find that the real reason the account shifted is because a salesperson left. That is, Boise hires a salesperson away from Yorkship, and they get some accounts from Yorkship. **[**27]** Although in that case, if you read on, you find later Yorkship gained some of those back.
> . . . . It is so common in this industry I think they have a term for it. It is called following; the salespeople have a following. The thing that struck me is the amount of evidence that seemed unambiguous of an account shifting that was explicable not by lower prices, not by better service, but by the simple pristine fact that the salesperson shifted.

ALJ Finding 434, J.A. at 123a-124 (quoting Transcript at 6118-19) (footnote omitted).

Further diluting the Commission's attempted showing of diverted sales, *Boise introduced considerable evidence of sales that it had lost to the selected dealers*. The ALJ, moreover, made specific findings to this effect. For instance, Boise's Philadelphia distribution center lost four large accounts in 1982 to dealers that offered lower prices. *Id. 418*, J.A. at 119. Likewise, Boise's Boston distribution center lost several accounts to Monroe, one of the selected dealers, because Monroe offered significantly lower prices. *Id. 420*, J.A. at 120. Seven accounts switched from Boise's Phoenix distribution center to Wist due to Wist's lower prices. **[**28]** *Id. 421*, J.A. at 120.

In addition to evidence of accounts actually lost, Boise identified many instances where lower prices were offered by the selected dealers and their competitors. *Id. 409*, J.A. at 117. One of Boise's Washington, D.C. salespersons, for example, testified that a dealer's price list obtained from one of Boise's customers revealed that the dealer was offering prices on average 30 % lower than those offered by Boise. *Id. 412*, J.A. at 118. In the same vein, a sales representative from Boise's Salt Lake City distribution center testified that although he had submitted pricing to two school districts which was only 4 % to 5 % over Boise's costs, Boise received only 10 % to 20 % of the districts' business. *Id. 414*, J.A. at 119. *See also* *id. 410-421*, J.A. at 118-120.

The ALJ quoted Boise's expert's analysis and conclusions in this regard:

> The evidence that I have studied and reflected on with regard to lost accounts persuades me that you simply cannot look at that evidence and conclude that injury to competition has occurred or is occurring here.
>
> In fact the thing that really strikes me -- and here again I speak as an economist -- is you **[**29]** look at these [selected] dealers who . . . have literally hundreds and hundreds and in some cases thousands of accounts, and when they are asked to give illustrations and to document the accounts they have lost to Boise, they are able to come up with a handful at **[*1137]** best. I was really struck at the tiny number, in fact.
> In fact, it was in a way even troubling to me as an economist that there were not more accounts being diverted around just through normal market processes. I would have expected much more just through almost random competitive shocks.
> . . . The striking thing to me is how few accounts were lost, and then when you start to get into the record as to the precise facts about those purportedly lost accounts, I find over and again that it is not clear to me they were lost to Boise, much less were they lost to Boise because Boise buys products at lower prices from manufacturers.

Id. 433, J.A. at 123-23a (quoting Transcript at 6119-22).

IV

Notwithstanding his findings (1) that the selected dealers were competitively healthy and (2) that "accounts lost to Boise were counter-balanced by accounts which Boise lost to the dealers," the ALJ **[**30]** concluded that that evidence went only to the price discrimination's lack of effect on market structure. J.A. at 153-54. By virtue of that characterization, the ALJ determined that market-structure evidence was by its nature inadequate to rebut the inference of competitive injury raised by the sustained and substantial price discrimination that Boise received. J.A. at 154-55; *see* *FTC v. Morton Salt Co., 334 U.S. at 46-47*. The ALJ stated his position in the following way: "It is inconceivable that the substantial and sustained price differences documented in this record can have had no substantial effect on the ability of the dealers to compete with Boise." J.A. at 155.

Having determined that a *prima facie* violation of section 2(f) existed, the ALJ went on to conclude that the discounts were not practically available to the selected dealers, J.A. at 155-57, and that Boise knew, or should have known, that the discriminations in price were neither cost-justified nor given in good faith to meet competition, J.A. at 161-70. In addition, the ALJ recommended that the Commission adhere to its decision in *Mueller*. J.A. at 159-61. On the possibility that the Commission **[**31]** would reembrace the *Doubleday* rule, the ALJ determined that, because Boise did not perform services not performed by the selected dealers, Boise did not qualify for that "defense." J.A. at 161.

The Commission heard oral argument on the case in June 1984, and in February 1986 issued its order and opinion adopting and affirming the ALJ's findings of fact and conclusions of law. *Boise Cascade Corp.*, FTC No. 9133 (Feb. 11, 1986), J.A. at 174 [hereinafter *Commission Decision*]. In its opinion, the Commission expressly relied on *Morton Salt's* inference that substantial price discrimination between competing purchasers over time causes, or tends to cause, competitive injury. *Id. at 187*. In doing so, the Commission expressly recognized that the inference "'may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.'" *Id.* (quoting *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983))*. Specifically, the Commission suggested that the *Morton Salt* inference could be overcome by a showing that market conditions unrelated to the price **[**32]** discrimination explained the lost accounts or shifted sales or the effects on the disfavored competitors (presumably lost profits or market share). *Commission Decision*, J.A. at 191.

The Commission nonetheless determined that Boise's showing of dealer-specific and industry-wide competitive health, in conjunction with the relative absence of lost sales, "fails to rebut the 'self-evident' inference of causation." *Id. at 191-92*. Indeed, with virtually no elaboration, the Commission concluded that Boise's elaborate evidentiary showing did "not address the causal connection at all." *Id. at 191*. The FTC emphasized that under Robinson-Patman actual injury to competition need not be shown, but only "'a reasonable possibility that a price difference may harm competition.'" *Id. at 192* (quoting *Falls City, 460 U.S. at 434-35*).

[*1138] Having found the two essential elements to a *prima facie* case (price discrimination and resulting competitive injury), the Commission concluded that Boise did not satisfy any of the defenses, statutory or Commission-fashioned, to Robinson-Patman liability. *Id. at 204-18*. In addition, for reasons that we will detail **[**33]** shortly, the Commission decided that *Doubleday* should not be revitalized and, accordingly, reaffirmed the anti-Doubleday holding of *Mueller. Id. at 193-204*. [10]

V

The Commission's decision confronts us with a difficult issue arising under a statute that does not represent the highwater mark of skillful draftsmanship. As Justice Frankfurter well put **[**34]** it in speaking for the Court a generation ago in *Automatic Canteen Co. v. FTC, 346 U.S. at 65*, "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." More recently, Justice Powell, joined by Justices Brennan, Marshall and Blackmun, decried judicial interpretations and applications that "increase[] the uncertainty inherent in the generalities of the Robinson-Patman Act." *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 570, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)* (dissenting opinion).

The need for clarity, obviously a desideratum for any body of law, has been evidenced by judicial recognition that Robinson-Patman is not to be viewed as an act of Congressional schizophrenia, an anti-competitive island situated in an otherwise turbulent sea of pro-competitive efficiency and maximization of consumer welfare, the hallmarks of the Nation's antitrust laws. The Supreme Court warned early on of the dangers of doctrinaire interpretations of

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[10] Concluding that Boise's receipt of wholesale discounts on goods it resold to end-users violated section 2(f), the Commission fashioned the following order: that Boise "cease and desist from directly or indirectly inducing, receiving or accepting from any seller a net price that Boise Cascade knows or has reason to know is below the net price at which office products of like grade and quality are being offered or sold by such seller to other purchasers with whom Boise Cascade is competing in the resale or distribution of said office products to end-users." Final Order, *Boise Cascade Corp.*, FTC No. 9133, at 2 (Feb. 11, 1986), J.A. 220, 221.

Robinson-Patman that could lead to "conflict with the purposes of other antitrust legislation." *Automatic Canteen, 346 U.S. at 63*. That warning has been **[**35]** repeated in more recent times. *See also* *United States v. United States Gypsum Co., 438 U.S. 422, 450-51, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*; *Great A & P Tea Co., 440 U.S. at 80*.

The imprecision infecting the statutory language has frequently led courts construing the measure to repair to the backdrop against which the Robinson-Patman amendments were crafted in 1937. For it is in its genesis that the purposes animating Congress in passing this ambiguous statute can best be discerned and then borne carefully in mind in contemporary judicial applications.

The Supreme Court has summarized the statute's background in the following way:

> 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 that threatened the existence of small independent retailers.

Great A & P Tea Co., 440 U.S. at 75-76. Robinson-Patman was thus aimed at protecting small retail businesses against favoritism toward their larger competitors, a threat seen as eventuating from an exception carved out by the original Clayton Act, passed in **[**36]** 1914, permitting discriminations in price based on "differences in the grade, quality or *quantity* of the commodity sold." Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914), *15 U.S.C. § 13 (1982)* (emphasis added). Robinson-Patman, in short, sought to remove the competitive advantage conferred solely by virtue of the size of the buyer's appetite. "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because **[*1139]** of the large buyer's quantity purchasing ability." *Morton Salt, 334 U.S. at 43*. *See also* *Falls City, 460 U.S. at 436*; F. Rowe, Price Discrimination Under the Robinson-Patman Act 3-23 (1962) [hereinafter "Rowe"]. [11]

[37]** The Supreme Court addressed early on the operation of Robinson-Patman in the paradigm setting envisioned by Congress -- a quantity discount to large buyers. In *Morton Salt*, the Court was confronted with a salt manufacturer's discount pricing system under which only the five largest retail grocery chains in the country were able to buy enough salt to qualify for the manufacturer's most lucrative discount. The Court found that competitive injury, a prerequisite to liability under section 2(a) of Robinson-Patman, [12] **[**38]** was "self-evident" simply by virtue of the longstanding and substantial price disparity:

> Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay [Morton Salt] substantially more for their goods than their competitors had to pay.

Morton Salt, 334 U.S. at 46-47. [13]

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[11] This is not to say that Robinson-Patman applies only as to cases involving large buyers. The Supreme Court has held squarely to the contrary. *FTC v. Sun Oil Co., 371 U.S. 505, 522, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*; *see also* *Falls City, 460 U.S. at 436*.

[12] "Competitive injury," as used throughout our opinion, refers to the broader definition of injury under the Robinson-Patman Act. As the Supreme Court established early on, "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Products Co. v. FTC, 324 U.S. 726, 742, 89 L. Ed. 1320, 65 S. Ct. 961 (1945)*. *See also* *Falls City, 460 U.S. at 434-35* (Commission "must show . . . a reasonable possibility that a price difference may harm competition.").

In recent years, the Supreme Court has reaffirmed the viability of the *Morton Salt* inference of competitive injury arising from a substantial price difference existing over time. It has, moreover, declined to cabin the *Morton Salt* inference to "cases involving 'large buyer preference or seller predation.'" *Falls City, 460 U.S. at 436*. *See also J. Truett Payne Co., 451 U.S. at 561*. To the contrary, the *Falls City* Court upheld application of *Morton Salt's* rule to a discriminatory pricing system based upon the geographical location of the buyer. (In that case, Indiana distributors of Falls City beer were charged higher prices than Kentucky beer distributors.)

The *Morton Salt* inference is thus alive and well in the law. The case before us, however, presents the **[**39]** Commission's modern-day invocation of that inference in the setting of a pricing system which is entirely different from quantity and regional discounts. [14] For as we have seen, the *Morton Salt* inference has been applied in the case at hand to a system of wholesale discounts. (The Commission uses the term "functional discount" generically to describe the wholesale discounts at issue here. We will therefore proceed to use these terms interchangeably. *Cf. supra* text at 1132.) Acting Chairman Calvani, in writing for the Commission, succinctly described the legislative landscape as to wholesale functional discounts: "The Act does not expressly address functional discounts, and the legislative history is inconclusive." J.A. at 194. Thus, the imprecise statutory language of which the Supreme Court has complained, **[*1140]** *see supra* text slip op. at 22-23, beclouds the area of functional discounts as well.

[40]** The rather chaotic state of the law as to functional discounts was aptly summarized by then-Professor Calvani who, as fate would have it, was destined in another capacity to author the decision now before us:

> The uncertain status of functional discounting is primarily due to the failure of Congress, the Federal Trade Commission, and the courts to give explicit and independent recognition to the practice and to define with any modicum of specificity its permissible contours. The result of this failure of recognition has been a lack of focus upon the validity of the functional discount which, in turn, has left the law in a state of confusion, causing often legitimate practices to be condemned.

Calvani, Functional Discounts Under the Robinson-Patman Act, 17 Boston C. Indus. & Com. L. Rev. 543, 543-44 (1976).

Eloquent attestation as to the unsettled nature of the law of functional discounts is found in events surrounding the complaint that brought this case to life. In considering whether to issue a complaint, the Commission divided three to two in favor of sending the staff forward, with Commissioner Clanton and now-Dean Pitofsky in dissent. Dean Pitofsky set forth **[**41]** his views in a thorough opinion, which opened with the following warning:

> The Commission today has issued an extremely unwise Robinson-Patman complaint. I would not ordinarily dissent from the issuance of a complaint (and certainly not at such length), but this one has such a profound anticompetitive potential that it ought not to go by without comment.

Complaint, *Boise Cascade Corp.* (dissenting statement of Comm'r Pitofsky), J.A. at 12.

Further evidencing the divided state of the Trade Commission's house was its order directing the administrative law judge to receive evidence and enter findings sufficient to dispose of the case under two warring doctrines articulated in the corpus of FTC law. As we saw above, *see supra* text slip op. at 5, the earlier doctrine was the *Doubleday* rule, first clearly enunciated in *Doubleday & Co., 52 F.T.C. 169*, involving a publishing company's disparately favorable discounts bestowed upon three large jobber-distributors. To remind the patient reader, the *Doubleday* rule briefly stated is as follows: no injury to competition is occasioned by a buyer's receipt of a discount

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[13] The Court in *Falls City* expressly referred to the forbidden form of discrimination as one continuing "over time." *460 U.S. at 435*. A contrary approach would suffer from the danger of rigidly forbidding market adjustments to changing or temporary conditions.

[14] With all respect, this is scarcely a paradigmatic Robinson-Patman Act case, contrary to what our colleague in dissent argues at such length. The Commission recognized at the creation of this long-lived proceeding that it was venturing into relatively new territory, namely into the area of dual distribution. This has been a hard fought venture by the Commission, with powerful and eloquent voices, such as that of now-Dean Pitofsky, railing against what some deem to be a quixotic application of Robinson-Patman. This case is simply not of the lineage of *Morton Salt*.

from a seller-supplier if that **[**42]** discount simply compensates the buyer for additional useful services it performs for the seller-supplier's benefit.

Doubleday recognized that the world of commerce, like the rest of life, is not simple. As complex distribution systems developed, the lines along the distribution chain became blurred. No longer was there a straightforward, three-tiered structure of manufacturer-wholesaler-retailer. In *Doubleday*, then-Chairman Howrey commented on this development as follows:

> More complex types of distributors . . . were beginning to dominate our market structure-distributors whose functions ranged from only partial performance of the wholesale function to those who were almost wholly integrated, that is, who were both wholesalers and retailers and often consumers as well.
>
> Under these conditions classification of buyers became unprecise and shifting in meaning. Wholesalers and retailers no longer comprised clear-cut separate links between the producer and the ultimate consumer, each responsible for a clearly defined set of duties. Marketing functions became scrambled, with many permutations and combinations. . . . The number of patterns was legion and diverse.

[43]** *Id. at 208*. This presumably beneficial dynamism in the marketplace was threatened by what Chairman Howrey viewed as "a suspended state of confusion" in the law, which did not recognize that distributive activities traditionally carried out by sellers could often efficiently be shifted to buyers, in return for which the buyers could legitimately secure compensating discounts from the sellers. *Id.* And thus to bring clarity into this chaotic state of affairs, **[*1141]** Chairman Howrey posited the following principle:

> In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher prices. . . . Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services.

Id. at 209. Chairman Howrey condemned as arbitrary an exclusionary rule that would forbid an *integrated* wholesaler from proving that it was indeed performing the wholesaling **[**44]** function. The matter, rather, should "be put to proof." *Id.* The evidentiary burden on the integrated wholesaler was not, the Chairman warned, to be insubstantial:

> The Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount . . . should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it.

Id.

But as befits an imprecise statute which reflects, in Dean Pitofsky's words, a "tension between the philosophies of the Sherman Act and the Robinson-Patman Act -- a conflict created by Congress and left unresolved on the FTC's doorstep many years ago," Complaint, *Boise Cascade Corp.*, (dissenting statement of Comm'r Pitofsky), J.A. at 12, Chairman Howrey's suggested approach did not find fertile soil even within the offices of his fellow Commissioners. Foreshadowing what was destined to be the second competing approach, the *Mueller* rule, Commissioner Secrest in writing separately in *Doubleday* took issue with the Chairman's **[**45]** thinking. Commissioner Secrest advocated the approach adopted by the hearing examiner, who refused to consider evidence by three large book jobbers that the discount extended to them was offset by the costs of assuming wholesale functions which Doubleday would otherwise have to perform. In Commissioner Secrest's view, a discount is improper to the extent it compensates a buyer for services which, albeit helpful to the seller, also redound to the *buyer's* own benefit. Neither altruism nor servility were at work in the marketplace; the integrated buyer was out for its own welfare, even if its activities did in fact further the seller's commercial purposes. Calling for simplicity in enforcement, Commissioner Secrest laid down a warning if Chairman Howrey's approach were embraced:

> Enforcement of the law would be extremely difficult if not impossible, if, in each 2(a) case, the Commission were required to divide a common service which may benefit both the buyer and the seller. Each case would require an operation as delicate and difficult as the separation of Siamese twins.

52 F.T.C. at 211 (Comm'r Secrest, concurring in result).

This contrary (soon **[**46]** to be called *Mueller*) principle was thus informed by both instrumentalist and conceptual concerns: the *Doubleday* rule would be an immense headache to administer, and the rule would justify a discount where the buyer, by providing such services, was improving its own competitive position with other buyers. And this latter reality raised the spectre of Robinson-Patman's core concern for little fish competing with whales (or at least larger fish). *Doubleday's* rule, in short, "would undoubtedly give the larger buyer a price advantage in the resale of the seller's goods." *Id.* This same concern was echoed by Commissioner Mead, who likewise took issue with Chairman Howrey's approach:

> Whether or not [the Chairman's view] is good economics, I am not prepared to say. . . . [But] it is not the law as expressed in the Robinson-Patman Act. . . . [It] paves the way for the ultimate annihilation of small retail dealers who are unable, by reason of their inability to perform the same marketing functions as **[*1142]** their larger dual-functioning competitors to successfully compete with them.

Id. at 211-12 (Comm'r Mead, concurring in result).

[47]** The cacophony occasioned by *Doubleday* was short-lived. For in *Mueller Co., 60 F.T.C. 120*, the Commission squarely and unanimously rejected *Doubleday's* treatment of functional discounts. The *Doubleday* approach, in the Commission's later view, "ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller." *Id. at 127*. In the course of its decision, the Commission overturned the hearing examiner's finding that there was a failure of proof as to competitive injury. The Commission went on to hold in broad terms that a Robinson-Patman Act violation would lie even if the challenged discount (1) had been carefully limited to specific goods that Mueller's favored ("limit") jobbers had actually warehoused and (2) at most merely covered the jobbers' increased costs incurred by virtue of the warehousing services performed on those specified goods:

> These findings mean only that [Mueller] has subsidized in whole or in part the "limit" jobbers' warehousing of certain products. . . . By doing so, [Mueller] has given this class of customers a **[**48]** substantial competitive advantage in the resale of such products. In this connection, the items on which the higher discount is given are . . . the smaller, most commonly used products -- those which are needed most frequently by the ultimate user, often to meet an emergency. That a jobber who has products of this type on hand is in a more favorable position than the jobber who does not is so obvious as to require little comment.

Id. at 128-29.

The Commission did not stop at this conceptually pure juncture, however. It went on to explore at some length the darker side of Mueller's purportedly benign regime of functional discounts. In contrast to Robinson-Patman's aim at securing a "level playing field" for all players, large and small, Mueller had in fact been bestowing the extra discounts on large jobbers with which it had longstanding relationships.

As so frequently happens in antitrust litigation, a documentary "smoking gun" found its way into evidence in *Mueller* indicating that the discount pricing system was not founded solely on a cold, economically rational decision to reimburse the favored jobbers for distributive functions performed by **[**49]** them. The tell-tale document in that case was a "get lost" letter from Mueller to one of its second-class ("regular") jobbers who sought to move into the more desirable ranks of Mueller's first-class ("limit") jobbers. The regular jobber had had the effrontery to request the higher discount because the ambitious jobber was planning "to stock several items which [the jobber maintained] should qualify [it] as a stocking distributor [or "limit" jobber]." *Id. at 129*. Mueller would have none of it.

> We cannot see our way clear to change your 15 % discount, for we do not have a 20 % discount. We do have a greater one, however it applies only to those large stocking jobbers who place hundreds of orders with us throughout the year, totaling thousands of dollars.

Id. To leave no lingering doubts in the mind of the aspiring second-class jobber, the powers-that-be at Mueller administered the follow *coup de grace*:

> These old established jobbers, who have been carrying MUELLER goods in large quantities for a number of years, are entitled to this protection, and until there might be some major change in your State and surrounding states, it will **[**50]** be necessary to continue the same differential that we have been allowing you.

Id. at 130.

Thus, upon analysis, Mueller's two-tiered structure of jobbers smacked of the regime of favoritism that had been condemned by the Supreme Court in *Morton Salt*. After all was said and done, Mueller was playing favorites based upon such factors as the volume of jobber purchases and whether the jobber was a member of the exclusive club, as it were, of "old established jobbers." **[*1143]** Mueller's distribution system had succumbed to calcification.

Examination of this darker side of *Mueller* appears to bring the case closer to the ultimate holding in *Doubleday*. For while in the latter case the publishing company had won the battle over the principle of law, the victory proved empty as Doubleday lost the war. The Commission concluded that Doubleday, like Mueller and Morton Salt, was just another in a long line of manufacturers who play favorites among distributors with anticompetitive consequences of the sort that Congress intended in Robinson-Patman to condemn. Doubleday had, upon analysis, stacked the distribution deck in favor of a very limited class, **[**51]** "the so-called 'Big Three' jobbers," *52 F.T.C. at 206*, who simply "treated the higher discounts as price reductions and not payments or allowances for services rendered." *Id. at 209*.

So it is that *Mueller* and *Doubleday*, the two warring rules spawned almost a generation ago by the Commission, shared a salient characteristic with *Morton Salt* and, years later, *Falls City*. In each instance, a manufacturer or supplier's idiosyncratic, non-economically justified pricing regime favored certain identified distributors (big distributors in *Morton Salt, Doubleday* and *Mueller*; home-State, or more precisely, non-Indiana distributors in *Falls City*), with nothing but favoritism -- the evil sought to be remedied through the Robinson-Patman Act -- to explain the disparate treatment.

VI

This case loomed at the Commission as the test of whether *Mueller* or *Doubleday* would survive in the present generation. The ALJ, whose thoroughness and care in this proceeding we would be remiss not to acknowledge, was thus presented with the unenviable task of trying two cases -- one under *Doubleday's* teaching and the other under the **[**52]** starkly different approach enunciated by *Mueller*. The unorthodoxy of this two-pronged directive from Commission headquarters did not escape the Commissioners' notice. "The majority of the Commission today issues a complaint proceeding on two mutually exclusive, inconsistent theories of violation of the Robinson-Patman Act," was the apt description penned by Commissioner Clanton in dissent. Complaint, *Boise Cascade Corp.* (dissenting statement of Comm'r Clanton), J.A. at 11; *see also id.* (dissenting statement of Comm'r Pitofsky), J.A. at 21-22.

At day's end, as we have seen, the Commission (affirming the ALJ) embraced *Mueller*. And thus the case is now heralded as a battle of the Robinson-Patman titans, of *Mueller* versus *Doubleday*, with eminent authority summoned to support each of the two competing approaches. But we see a preliminary difficulty that precludes our declaring in this case whether the champions of *Mueller* or those of *Doubleday* should be the ultimate winners in the long-lived struggle over the application of Robinson-Patman to dual distributors in modern-day distribution systems. And that has to do with the threshold question whether **[**53]** *in this case* competitive injury, even as expansively defined under Robinson-Patman, *see supra* note 12, has been shown. Competitive injury, which no one disputes is the condition precedent for establishing violations of the Act, is a critical element. For, as we have seen, Robinson-Patman ***HN7***[] is directed to the preservation of competition. Indeed, the terms of the statute itself mandate that, in order for a price differential to be unlawful, it must tend "*to injure, destroy, or prevent competition*." *15 U.S.C. § 13(a)*. *Cf. also* Foremost Pro Color, Inc. v. Kodak Co., 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied 465 U.S. 1038, 79 L. Ed. 2d 712, 104 S. Ct. 1315 (1984)*; Whitaker Cable Corp. v. FTC, 239 F.2d 253, 256 (7th Cir. 1956), *cert. denied 353 U.S. 938, 1 L. Ed. 2d 761, 77 S. Ct. 813 (1957)*. Injury to competition is thus the name of the Robinson-Patman game.

In its opinion, the FTC waved aside substantial evidence (1) that competition among dealers generally was healthy, (2) that the selected **[**54]** dealers singled out for FTC examination were thriving, and (3) that this happy picture of prosperity was apparently unclouded by instances of diverted **[*1144]** sales attributable to the challenged discounts. The Commission flatly concluded that this entire body of evidence was *irrelevant*. Indeed, in the Commission's view, for reasons that we fail to discern and the FTC failed to articulate, this evidence did "not address the causal connection [between the price differentials and competitive injury] at all." *Commission Decision*, J.A. at 191. This cannot be. In our view, the Commission's conclusion that Boise's dealer-specific evidence was irrelevant to the inference of competitive injury is wrong as a matter of law.

It is clear that *Morton Salt's* inference of competitive injury "may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits," *Falls City, 460 U.S. at 435*. In reason, *the inference can also be overcome by evidence showing an absence of competitive injury within the meaning of Robinson-Patman*. That is to say, **[**55]** ***HN8***[] a sustained and substantial price discrimination raises an inference, but it manifestly does not create an irrebuttable presumption of competitive injury. Specific, substantial evidence of absence of competitive injury, *see supra* note 12, is, in our view, sufficient to rebut what is, after all, only an inference. The Commission, in effect, employed the *Morton Salt* inference to presume competitive injury conclusively in this case, and would only treat as relevant evidence "breaking the causal connection" between that assumed injury and the price discrimination to rebut the inference. This approach defies both logic and the import of *Morton Salt* that the inference of injury is rebuttable; for if the respondent's evidence demonstrates that there is no competitive injury (or reasonable possibility of competitive injury) to begin with, then evidence breaking the causal connection is obviously impossible to adduce. There is, under those circumstances, no causal connection to break.

As a result of its interpretation of Robinson-Patman, the Commission found it unnecessary to sift and weigh Boise's evidence of absence of injury. All those days of trial before the ALJ were, it seems, **[**56]** largely for naught. In reaching this odd result, the Commission simply failed to determine whether Boise's evidence demonstrated that no injury or "reasonable possibility" of competitive injury existed. *See* Falls City, 460 U.S. at 434-35.

First. Important among the salient facts that the Commission chose to ignore was the ALJ's finding that the selected dealers were not wallowing in a hopeless or deteriorating environment. Quite to the contrary, as we have already recounted, the ALJ found that all selected dealers for which data was available enjoyed an increase in sales and gross profits in excess of 22 % annually during the period in question, despite the recessionary condition of the economy. ALJ Finding 431, J.A. at 121-22. Indeed, Judge Parker observed that various indicators showed high profitability and financial health on the part of the selected dealers. *Id. 433-34*, J.A. at 123-24. Although we need not decide the matter, this tends, if anything, to point to an absence of "lost profits" of the sort described in *Falls City* as one possible manifestation of injury to competition; accordingly, this evidence merited consideration by **[**57]** the Commission rather than the out-of-hand dismissal that it received.

There is yet another portion of the record relating to profitability left unexamined by the Commission and, in our view, deserving of attention in reaching a reasoned result. As computed by the Commission's accounting expert, Mr. Rowe, the selected dealers' median net profit before taxes as a percent of sales over the years 1976 to 1981 ranged from 2.3 % to 3.5 %. *Id. 430*, J.A. at 121. Their net profit was thus apparently lower than those of dealer-members of NOPA, whose net profit ranged from 3.0 % to 3.9 % from 1967 to 1980. *Id. 423-27*, J.A. at 120-21. *See supra* text slip op. at 16. Although these statistics pose obvious comparative problems (in light of the fact that they are spread across different years and were computed by different entities), this *apparent* discrepancy in profitability obviously deserved consideration. But it received none. Likewise, the Commission failed to **[*1145]** analyze the relationship of Boise's higher net profit (which, of course, reflected both its sales as a wholesaler and a dealer) to that of the selected dealers. *See supra* text slip op. **[**58]** at 16.

In addition, the evidence, as found by the ALJ, failed to demonstrate "displaced sales," another form the *Falls City* Court indicated injury could take. The ALJ found that switches of accounts from one supplier to another were "not uncommon"; to the contrary, they were the order of the day. *Id. 422*, J.A. at 120. *See supra* text slip op. at 17. While on the one hand twenty-one of the twenty-three dealers testified that they had lost accounts to Boise's lower prices or better service in recent years, ALJ Finding 384, J.A. at 112-13; *see also* *id. 385-406*, J.A. at 113-17, the phenomenon of lost accounts was very much a two-way street. As the ALJ extensively recounted, Boise also lost accounts and it too was unable to meet competitors' prices in some instances. *See* ALJ Finding 408-21, J.A. at 117-20. (The list is long, and as we have provided various examples, *see supra* text slip op. at 18, we will avoid the temptation common in antitrust cases of proliferating the record. *Automatic Canteen, 346 U.S. at 65-66* & n.3.) Indeed, considered together, the number of accounts that switched from the selected dealers to Boise was quite small. *See* **[**59]** *supra* text slip op. at 17-18. And the proportion of switched accounts to a dealer's total accounts was strikingly low. Whereas a typical dealer might have a thousand accounts (or more), only a handful of accounts were shown to have switched. On top of that, the reasons for the switches were manifold. The following finding by Judge Parker makes the key point:

> None of the selected dealers who lost accounts in whole or in part to Boise were able to conclude that the losses were due to the different prices charged them and Boise by the six manufacturers (citations omitted).

Id. 407, J.A. at 117. In short, *the switches to Boise apparently cannot be explained as sales diverted through operation of the wholesale discount*. [15]

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[15] Notwithstanding this welter of dealer-specific evidence marshalled by Boise and painstakingly sifted by Judge Parker, the Commission apparently viewed Boise's efforts as an attempt to muddy the Robinson-Patman waters by implanting market-structure analyses in alien legal soil. To be sure, Judge Parker made pertinent and seemingly well-founded observations as to the competitive health and vibrancy of the office products industry at large. Here is one such point:

> The battle between dealers in the office-products industry is highly competitive and it is inevitable that when Boise competes with the selected dealers it will lose accounts to them.

Id. para. 408, J.A. at 117. And it is also clear that Boise argued in favor of a market-structure analysis under Robinson-Patman.

But that is not to say that Judge Parker found only evidence going broadly to the structure of the industry and the competitive health of that industry overall. There was in this respect no commingling of market-structure analysis appropriate under other provisions of the Clayton Act, such as section 7, *15 U.S.C. § 18 (1982)*, but, as the Commission claims, off-target as to Robinson-Patman's less global perspective. The ALJ's findings, set forth in a thorough and careful 131-page opinion, are replete with the most specific, detailed facts about the twenty-three selected dealers and the six representative manufacturers, not just the structure of the entire industry. In short, Judge Parker did not lose sight of the trees in the midst of this vast forest. It seems to us, therefore, that the Commission mischaracterizes Boise's evidence as going to market structure, rather than to the twenty-three selected dealers themselves, when Boise, in fairness, adduced evidence as to both.

The dissent criticizes us for not telling the Commission with specificity how it should evaluate or weigh the evidence that was amassed before it in this case. We decline, with gratitude, the invitation to venture too deeply into areas where the Commission has yet to tread. The very fact of the Commission's expertise and knowledge of the industry, featured elsewhere by the dissent, counsels powerfully at this stage in favor of restraint and of permitting the expert agency to perform its assigned functions which it failed to carry out the first time around. This approach strikes us as achieving a more prudent balance between court and agency than that beguilingly suggested to us by the dissent.

[60]** *Second*. To explain its refusal to consider Boise's evidence (and, indeed, the countervailing evidence) of absence of actual competitive injury, the Commission asserted that "the competitive injury requirement of Section 2(a) is satisfied by a showing of 'a reasonable possibility that a price **[*1146]** difference may harm competition.'" *Commission Decision*, J.A. at 192 (quoting *Falls City, 460 U.S. at 434-35*). While true, that principle does not justify abdication of the duty to consider evidence indicating that a "reasonable possibility" of harm does not, in fact, exist in the particular industry. Robinson-Patman has not ushered in a bizarre rule of law that exalts theory "no matter what" in the face of hard, cold facts. That curious rule, if it ever was a rule, has been scotched by *Falls City's* teaching. [16]

[61]** In this case, the Commission is attacking a long-established, widespread practice within a vibrant, dynamic industry. The ALJ specifically found that the wholesale discounts are no new-fangled concoctions. For example, Bates, a distinguished manufacturer whose products appear to enjoy considerable customer loyalty, "has had its wholesale discount since the 1940's, and Boise has been receiving that discount from Bates as long as it has been a customer." ALJ Finding 302, J.A. at 97. Forty years is a long time for evil, anticompetitive practices to have flourished unchallenged either by Washington, D.C. regulators or private entities which find themselves on the short end of the discount stick. Much the same can be said of Master Products. That firm's system of wholesale discounts has been unchanged for almost 40 years. *Id. 345*, J.A., at 105. So too with Boorum & Pease, whose even-handed pricing structure has been in effect for many years. *Id. 263*, J.A. at 91.

To be sure, the prevalence and longstanding nature of the discounts does not preclude the possibility that the discount regime posed a threat of injury to competition in the future. In light of the flourishing condition **[**62]** of the industry generally and the selected dealers specifically, however, one would reasonably expect that any potential for injury, if indeed there was one, would have manifested itself by now in the form of some dragging down. As yet, however, there appears to be no such damper. [17]

[63]** *Third*. In assuming, without analysis, the existence of competitive injury, we believe that the Commission erred in another way as well. It entirely failed to inform its application of *Morton Salt's* inference of injury with the purposes of the Robinson-Patman Act. As we have previously detailed, *see supra* text slip op. at 23-24, it is **[*1147]** fairness, as Congress perceives it, that Robinson-Patman is all about. That Act, a legislative monument to smallness in a century which rewards bigness, is aimed at putting a halt to singling out the "Big Fives" and "Big Threes" of the world for disparately favorable treatment (unless, of course, a statutory defense lies).

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[16] Our dissenting colleague suggests throughout his opinion that we have fashioned a novel rule of law under the Robinson-Patman Act, namely a new evidentiary burden on the FTC to prove injury to competition. The charge, with all respect, is quite unfounded. To the contrary, we have steadfastly adhered to traditional principles of Robinson-Patman law in concluding that the *Morton Salt* inference was properly relied upon here to establish a *prima facie* case of competitive injury. In light of the Commission's success in this respect, the burden therefore shifted to Boise to rebut the FTC's *prima facie* case by breaking, if it could, the "causal connection." Our quarrel with the Commission, and now with our colleague, is that *the FTC proceeded deliberately to ignore the wealth of evidence submitted by Boise, including fact-specific evidence going directly to the Commission-annointed "victims*," namely the selected dealers. This was no open-ended Sherman or Clayton Act case going broadly to the structure of the market or "market dynamics," dissent op. at 1154: Boise's evidence could hardly have been more targeted. And Boise's target is clear to us, as it should have been to the Commission -- the selected dealers themselves and their specific circumstances in the competitive arena with Boise.

[17] We recognize, of course, that the *Falls City* Court included the longstanding nature of a price difference in articulating when the existence of such a difference gives rise to *Morton Salt's* inference of injury. *460 U.S. at 435*. We believe that the Court meant to suggest that long-term price differences more likely could lead to injury than differences of an equivalent magnitude maintained for only a short time or sporadically. *See supra* n.13. Our point is unrelated to this common-sense observation; it is that a price difference with the potential for causing injury will eventually result in measurable effects, such as diverted sales or lost profits. The more time that passes without such effects showing up, the more likely it becomes that the price difference does not in fact pose a threat of competitive injury. *Cf. Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1358, 89 L. Ed. 2d 538 (1986)*. Thus, evidence suggesting a lack of injury over the many years during which the challenged discounts have prevailed is clearly relevant to determining whether the statutory prerequisite of a "reasonable possibility" of injury exists.

This is not a case of the "Big Five" retailers (*Morton Salt*), the "Big Three" book distributors (*Doubleday*), the long-established, large jobbers who enjoyed manufacturer protection from uppity newcomers (*Mueller*) or the Hoosier beer distributor which happened to be on the "wrong" side of the Indiana-Kentucky state line (*Falls City*). Quite to the contrary, there is among the six manufacturers selected in this case no regime of favoritism towards Boise. There is not the slightest hint in the **[**64]** ALJ's opinion, or in the Commission's for that matter, that the manufacturers were singling out Boise (and other big fish) for disparately favorable treatment. Rather, in accordance with a practice prevalent well before Boise even entered the industry, *it is undisputed that the six manufacturers in question treated all wholesalers alike and provided the wholesale discount to Boise solely because it met their respective definitions of "wholesaler*." There is simply no cabal between Boise and the six manufacturers to give Boise an additional price break. [18]

To recap briefly, there are five national wholesalers, ALJ Finding 26, 28, J.A. at 50-51, of which Boise is one of the two largest, and a host of smaller wholesalers. The "little **[**65]** fish" are typically "small, privately-owned businesses with annual volumes of under $ 10 million." *Id.* 27, J.A. at 51. Judge Parker's findings of fact show beyond doubt that equal treatment of all that qualify as "wholesalers," whether great or small, is the order of the day as to all six selected manufacturers. *See, e.g., id. 447*, J.A. at 127-28 (Rediform); *id. 450*, J.A. at 128 (Sheaffer-Eaton); *id. 449*, J.A. at 128 (Kardex); *id. 451*, J.A. at 128 (Boorum & Pease); *id. 452*, J.A. at 128-29 (Bates); *id. 453*, J.A. at 129 (Master Products).

This evenhandedness might strike Robinson-Patman aficionados as a rather odd choice as a basis for a claim of illegal price discrimination. Indeed, one attuned to such matters might more naturally expect that, if such a discrimination claim were to lie, the charge would be (1) that Boise (and perhaps the other national wholesalers, "the Big Five," as it were) was receiving higher discounts than smaller firms that qualified as "wholesalers," *see e.g., Automatic Canteen, 346 U.S. 61, 97 L. Ed. 1454, 73 S. Ct. 1017*; *Morton Salt, 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822*, or (2) that Boise **[**66]** had coerced the manufacturers into framing their "wholesaler" definitions in a manner favorable to Boise's method of doing business. In either of these contexts, one could readily understand why the Robinson-Patman complaint would be levelled against Boise as a power buyer exerting its muscle to win additional pricing concessions from amenable, or at least nervous, vendors anxious to please the big-fish buyer. But, again, that is not this case. Boise has not been accused of piggishly demanding more than its equal share at the wholesale discount trough.

Fourth. We note, finally, the irony of the Commission's concept of Robinson-Patman liability, namely that these egalitarian-minded manufacturers with their long-settled commercial practices now stand condemned as price discriminators in violation of federal law. As the Supreme Court has made abundantly clear, a buyer's liability under section 2(f) is entirely derivative in nature. *Great A & P Tea Co., 440 U.S. at 76-77*. *See supra* text slip op. at 3. For there to be a guilty buyer, there must be a guilty seller. And thus it cannot pass unnoticed that under the Commission's approach, Bates, Master Products, **[**67]** Boorum & Pease and the other three manufacturers have run afoul of Robinson-Patman even though they have followed neutral, objective criteria in determining what buyers are to be considered wholesalers. **[*1148]** It cannot be clearer that the Commission's sweeping attack, not narrowly focused on some anti-competitive, discriminatory pocket within an industry, carries with it dangers that the FTC is marching rapidly down a road leading to a regime of "price uniformity and rigidity" that has long stood condemned by the Supreme Court as antithetical to our law. This is nothing less than an all-out attack on uniform wholesale prices to dual distributors. *Id. at 80*; *Automatic Canteen, 346 U.S. at 63*.

In sum, although the Commission (and the ALJ) correctly took the view that the *Morton Salt* inference is rebuttable, its rejection on relevancy grounds of Boise's evidence of the absence of competitive injury (or reasonable possibility

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[18] For instance, although Boise looms big as Boorum & Pease's largest single customer, *id. 275*, J.A. at 93 (at least in one fiscal year), Boise received over the years only the plain vanilla wholesaler discount offered to every other wholesaler. *Id. 263*, J.A. at 91.

of competitive injury) was in error. [19] The petition for review is therefore granted, and the case is remanded for further proceedings consistent with this opinion.

[68]** *It is so ordered*.

Concur by: WILLIAMS

Concur

WILLIAMS, Circuit Judge, concurring:

I willingly concur in Judge Starr's excellent opinion and write separately to indicate the extraordinary difficulties facing the Commission if it should attempt to pursue this case on remand. On my reading of the law (which is somewhat less generous to the Commission than that of the majority), the practices complained of cannot be found to be illegal price discriminations.

In 1980, the Commission filed a complaint charging Boise with "knowingly [receiving] a discrimination in price" that may substantially lessen or injure competition in violation of § 2(f) of the Robinson-Patman Act. *15 U.S.C. § 13(f) (1982)*. The complaint attacked Boise's receipt of "functional discounts" -- discounts that its suppliers offered to *each and every* customer who met certain objective criteria. The most important of these criteria was that the customer resell a minimum percentage of its purchases at wholesale. In the face of powerful evidence that the discounts in no way injured competition, the Commission assumed injury. Instead of evaluating the evidence of competitive injury, it considered **[**69]** only evidence that might "break the causal connection" between the imagined injury and the contested discounts. In support of this odd set of blinkers, it invoked *FTC v. Morton Salt Co., 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)*, which allows an inference of competitive injury from the mere fact of price discrimination. [1] As Judge Starr points out so well, Maj. slip op. at 35, *Morton Salt* clearly cannot justify this complete dismissal of the issue of competitive injury *vel non*.

[70]** In my view, however, the case suffers graver faults than those identified by the **[*1149]** court. The Commission's theory seems to me to place the Robinson-Patman Act in hopeless and complete conflict with the other antitrust laws, in violation of innumerable Supreme Court injunctions that it must be construed to avoid such conflict. *E.g., Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80-81* & n.13, *59 L. Ed. 2d 153, 99 S. Ct. 925 (1979)*; *United States v. United States Gypsum Co., 438 U.S. 422, 447-59, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*;

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[19] Our disposition obviates any need to choose sides once and for all between *Mueller* and *Doubleday. Mueller* may, of course, be viewed as a strict application of the *Morton Salt* inference of competitive injury, because *Mueller* does not allow a finding that the amount of a functional discount is reasonably related to the recipient's cost of performing additional functions for the seller to negate the possibility of competitive injury. But we believe, for reasons previously set forth, that the inference can nonetheless be rebutted by a showing that injury is nonexistent. That view is clearly supported by *Falls City*, not to mention common sense.

[1] I question whether the *Morton Salt* inference can ever be applied in a § 2(f) case. The Supreme Court has clearly held that the Commission cannot shift the burden of production onto the buyer simply by showing that the buyer knew that it was receiving a price discount unavailable to others. *Automatic Canteen Co. v. FTC, 346 U.S. 61, 79, 97 L. Ed. 1454, 73 S. Ct. 1017 (1953)*. The Commission cites no Supreme Court precedent applying the inference in a § 2(f) case, *see* Brief for Commission at 28-29 n.26, and the only supporting circuit court case that it cites, *Kroger Co. v. FTC, 438 F.2d 1372, 1378-79* (6th Cir.), *cert. denied*, ***404 U.S. 871, 30 L. Ed. 2d 115, 92 S. Ct. 59 (1971)***, has been strictly limited to its unique facts, *see Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 81-82 n.15, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979)*. In A & P, the Court held that a buyer accepting the lower of two prices competitively offered does not violate § 2(f) if seller has a "meeting competition" defense; it confined *Kroger*, which denied a buyer that defense, to instances of a "lying buyer." The decision appears to implement *Automatic Canteen's* unwillingness to foist onto a defendant buyer production burdens that are appropriate only for a seller responsible for a price discrimination.

Automatic Canteen Co. v. FTC, 346 U.S. 61, 63, 74, 73 S. Ct. 1017, 97 L. Ed. 1454 (1953). As a matter of law the very conditions on which sellers offer the discounts should preclude their being illegal price discriminations.

* * *

The Robinson-Patman Act has been no favorite among enthusiasts of competition. Price differentials may be found violative of the Act even when they represent the opening wedge of competition in a market that is largely cartelized or in which for some other reason competition is sluggish. *See* R. BORK, THE ANTITRUST PARADOX 385-91 (1978); R. POSNER, **[**71]** THE ROBINSON-PATMAN ACT 37-38 (1976). But the Act is law, together with the pro-competitive provisions of the antitrust laws. The courts accordingly have struggled to reconcile the two. In practice, they have read the Act to protect certain fairness goals, at the expense of competition. In no case, so far as I know, have they read the Act to stamp out a pro-competitive practice that in no way permits any competitor an unfair advantage.

Price discrimination in an economic sense -- and I will shortly address the issue of Robinson-Patman cases that might be seen as extending the Act's reach beyond discrimination in that sense -- causes disfavored purchasers to bear a disproportionate share of the seller's total costs of production. If variable production costs per unit are $ 1 and fixed costs $ 2, and a firm sells in equal amounts to A at $ 2.50 and to B at $ 3.50, B will bear 5/8 of fixed costs while A will bear only 3/8. (*E.g.*, if 100 units are sold to each, sales to B will account for $ 250 of the $ 400 in total fixed costs, while those to A will account for only $ 150.) Such differentials appear to give the favored purchaser an edge over his competitors in the resale market, **[**72]** even where he has no superior efficiency to justify the advantage. The advantage has at least a look of unfairness. Thus it is not altogether surprising that Congress might seek to prevent such unfairness by prohibiting the practice, even though to do so may inhibit competition or injure consumers. [2]

[73]** We deal here, however, with a practice that *cannot* entail such an unequal allocation of costs. In instances of genuine price discrimination, the seller is able to extract a higher proportion of fixed costs from the disfavored customers because he has segmented the market. Critical to that segmentation is the existence of a barrier preventing resales by favored customers to disfavored ones -- resales known as "arbitrage." In the absence of such a barrier, the favored customers would make such resales. Thus they would displace their own supplier and would capture for themselves the revenue that the original supplier sought to secure by his price discrimination.

Accordingly, it is black letter economics that price discrimination cannot occur if the favored customers can resell to the disfavored. *See, e.g.*, P.R.G. LAYARD & A.A. WALTERS, MICRO-ECONOMIC THEORY 240-41 (1978); E. MANSFIELD, MICROCONOMICS: THEORY & APPLICATIONS 286 (2d ed. 1975); W. BAUMOL, ECONOMIC THEORY AND OPERATIONS **[*1150]** ANALYSIS 347-48 (3rd ed. 1972); A. ALCHIAN & W. ALLEN, EXCHANGE AND PRODUCTION: THEORY IN USE 136-37 (1969).

Obviously the principle cannot apply if arbitrage is obstructed, and barriers **[**74]** may take a variety of forms. A physical problem is common. If, for example, local gas companies discriminate in favor of residential gas customers and against industrial ones, clearly the residential customers cannot increase their purchases and resell to industrial users: they lack control over the pipes necessary to reship the gas to their hypothetical purchasers. But physical barriers are hardly essential. The law itself may obstruct arbitrage, [3] as may firm behavior. For example, a seller

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[2] *See* Statement of Representative Utterback, presenting Conference Report to the House, 80 Cong. Rec. 9413, 9416 (1936) (contrasting unfair advantages said to accrue to some firms with "the assurance of equal opportunity and fair play" afforded by the bill); Report of House Judiciary Committee, H.R. Rep. No. 2287, 74th Cong., 2d Sess., pt. 1 at 8 (1936) (favored buyers' partial non-contribution to costs and profits leads to "burden and injury" to disfavored customers); Report of Senate Judiciary Committee, S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936) (committee's goal has been "the preservation of equal opportunity" to those engaged in distribution "comportably with their ability . . . to serve . . . with real efficiency"); *FTC v. Simplicity Pattern Co., 360 U.S. 55, 69, 3 L. Ed. 2d 1079, 79 S. Ct. 1005 (1959)* (smaller firms said to suffer "hopeless competitive disadvantage" unrelated to cost).

can sometimes monitor the favored customers' resales and credibly threaten to cut off their supplies if they resell to disfavored ones. The defendant salt manufacturer in *Morton Salt*, for example, surely possessed that modest monitoring capability. (The absence of discussion of the subject in that case, *cf.* Dissent slip op. at 19, is hardly a sturdy basis for an inference that the salt seller could not penalize attempted arbitrage.) Discount recipients could conceivably organize a group boycott of disfavored buyers. *Cf.* Dissent at 1162 (reference to "price umbrella").

[75]** The present case is not merely bereft of evidence of any such barrier, but plainly demonstrates its absence. Far from restricting favored customers' sales to disfavored ones, or relying on any physical or legal barrier to their doing so, Boise's suppliers *demand* of the favored customers that they resell to disfavored ones. Indeed, the only condition uniformly imposed upon recipients of the discounts is that they make a minimum proportion of their sales to dealers (the disfavored customers). Boise's suppliers seek not to segment the market; they demand its integration. Far from seeking to discourage arbitrage, or relying on any physical or legal barrier to arbitrage, they insist on it. These are not the acts of a price discriminator.

Once the absence of any barrier to arbitrage is clear, [4] **[**77]** the exact terms under which wholesalers resell to dealers, whatever they may be, cannot support a claim that manufacturers are offering wholesalers unmerited discounts. Suppose, for example, that wholesalers do not share *any* of their discounts with retailers to whom they sell. *Cf.* Dissent at 1162 ("It is not to [dual distributors'] advantage to reduce prices for competing retailers. **[**76]** "). If this be so, [5] there appear to be two imaginable explanations. (1) There are no unmerited discounts; the costs of selling to wholesalers are lower or they perform services of offsetting value to manufacturers (or some combination). As the wholesalers have already given value for the nominal discounts, there is nothing for them to "pass" through to dealers. (2) The manufacturers are giving wholesalers unmerited discounts **[*1151]** and, given the availability of arbitrage, are allowing them to capture the "excess profits" available on sales to the disfavored customers. The principle accepted without dissent by economists is that the second hypothesis is utterly implausible. So it seems to me. Nothing in the record appears to support the notion that office supply manufacturers are engaged in such a bizarre charitable program.

The Dissent suggests that the inferences from arbitrage-availability are undercut by findings that "disfavored retailers performed many of the functions that Boise performed." Dissent at 1155; *see also id.* slip op. at 18. There is, however, no finding nor even a contention that any single retailer performs *all* the services provided by Boise or other wholesalers. *See* J.A. 139-40 (listing of some services provided by some dealers); Maj. Op. at 1134 n.7. Nor is there any qualitative or quantitative evaluation of the services provided by the two classes of intermediaries. Thus there seems no reason to question the inferences that are normally to be drawn from ease of arbitrage.

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[3] This appears to have been the case in *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*. Falls City sold beer to Kentucky wholesalers at a lower price than to Indiana ones (evidently solely because of a quirk in Indiana law). The Indiana wholesalers could not simply turn around and buy from Kentucky wholesalers across the border. It is a crime for an Indiana wholesaler to purchase beer from an out-of-state seller who does not hold a valid brewer's permit. The prerequisites to such a permit include not holding a disqualifying interest in another liquor permit, posting a bond to cover taxes, and agreeing to file reports with Indiana. *See* *Ind. Code §§ 7.1-5-8-9*; 7.1-5-9-1 to -13; 7.1-3-2-4 and -5 (1984). While the *Falls City* Court does not discuss the matter, the tone of the opinion strongly suggests that the Kentucky wholesaler did not hold the requisite permit.

[4] The Dissent's suggestion slip op. at 22 that wholesalers cannot discover disfavored buyers of substantial quantities of discriminatorily priced goods reflects a robust imagination. It is, of course, the business of wholesalers to sell to retailers. Recipients of the wholesale discounts are typically listed as members of the Wholesale Stationers Association. Maj. Op. slip op. at 11. Thus the wholesaler seeking to engage in arbitrage can simply start with all firms in the business downstream from manufacture, subtract members of the Association, and have a *prima facie* list of the target group.

[5] There is in fact substantial competition for sales to dealers between and among the wholesalers, and the suppliers. *See* AF 7, 30, 33, 38, J.A. at 46, 51-53. Accordingly, if sellers in fact gave wholesalers unmerited discounts, competition among wholesalers would shift the benefit forward to dealers.

I must confess puzzlement at the Dissent's contrasting "realistic appraisals of relevant competitive **[**78]** facts" with "general economic theorems." Dissent at 1161. The theorems relied on, if they should be so labelled, are hardly metaphysical speculations; they are inferred from widely shared propositions about human behavior, *e.g.*, that firms do not gratuitously turn profit opportunities over to other firms for no reason. The Dissent contends that this proposition is not at issue, *id.* slip op. at 19-20, evidently on the basis of various theories which, if 100 % true, would show only that wholesalers do not pass their discounts on to retailers. But the issue is precisely whether there are any unmerited discounts to pass on. [6]

Of course the fact that obstruction of arbitrage is a necessary condition of "price discrimination" as economists use the term would not prevent Congress from enacting a prohibition that spoke more broadly. Indeed, the Supreme Court has explicitly said that price **[**79]** discrimination for Robinson-Patman Act purposes means no more than a price differential. *See* *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*. Under this view -- which of course is authoritative -- the price differential offered by Boise's suppliers to wholesalers is price discrimination. But the Act prohibits only price discrimination whose effect "may be substantially to lessen . . . or to injure . . . competition." *15 U.S.C. § 13(a)*. The issue is whether this "price discrimination" can injure competition in any sense that Congress might have intended. *Cf.* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 96-97 (1962) (discussing *Anheuser-Busch*).

Even *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*, which the Commission appears to regard as the Court's most expansive extension of *Morton Salt's* readiness to infer injury to competition, makes clear that the Act is not intended to reach losses that are consistent with fairness. There a brewer charged an Indiana beer distributor more than it charged a competing **[**80]** Kentucky distributor. The Court held that unlawful price discrimination could be found (and that anticompetitive effect could be inferred from the price discrimination itself) even though the favored buyer was not "extraordinarily large." *460 U.S. at 436*. Although this holding extended Robinson-Patman liability beyond the core image animating Congress -- the buyer that uses sheer size to secure unfair advantages -- it in fact did not disconnect Robinson-Patman liability from the economic concept of price discrimination or from a concern over *unfair* competitive advantages.

The economists' definition of price discrimination requires, to be sure, that the seller have market power (*i.e.*, a power to raise the price above competitive levels **[*1152]** without loss of all sales): otherwise the discriminatees would simply buy from alternative sources. Although *Falls City* does not refer to any finding of market power, as it was not at issue, the record might well have sustained such a finding. The seller was a regional brewer with an established brand name, and brand name loyalties typically enable a seller to raise prices without all customers abandoning it for **[**81]** alternative suppliers.

Moreover, *Falls City* expressly limited the permissibility of inferring competitive injury. It pointed out that the defendant brewer had identified no "economic reason" why the inference should not be drawn. *460 U.S. at 436*. So far as appeared, the brewer's pricing practices enabled Kentucky wholesalers to increase their sales at the expense of Indiana ones regardless of the latters' efficiencies. As the Court noted, Indiana and Kentucky retailers competed in a single interstate market, so that the relatively high prices paid by Indiana wholesalers would necessarily impede their sales. *Id.* The message of the case is that where some inherent aspect of the practice supplies an economic reason why it could not generate such an unfair competitive advantage, the inference cannot be drawn.

The "price discrimination" here cannot lead to the sort of competitive injury evidently feared by Congress -- an impaired ability to compete regardless of the losers' efficiency. [7] If the disfavored customers bore a disproportionate

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[6] As Holmes said, "A fact taken in its isolation . . . is gossip." 1 M. Howe, ed., Holmes-Laski Letters 129 (1953).

[7] This analysis is not altered in the slightest by the fact that sellers generally give the discount on all products bought by a wholesaler, even though many of them may be resold to end users. So long as the resale condition assures that non-discount customers are not saddled with a disproportionate share of fixed costs and profits, the sort of injustice at which the Act strikes is necessarily absent.

share of their suppliers' costs, their ability to buy from the favored ones would enable them to escape the burden. The terms **[**82]** of the discounts themselves assure this result.

[83]** Because the nature of the challenged practice compels the conclusion that it could confer no competitive advantage of the sort the Robinson-Patman Act sought to eradicate, the practice should be absolved as a matter of law. The Supreme Court's mandate to construe the Robinson-Patman Act consistently with the other antitrust laws demands no less.

I am frankly unable to see how the Commission can resurrect this case, nor any reason beyond bureaucratic momentum why it should try to do so. With luck, however, it will make use of the remand to develop an intellectually coherent policy on functional discounts, one that addresses economic reality.

Dissent by: MIKVA

Dissent

MIKVA, Circuit Judge, dissenting:

The majority today tells the Federal Trade Commission ("FTC") that manufacturers who charge different prices to competing retailers cannot be held to have violated price discrimination law -- *unless* the FTC somehow overcomes evidence that competition persists in the affected business sector. Apparently, the majority imposes this new evidentiary burden to avoid a result it finds economically unappealing. Even if the majority is right in its economic **[*1153]** appraisal, however, **[**84]** the choice is not ours to make. Though born of good intentions, today's decision disregards the policies that Congress purposefully created more than fifty years ago.

There can be no doubt that Congress' chief aim in enacting Robinson-Patman was to combat discrimination that favored big retailers -- to counter "the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores." *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 544, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)* (footnote omitted). Congress thus sought to ensure the survival of small retailers by requiring that they be placed on an equal footing with larger competitors.

Congress had a second objective in enacting Robinson-Patman. As I demonstrate below on the basis of its legislative history, Robinson-Patman was passed by a Congress that believed price discrimination favoring large buyers ultimately harmed competition itself. Congress was convinced that, by protecting small businesses, it was also protecting the operation of a competitive economy.

Two factors thus set Robinson-Patman apart from the rest of ***antitrust law***. First, the fate of small retailers remained the **[**85]** Act's primary concern. Secondly, Congress determined that the proscribed activity -- price discrimination between competing buyers (so-called "secondary-line" injury) -- tended by its very nature to injure

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Moreover, a rule requiring suppliers to limit the discounts to items actually sold at wholesale would work to the detriment of Boise's purchasers, including dealers. Enforcement of such a rule would entail substantial administrative costs, *see* Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Ind. & Com. L. Rev. 543, 556 (1976) (a company that had insisted on certification of resale scrapped the requirement "as unworkable because it was not adopted by its competitors, was resented by its customers, and resulted in falsehood and inaccuracy"), which would doubtless be passed on to customers. Because of these administrative costs, Commission insistence on such market segregation might well eliminate the use of functional discounts and the substantial efficiencies they generate for dealers, *see* ALJ Finding ("AF") 46, J.A. at 54-55 (dealers recognize that wholesalers provide them with valuable services unavailable from manufacturers), and for end users, *see* AF 393, J.A. at 114 ("'The City of Seattle buys from Boise because of usage reports, because of some of the sophistication in the invoicing system, because of depth of inventory and high [fill] rates.'"); *see also* AF 385, 392, 398, 402, J.A. at 113-16. The high administrative costs, as well as the tendency of the resulting efficiencies to spill over in sales to end users, likely account for sellers' disinclination to so restrict the discounts.

competition. Unlike many Sherman and Clayton Act cases, then, price discrimination suits would not require every court to reestablish the likelihood of market injury. Under Robinson-Patman, Congress had already identified and condemned the harmful consequences of this discrimination.

Today's decision disregards these crucial facts about Robinson-Patman law. It ignores, first, how much this case resembles the paradigm of Robinson-Patman discrimination. A giant, favored buyer here competes with smaller disfavored retailers. Secondly, the majority injects Sherman and Clayton Act doctrine into the distinct jurisprudence of Robinson-Patman's secondary-line cases. The majority in effect holds that, where a party can demonstrate continuing competition in a business sector -- the sort of showing that might shield a conventional antitrust defendant from liability for restraint of trade -- that party avoids liability for price discrimination, too. This novel proposition contradicts numerous **[**86]** judicial precedents concerning the evidence required to show secondary-line injury. It also threatens to frustrate FTC enforcement of Robinson-Patman. Because "the determination whether to alter the scope of [Robinson-Patman] must be made by Congress, not this Court," *Falls City Industries v. Vanco Beverage, Inc., 460 U.S. 428, 436, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*, I dissent.

1. *Evidentiary Showing Required*

Evidence concerning the competitive structure of a business sector is precisely the sort that the Supreme Court has said need not be presented by complaint counsel in § 2(a) cases and need not be considered before a court finds unlawful price discrimination. In *FTC v. Morton Salt Co., 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)*, the Supreme Court explained the advisability of dispensing with such evidence. "It would greatly handicap effective enforcement of the Act," the Court held, "to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods **[**87]** to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Id. at 50*. Of course, not every disparity in the prices charged to competing retailers justifies the inference of an "adverse effect" on competition. But, "where the record indicates a price differential substantial enough to cut into the purchaser's profit margin . . . [or one] that, if reflected in a resale price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may properly be indulged." *Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680* (5th Cir.) (footnote omitted), **[*1154]** *cert. denied*, *382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435 (1965)*.

Once the inference of injury is justified, the burden logically shifts to the defendant to rebut the presumption. The Supreme Court made this evidentiary consequence explicit when it recently reaffirmed the "inference of injury" doctrine in *Falls City Industries v. Vanco Beverage, Inc., 460 U.S. 428, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*. The effect of invoking the inference, the Court said, is that **[**88]** the Robinson-Patman defendant can then present a *specific* type of rebuttal evidence. "In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Id. at 435*.

The *Falls City* Court cited a Fifth Circuit decision as an illustration of the type of evidence that could refute a "causal connection." *Id.* In *Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575* (5th Cir.), *cert. denied*, *459 U.S. 908, 74 L. Ed. 2d 169, 103 S. Ct. 212 (1982)*, the court rejected a car dealer's claim that a manufacturer's bonus program constituted price discrimination. Ultimately, the court found the price differential too small to warrant an inference of injury. But, the court also noted that plaintiff's franchise (unlike its competitors') was not located in an expanding sector of the city, that plaintiff had been unable to obtain financing for its used cars, and that plaintiff had shifted its sales focus from new car purchasers to fleet purchasers. *Id. at 581*. These factors supplied independent reasons **[**89]** for plaintiff's poorer performance among car dealers and thus could have broken a "causal connection" between the price differential and any decline in relative profits or market share.

As these precedents demonstrate, data concerning the level of competition in a given business sector usually does *not* fall within the range of rebuttal evidence. Thus, the majority today instructs the FTC to consider evidence that *Falls City* and *Morton Salt* say it is not obliged to assess. The majority rebukes the FTC for having "waved aside" evidence that "competition among dealers generally was healthy," maj. op. at 1143, and specifically directs the FTC to consider (1) the relative profit margins of retailers, wholesalers, and dual distributors, maj. op. slip op. at 36, (2) the "longstanding nature" of discounts given to Boise, "in light of the flourishing condition of the industry generally and the selected dealers specifically," *id. at 1146*, (3) the absence of a "cabal between Boise and the six manufacturers," *id. at 1147*, and (4) the fact that the discriminating sellers "have followed neutral, objective criteria" in establishing price differentials. *Id. at 1147*.

Though **[**90]** it requires the Commission to assimilate this electric array of evidence, the majority insists it is "adher[ing] to traditional principles of Robinson-Patman law." Maj. op. at 1146 n.16. The majority cannot cite a single precedent, however, that finds this broad range of evidence to be a proper "rebuttal" to *Morton Salt's* inference of injury. The majority also protests that it has not imposed a "new evidentiary burden on the FTC." *Id.* But obviously the majority expects the Commission to do more with this evidence than simply accept it into the record. As the majority makes clear with its repeated references to the "intense competition" and the "absence of anti-competitive forces" in the office supplies sector, maj. op. at 1135, the FTC must somehow undercut or overcome such evidence of "competition" before the majority will countenance a finding of competitive injury. The practical effect of today's remand, then, is to force the Commission to "rebut the rebuttal." This does impose a new evidentiary burden on the FTC. Moreover, nothing in Robinson-Patman commands such an inquiry into market dynamics, and the Supreme Court has expressly pronounced it unnecessary.

As I read **[**91]** today's decision, my colleagues offer two justifications for diverging from the Supreme Court's evidentiary guidelines. First, "this is not a case of the 'Big Five' retailers (*Morton Salt*), the 'Big Three' book distributors (*Doubleday*), the long-established, large jobbers who enjoyed manufacturer protection from uppity newcomers (*Mueller*) or the Hoosier beer distributor **[*1155]** which happened to be on the 'wrong' side of the Indiana-Kentucky state line (*Falls City*)." Maj. op. at 1147. The majority goes too far in reading any "big vs. small" element out of this record. It is true that many small wholesalers benefit from the functional discounts at issue. But the only wholesaler charged with using those discounts to compete against disfavored *retailers* is the largest distributor of office products in the nation: the Boise Cascade Corporation. J.A. at 46.

The majority's second reason for believing that "this case is simply not of the lineage of *Morton Salt*," maj. op. at 1139 n.14, is that it involves dual distributors. Applying price discrimination law to a dual distributor, however, is hardly a novel proposition. Indeed, the mass distributor of the '20s **[**92]** and '30s, against whom Robinson-Patman was originally aimed, "invested capital in facilities for performing bulk storage, redelivery, and financing, so as to 'integrate' the retailing and wholesaling functions within his own organization and to eliminate middleman profits by dealing with the manufacturer directly." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 4 (1962). *See, e.g.,* Purolator Products, Inc. v. FTC, 352 F.2d 874, 882 (7th Cir. 1965), *cert. denied*, *389 U.S. 1045, 19 L. Ed. 2d 837, 88 S. Ct. 758 (1968)* (even discounts that do no more than compensate an integrated competitor for the cost of its integration are proscribed; "some WDs [warehouse distributors] have costs peculiar to their manner of doing business[, which] does not show . . . that competitors of these WDs would not be injured if some of those costs are paid by" the manufacturer).

Thus, the majority's true reason for contending that the FTC is "venturing into relatively new territory," maj. op. at 1139 n.14, is not that the case involves dual distributors. Rather, the majority is impressed by the "powerful and eloquent voices . . . railing against" the **[**93]** type of enforcement action presented in this case. *Id.* Among those voices, my colleagues are particularly persuaded by Dean Pitofsky who, as a Commissioner, dissented from the FTC's complaint against Boise. *Id.*

Though I share my colleagues' regard for Dean Pitofsky's eloquence, I must point out that his dissent as a Commissioner was -- much like today's decision -- based more on economic philosophy than on an application of the statute before us. Commissioner Pitofsky conceded that Boise's price advantage "arguably . . . leads to an injury to competition, and therefore Section 2(a) of the Robinson-Patman Act is violated." J.A. at 15. The Commissioner nevertheless opposed FTC action in this case because he found "the *Mueller* rule[, holding that functional discounts are not exempt from Robinson-Patman's proscriptions,] is anticompetitive, anti-consumer and anti-efficient." J.A. at 17. Such economic judgments may well be appropriate when the Commission is deciding upon its enforcement priorities, but this court does not have the same discretion once the FTC has found a Robinson-Patman violation and that finding is brought before us on appeal.

Moreover, Commissioner **[**94]** Pitofsky's reason for opposing the complaint against Boise is now moot. The Commissioner said he would be willing to judge Boise's price advantage by the less stringent *Doubleday* rule (which permits functional discounts under certain conditions), rather than the *Mueller* doctrine. But the Commissioner was unsure, on the basis of the initial staff investigation, whether a violation could be proven under *Doubleday*. J.A. at 21 n.*. That uncertainty has now been resolved. Both the ALJ and the Commission found that the price discrimination favoring Boise was proscribed even under the more accommodating *Doubleday* rule because disfavored retailers performed many of the functions that Boise performed but Boise alone received a discount. J.A. at 159-61, 200-03. I note that the majority does not challenge that legal conclusion.

In sum, the majority's two reasons for disregarding traditional Robinson-Patman doctrine -- that the price differentials in this case benefit small wholesalers and that they encourage dual distribution -- are insufficient. These reasons do not negate the harm that such price discrimination **[*1156]** may inflict on retail competitors and competition. **[**95]** Applying price discrimination law to dual distributors may well bring with it inefficiencies. But they are the type of inefficiencies that Congress accepted when it enacted Robinson-Patman. As I explore more fully below, Congress in 1936 set out to help independent retailers at the expense of large chain stores. It cannot have escaped Congress' notice that the giant retailers were often more efficient.

This case does implicate, then, some of the same concerns about the economic fate of smaller retailers that gave rise to Robinson-Patman. And, even if this case did not implicate such "originalist" concerns, it has long since been established that the Robinson-Patman Act "is of general applicability and prohibits discriminations generally." *FTC v. Sun Oil Co., 371 U.S. 505, 522, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*. "Neither the scope nor the intent of the statute was limited to th[e] precise situation" that generated the Robinson-Patman amendments. *Id. at 520*.

2. *Frustrating FTC Enforcement*

Just as price discrimination is proscribed regardless of the size of its victims, so the new evidentiary burden imposed by the majority threatens **[**96]** to frustrate Robinson-Patman enforcement in every setting. The majority does not confine today's holding to cases involving dual distributors or even functional discounts. And, by generally instructing the FTC to consider evidence of competitive health in a business sector, the court does much more than expand the record. Even if injury to the *structure* of competition were the focus of Robinson-Patman (and I indicate below that it is not), the burden of proof that my colleagues impose on the FTC undermines the Supreme Court's objective in *Morton Salt*. It permits a Robinson-Patman defendant, once he introduces any evidence that competition persists in his business sector, to stall or frustrate FTC action by forcing complaint counsel to assemble a detailed and time-consuming record.

In some cases, such a record will be irrelevant since we may be asking the Commission to prove something that has not yet occurred. As the Supreme Court has often reminded us, "§ 2(a) is a prophylactic statute which is violated merely upon a showing that 'the effect of such discrimination *may be* substantially to lessen competition.'" *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)* **[**97]** (emphasis in original). Even when the injury is assumed to have already occurred, however, the proof required by the majority will be inappropriate. Where a seller has imposed (or a buyer has benefited from) a substantial price difference that is not cost-justified, placing the burden of proof on that seller (or buyer) to rebut an inferred injury best accords with the equities of the situation. That burden of proof will be meaningless if it can be satisfied (and shifted back to the Commission) by simply showing that competition still exists in the relevant market.

Not only will the majority's evidentiary innovation often prove irrelevant or inappropriate; it will doubtless prove confusing, too. While the majority does specify which evidence the FTC must consider on remand in this case, maj. op. slip op. at 36-42, my colleagues provide a murky standard for evaluating this evidence. The majority tells the Commission to "determine whether Boise's evidence demonstrated that no injury or 'reasonable possibility' of competitive injury existed." Maj. op. at 1144. But this simply begs the question: What constitutes such injury? The majority implies, without clearly stating, that competitive **[**98]** injury is manifested only when competition itself threatens to disappear from a given market. If that is the majority's standard, the majority still needs to tell the Commission how serious that threat must be. But, aside from such questions of degree, the majority's standard also raises a more fundamental legal issue.

3. *Distinguishing Robinson-Patman From Other Antitrust Laws*

The majority's willingness to increase the evidentiary burden on the FTC reflects, in my view, a misunderstanding of Robinson-Patman **[*1157]** doctrine. The majority proclaims that "Robinson-Patman is directed to the preservation of competition." Maj. op. at 1143. This description of the statute's purpose is simply too restrictive. The Congress that enacted Robinson-Patman did not focus on the process of competition to the exclusion of the living players in that process. This point is revealed in the statutory language itself. The majority presents the statute as proscribing only price differentials that tend to "injure, destroy, or prevent competition." *Id.* But the full text of this crucial passage banishes discrimination that would "injure, destroy, or prevent competition *with any person* **[**99]** who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them." *15 U.S.C. § 13(a) (1982)* (emphasis added).

Thus, as the Supreme Court long ago realized, "Congress intended to protect *a merchant* from competitive injury attributable to discriminatory prices. . . ." *Morton Salt, 334 U.S. at 49* (emphasis added). The amendment to the Clayton Act "was intended to justify a finding of injury to competition by a showing of 'injury to the *competitor* victimized by the discrimination.'" *Id.* (footnote omitted; emphasis added). On the facts of *Morton Salt*, the FTC could thus find a § 2 (a) violation because "less-than-carload purchasers [of salt] might have been handicapped in competing with the more favored carload purchasers by the differential in price. . . ." *Id. at 50*.

The *Morton Salt* result exemplifies Professor Sullivan's summary of price discrimination case law:

> Robinson-Patman . . . secondary line cases lack any requirement that injury be shown to competitive structure or process; they rely instead on injury to particular firms in the market. **[**100]** . . . There is warrant in the history of the statute for construing it so and the courts have regularly done so.

L. Sullivan, *Handbook of the Law of Antitrust* 694 (1977) (footnote omitted). Often, injury to competitors does involve (or at least foreshadow) some impact on competition. As the Ninth Circuit pointed out very recently, "competition does not exist in a vacuum; it consists of rivalry among competitors." *Hasbrouck v. Texaco, Inc., 830 F.2d 1513, 1518 (9th Cir. 1987)*. "With respect to price discrimination claims, the significance of harm to competitors is particularly clear." *Id.*

In *Morton Salt*, for example, the court found that "the competitive *opportunities* of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." *334 U.S. at 46-47* (emphasis added). The Fifth Circuit has similarly held that "a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give him a substantial advantage **[**101]** over his competition." *Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680* (5th Cir.), *cert. denied*, *382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435 (1965)*. Indeed, the ALJ in the present case found that even if victimized retailers experienced growth in their own sales this did not foreclose injury to their ability to compete. "Their growth would have been even greater, and their profits would have increased substantially, if they had enjoyed the pricing which the six manufacturers extended to Boise." J.A. at 155.

As these examples illustrate, the relationship between injury to competitors and injury to the structure of competition is highly variable. When the former injury does produce the latter, that market impact can be anything from severe to attenuated. The academic commentators are agreed on this range of market effects. *See* L. Sullivan, *Handbook of the Law of Antitrust* 681-82 (1977); H. Hovenkamp, *Economics and Federal* ***Antitrust Law*** 344-45 (1985); F. Scherer, *Industrial Market Structure and Economic Performance* 323-25 (2d ed. 1980).

Notwithstanding the ambiguous relationship between injury to competitors and injury to competitive **[**102]** structure, Congress saw fit to proscribe price discrimination in **[*1158]** secondary-line cases even when only the first of these injuries could be proven. To be sure, not every court has recognized this fact. Indeed, Boise identifies several decisions that renounce injury to competitors as a sufficient basis for § 2(a) liability. *See* Petitioner's Brief at 31. Most of these cases, however, involve distinguishable (and sometimes unusual) facts. *E.g., General Foods Corp., 103 F.T.C. 204 (1984)* (primary-line injury); *Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)* (price difference consisted only of a hauling allowance that was even-handedly applied); *American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963)*, *cert. denied*, *377 U.S. 954, 12 L. Ed. 2d 498, 84 S. Ct. 1631 (1964)* (price difference was of very brief duration). The remaining opinions that Boise cites are simply aberrations. *See*, for example, *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir. 1983)*, **[**103]** *cert. denied*, *465 U.S. 1038, 79 L. Ed. 2d 712, 104 S. Ct. 1315 (1984)*.

If there were any doubt that decisions like *Foremost Pro Color* stray from the proper reading of Robinson-Patman, it is laid to rest by Robinson-Patman's own legislative history. That record clearly demonstrates that Congress equated any significant injury to competitors with injury to competition. As the House Report explained the need to amend the Clayton Act:

> The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result. Through this broadening of the jurisdiction of the act, a more effective suppression of such injuries is possible and the more effective protection of the public interest at the same time is achieved.

H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936). *See also* S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936) (similar language). Congress could not have stated more clearly its **[**104]** conviction that, where a competitor was substantially injured, the market would eventually be injured, too. "To catch the weed in the seed," the Senate Report observed, "will keep it from coming to flower." *Id.*

The reason for limiting Robinson-Patman's proscription to price differences that tend to "injure, destroy or prevent competition" was simply to exclude "from the bill otherwise harmless violations of its letter." *Id.* In other words, the "injury to competition" test was not intended to leave substantial numbers of price differentials intact. According to the House Report, the bill "*prohibit[ed]* discriminations in price between purchasers where such discriminations cannot be shown to be justified by differences in the cost. . . ." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936) (emphasis added). The same document reiterated Congress' overriding concern "that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary." *Id.*

At bottom, today's decision refuses to recognize the inherent tension between the Robinson-Patman Act and the rest of ***antitrust law***. The majority claims **[**105]** the Supreme Court has instructed us not to interpret Robinson-Patman in ways that "'conflict with the purposes of other antitrust legislation.'" Maj. op. at 1138 (quoting *Automatic Canteen Co. v. FTC, 346 U.S. 61, 63, 97 L. Ed. 1454, 73 S. Ct. 1017 (1953))*. But my colleagues have wrenched this quotation from its context; the Supreme Court counsels us to bend price discrimination law to antitrust principles only when FTC enforcement threatens to "extend *beyond* the prohibitions of the [Robinson-Patman] Act." *Id.* (emphasis added). Indeed, what the Court in *Automatic Canteen* (and in two subsequent cases) declined to do was "to read [Robinson-Patman's] ambiguous language" about a seller's meeting-competition defense in ways that would violate "congressional policy as expressed in other antitrust legislation." *Id. at 73*. *See also Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80* & n.13, *99 S. Ct. 925, 59 L. Ed. 2d 153* ***[*1159]*** *(1979)*; *United States v. United States Gypsum Co., 438 U.S. 422, 458-59, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*.

When, however, a case falls *within* Robinson-Patman's **[**106]** clear prohibitions, the Supreme Court recognizes that a special concern for small business and "fairness" animates Robinson-Patman -- and that these values sometimes conflict with the free operation of competitive markets. "Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." *FTC v. Sun Oil Co., 371 U.S. 505, 520, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*. "The Robinson-Patman Act was passed to deprive a large buyer of [certain] advantages," the justices declared in *Morton Salt*, and its "avowed purpose [was] to protect competition from all price differentials except those based in full on cost savings." *334 U.S. at 43, 44 (1948)*.

Commentators have framed the conflict with antitrust principles more starkly. As Professor Scherer observes,

> it seems clear that the courts and the Federal Trade Commission are more inclined to err on the side of protecting competitors than protecting competition when the two goals are not congruent. And in this respect, the criteria applied when enforcing the Robinson-Patman Act **[**107]** are at odds with the broader pro-competitive objectives of antitrust.

F. Scherer, *Industrial Market Structure and Economic Performance* 578 (2d ed. 1980). Professor Hovenkamp is even more blunt in making this point: "While the Robinson-Patman Act is quite hostile toward competition it is nevertheless disguised as an ***antitrust law***." H. Hovenkamp, *Economics and Federal* ***Antitrust Law*** 346 (1985).

Obviously, protecting competitors from this type of price competition does not always maximize "consumer welfare." Yet, the majority insists that Robinson-Patman enforcement must not diverge from "maximization of consumer welfare," maj. op. at 1138, because to do so would violate the underlying principles of antitrust. Such a result, the majority says, would suggest "Congressional schizophrenia." *Id.* The majority mistakenly equates clearheadedness with singlemindedness. Congress has enacted many laws, under many different circumstances, to serve many disparate purposes. Our role as courts is to apply the laws at issue in a given case without doing violence to related statutes. It is not for us to legislate a consistency that Congress did not enact.

Thus, we may "harmonize" **[**108]** laws so that enforcement of one does not produce violations of another, *cf.* *Automatic Canteen Co. v. FTC, 346 U.S. at 73*, but we must not entirely subjugate one law to another. I think that the majority has overstepped this fine line by a quantum leap. The court today makes price discrimination law subservient to the rest of antitrust doctrine, when it declines to enforce Robinson-Patman in any way that might undermine "maximization of consumer welfare." As the Supreme Court has said of Robinson-Patman enforcement, "we are not free on the basis of our own economic predilections to make the choice between harm to [two groups] . . .; that choice is foreclosed by the determination in the statute itself in favor of equality of [price] treatment." *FTC v. Sun Oil Co., 371 U.S. 505, 519, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*. The majority today has opted for what it thinks is good free-market philosophy -- at the expense of faithfully interpreting the law that Congress passed. That is not the role of a court interpreting policy made by others.

4. *The Commission's Determination Should be Upheld*

Since I decline to impose a new evidentiary burden **[**109]** upon the FTC, the question that I believe is before this court is whether the Commission abused its discretion or was unsupported by substantial evidence in holding that the functional discounts in this case constitute proscribed price discrimination. *See* *Ash Grove Cement Co. v. FTC, 577 F.2d 1368, 1378* (9th Cir.) ("appellate **[*1160]** review of [FTC] fact-findings [is confined] to a determination whether they are supported by substantial evidence"), *cert. denied*, *439 U.S. 982, 58 L. Ed. 2d 653, 99 S. Ct. 571 (1978)*; *Colonial Stores Inc. v. FTC, 450 F.2d 733, 740 n.14 (5th Cir. 1971)* ("even when the Commission's findings[] are framed in terms of legal conclusions, their presumptive validity is considerable. *FTC v. Mary Carter Paint Co., 1965, 382 U.S. 46, 48-49, 15 L. Ed. 2d 128, 86 S. Ct. 219 (1965)*.").

Ultimately, the ALJ's and the Commission's finding of competitive injury rested on one essential fact: the size of the functional discounts that Boise received (which ranged from 5 to 33 percent) exceeded the net profit rates of the dealers. These profit margins were quite low because of the intense **[**110]** competition in the office supplies business. "Considering these facts," the ALJ stated, "the only possible inference is that the effect of the substantial and sustained price discriminations favoring Boise may be to destroy or prevent competition with the unfavored dealers." J.A. at 152.

The fact that a substantial price discount exceeds the disfavored dealers' profit margins or occurs in a highly competitive sector has been found to justify the *Morton Salt* inference of injury in many cases. *See, e.g., Corn Products Refining Co. v. FTC, 324 U.S. 726, 742, 89 L. Ed. 1320, 65 S. Ct. 961 (1945)*; *Hasbrouck v. Texaco, Inc., 830 F.2d 1513, 1519 (9th Cir. 1987)*; *Kroger Co. v. FTC, 438 F.2d 1372* (6th Cir.), *cert. denied*, *404 U.S. 871, 30 L. Ed. 2d 115, 92 S. Ct. 59 (1971)*; *Foremost Dairies, Inc. v. FTC, 348 F.2d 674* (5th Cir.), *cert. denied*, *382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435 (1965)*; *United Biscuit Co. v. FTC, 350 F.2d 615 (7th Cir. 1965)*, *cert. denied*, *383 U.S. 926, 15 L. Ed. 2d 845, 86 S. Ct. 930 (1966)*; *Monroe Auto Equip. Co. v. FTC, 347 F.2d 401 (7th Cir. 1965)*, **[**111]** *cert. denied*, *382 U.S. 1009, 86 S. Ct. 613, 15 L. Ed. 2d 525 (1966)*.

In this case, the inference of injury was not rebutted by any evidence that the price differences were somehow offset or otherwise would not harm disfavored retailers. Indeed, there was evidence reinforcing the likelihood of harm: the ALJ found that many of the wholesaling functions that ostensibly justified Boise's discounts were also performed by the retailers who received no discounts. J.A. at 139, 141, 159. Thus, the retailing costs incurred by Boise and its disfavored competitors were likely to be similar. Additional evidence suggested that profit margins were higher for Boise than for its disfavored competitors -- although, as the majority points out, these statistics were not strictly comparable. Maj. op. slip op. at 36. Given this evidence and the numerous precedents supporting the Commission's treatment of substantial price differentials, I believe the Commission's result must be upheld. Especially is this so, since "the precise impact of a particular practice on the trade is for the Commission, not the courts, to determine." *FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 396, 97 L. Ed. 426, 73 S. Ct. 361 (1953)*. **[**112]** *See also* *Corn Products Refining Co. v. FTC, 324 U.S. at 739*.

5. *Deference to the Commission's Expertise*

The advisability of deferring to the Commission's reading of close cases is highlighted, I think, by Judge Williams' concurrence. In counseling the Commission on what it can conclude from this case, Judge Williams relies on abstract economic models to interpret ambiguous facts and solve real market problems. Apparently, my colleague prefers "black letter economics," concurring opinion ("con. op.") at 1149, to black letter law.

The particular economic model that Judge Williams invokes is the process of arbitrage. Judge Williams believes there can be no price discrimination unless there is a "barrier preventing resales by favored customers to disfavored ones." Con. op. at 1149. Since, in this case, favored wholesalers *do* sell to disfavored retailers, my colleague assures us that "the 'price discrimination' here *cannot* lead to the sort of competitive injury evidently feared by Congress." Con. op. at 1152 (emphasis added). Despite a record clearly demonstrating that disfavored dealers have paid thousands of **[*1161]** dollars more than Boise for **[**113]** the same office supplies, Judge Williams is confident that no injury has occurred for one reason: this record does not exhibit any of the "textbook" barriers to arbitrage. I do not share my colleague's willingness to exalt the model over the record -- nor, I imagine, did those who drafted the Robinson-Patman Act.

I indicate below why reliance on a simplified model to infer crucial facts may be misplaced. But it is important to note at the outset that, by focusing upon arbitrage, my colleague transforms Robinson-Patman doctrine in two substantial and related ways. First, Judge Williams is willing to assume that arbitrage (or a viable threat of arbitrage) has done its work if favored purchasers who receive price discounts "perform services of offsetting value to manufacturers." Con. op. at 1150. Such a showing may satisfy Judge Williams, but it does not satisfy Robinson-Patman. Even under the more accommodating *Doubleday* rule, a price discount is not legal simply because the beneficiary performs "offsetting services." Rather, *all* buyers who perform similar services must also be eligible for the discount. In this case, the FTC expressly found that disfavored retailers perform **[**114]** services similar to those performed by Boise yet are ineligible for the discount. J.A. at 201-02. Thus, the discounts in this case run afoul of Robinson-Patman, even if they pass the "economic" test for injury that my colleague has newly fashioned.

The second way in which the focus upon arbitrage transforms Robinson-Patman doctrine is that it effectively alters the litigation burden. Just as the majority opinion imposes a new evidentiary duty on the FTC, so the concurring opinion, for its part, creates a new presumption favoring defendants. Despite *Morton Salt's* inference of injury whenever substantial price differences are imposed on competing buyers, Judge Williams creates an inference of noninjury whenever his model predicts that arbitrage must have occurred. Evidently, if no physical or other "barriers" between favored and disfavored buyers appear in the record, the courts should *presume* (whether rebuttably or irrebuttably, I am not sure) that arbitrage has eliminated any ill effects of price discrimination.

Thus, Judge Williams' reliance on the concept of arbitrage is not compatible with current Robinson-Patman doctrine. Even if it were compatible, however, I would **[**115]** still question my colleague's willingness to infer that effective arbitrage has occurred (and that competitive injury has been eliminated) on the basis of abstract principles about resale "barriers." Numerous Robinson-Patman precedents demonstrate the defect in Judge Williams' approach. Those precedents counsel reliance on "realistic appraisals of relevant competitive facts," *FTC v. Sun Oil Co., 371 U.S. 505, 527, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*, not general economic theorems. The "relevant competitive facts" in *Morton Salt*, for example, suggested none of the barriers to arbitrage that Judge Williams would make prerequisite to § 2(a) violations. Indeed the five buyers who benefited from the lowest prices for Blue Label salt were precisely the sort of integrated retailers that Boise exemplifies in the present case. *334 U.S. at 41 n.4*. The opinion cited no evidence of barriers -- physical, legal, contractual or otherwise -- that prevented favored buyers from engaging in arbitrage by reselling the salt to disfavored buyers. Nevertheless, the Court found price discrimination and competitive injury.

Judge Williams' economic model yields only **[**116]** two explanatory "hypotheses" for the facts in *Morton Salt*. Con. op. slip op. at 6. Since arbitrage is clearly "available" according to the model, either (1) manufacturers are giving "unmerited discounts" to the favored buyers or (2) "there are no unmerited discounts." *Id.* "The principle accepted without dissent by economists," Judge Williams reminds us, "is that the first hypothesis is utterly implausible." *Id.* My colleague is right, of course, that economists would not expect "office supply manufacturers [to] engage[] in . . . a bizarre charitable program." *Id.* But simply to recite this conclusion is to recognize its emptiness. The real question is whether economists "accept without dissent" the **[*1162]** Hobson's choice of explanatory "hypotheses" that Judge Williams offers.

Are there "relevant competitive facts," more compelling than my colleague's "hypotheses," that may explain why integrated retailers like Boise (or like Safeway and A & P, in *Morton Salt*) do not engage in arbitrage? I believe there are. Without trespassing on the work of the FTC, whose familiarity with this record and general expertise in analyzing trade restraints leave it best equipped **[**117]** to evaluate Boise's price advantage, I would at least point out some aspects of this case that may have thwarted the process of arbitrage. These factors operate on the two levels at which the arbitrage sales might occur: retail and wholesale.

Consider, first, the possibility of arbitrage sales from favored to disfavored retailers. Although retail sales account for only forty-two percent of Boise's office supplies business, J.A. at 57, this average is misleading. Boise's proportion of retail business in particular sales regions is usually much lower or much higher. In seven of the eight distribution centers that the FTC examined in this case, Boise's proportion of retail sales ranged between eighty and ninety percent. J.A. at 58. When a dual distributor chiefly functions in a retail capacity (but purchases its inventory at wholesale rates), it is not to the distributor's advantage to reduce prices for competing retailers by engaging in arbitrage. Boise's profit margins are higher if it takes the same items it could sell to competing retailers and, instead, sells them directly to end users. Moreover, if Boise undercuts the prevailing price to the other retailers, those retailers can **[**118]** then lower their own prices to customers, which in turn would adversely affect Boise's direct sales to end users.

The logic of this economic calculus undoubtedly informed the strategies of mass retailers in the '20s and '30s. Indeed, the FTC investigation that spawned the Robinson-Patman Act concluded that "lower selling prices are a very substantial, if not the chief, factor in the growth of chain-store merchandising, and . . . lower buying prices than are available to independent [stores] are a most substantial, if not the chief, factor in these lower selling prices." Federal Trade Commission, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. 53 (1935). Judge Williams' conclusion that price discrimination could not occur in such circumstances (because there were no barriers to arbitrage) is unpersuasive. It cannot explain why Robinson-Patman was enacted or why disfavored retailers complained so bitterly before Congress stepped in.

Notwithstanding the fact that the competitive injury in this case is inflicted by dual distributors acting in their *retail* capacity, Judge Williams expects the injury to be mitigated by arbitrage occurring in **[**119]** a different context:

sales by favored *wholesalers* to disfavored retailers. Con. op. slip op. at 6. One difficulty with this view is that, even if arbitrage effectively eliminated discrimination between wholesalers and disfavored retailers, it still might not mitigate such injury inflicted by favored *retailers*. This would be true, for example, if wholesalers who engage in arbitrage cannot cut their resale prices as low as favored retailers can because the wholesalers perform more costly "offsetting services."

Even assuming, however, that arbitrage between wholesalers and retailers *could* eliminate all competitive injury, there are factors in this record that might interfere with that process. To begin with, the record shows that wholesalers try very hard to stay informed of the prices that manufacturers charge to retailers. Such information largely determines wholesalers' own pricing toward retailers. J.A. at 51-54. This suggests that manufacturers may be exerting price leadership. If they have indeed established some sort of price umbrella, wholesalers may be forsaking arbitrage for the predictable profits of somewhat higher prices.

Effective arbitrage also entails some **[**120]** threshold costs of identifying disfavored buyers of substantial quantities of each good that is discriminatorily priced and of fashioning the appropriate discount on each of those items for each of those buyers. **[*1163]** Price competition on office supplies may be especially difficult -- and unrewarding -- because wholesalers like Boise carry more than 8,000 products in their catalogue, J.A. at 51, and many retailers may purchase only a small number of items or from only a few manufacturers' product lines. The record supports this conclusion. Favored wholesalers more frequently compete for retail accounts on the basis of their overall service or their salespersons than by selectively discounting their catalogue prices. J.A. at 54, 61, 123a-124.

The record also reveals that net profit rates for Boise and other wholesalers are significantly higher than among disfavored retailers. J.A. at 62, 121. This suggests that whatever price competition occurs among wholesalers to win retailer accounts is constrained. In other words, wholesalers will not cut their prices below a certain level that preserves their higher profits. Once again, the fact that wholesalers more often compete on the **[**121]** basis of their service than on the basis of discounts supports this conclusion that price competition is limited.

Merely describing these factors that may hinder the process of arbitrage illustrates why a close understanding of a particular market is crucial for determining whether price discrimination has occurred. It is precisely that detailed familiarity with the facts that the FTC possesses and that this court lacks. Absent some indication that the Commission has erred in the law or not supported its conclusions with the evidence, I would refrain from foisting this court's own theory of the case upon the FTC. The operation *vel non* of a process of arbitrage is one of those matters on which "the inferences to be drawn from [the facts proven] are for the Commission to determine, not the courts." *Corn Products Refining Co. v. FTC, 324 U.S. at 739*.

Implicit in Judge Williams' instructions to the FTC is a fear that Robinson-Patman doctrine will not accommodate economic realities like arbitrage unless this court forces the issue. But the defense of availability, which has been repeatedly recognized by the courts, allows a defendant to defeat a charge of price **[**122]** discrimination precisely by proving that the lower prices were available to the disfavored purchasers from some other source -- i.e., from an arbitrager. *See* *Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694 (9th Cir. 1964)*. In this case, Boise raised the availability defense, and the FTC found it was unsupported by the evidence. J.A. at 124-29.

The majority today rewrites a controversial law with its decision to send the case back to the FTC. I may share my colleagues' doubts about whether the price discrimination enjoined in this case produces such pernicious effects. But I am unwilling to create new doctrine in order to accommodate my policy views. Just as "the *Fourteenth Amendment* does not enact Mr. Herbert Spencer's Social Statics," *Lochner v. New York, 198 U.S. 45, 75, 49 L. Ed. 937, 25 S. Ct. 539 (1905)* (Holmes, J., dissenting), so Congress did not mandate a "turbulent sea of pro-competitive efficiency and maximization of consumer welfare," maj. op. at 1138, when it enacted Robinson-Patman. That Act has been held repeatedly to proscribe price differences of the substantial size and duration that are exhibited here. I would uphold the Commission's **[**123]** injunction.

I dissent.

Cemar, Inc. v. Nissan Motor Corp.

United States District Court for the District of Delaware

January 29, 1988

Civil Action No. 87-165 - CMW

Reporter

678 F. Supp. 1091 *; 1988 U.S. Dist. LEXIS 646 **; 1988-1 Trade Cas. (CCH) P67,922

Cemar, Inc., t/a Rising Sun Motors, Plaintiff, v. Nissan Motor Corporation in U.S.A., Defendant; Nissan Motor Corporation in U.S.A., Counter-Plaintiff, v. Cemar, Inc., t/a Rising Sun Motors, and William T. Murray, Counter-Defendants

Core Terms

dealers, alleges, per se violation, franchise, competitors, anticompetitive, enterprise, delivery, motion to dismiss, terms, rule of reason, unpopular, conspired, notice, Sherman Act, manufacturer, supplier, courts, tied product, distributor, cases, competitive injury, wire fraud, discriminated, practices, argues, fails, mail, alleged violation, concerted refusal

LexisNexis® Headnotes

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

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

In a motion to dismiss, the facts alleged by plaintiff in its complaint will be taken as true for the purpose of deciding the motion.

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

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

HN2[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) states that a motion to dismiss can be granted for failure to state a claim upon which relief can be granted. The court can dismiss the complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. To decide whether to grant defendant's motion to dismiss, the court must take plaintiff's allegations as true and draw any reasonable inferences in favor of plaintiff.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] Defenses, Demurrers & Objections, Motions to Dismiss

Plaintiff is required only to plead a short and plain statement of the claim showing that the pleader is entitled to relief. A more liberal standard is often applied to antitrust pleadings. Thus, in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Plaintiff is required to plead enough data so that the elements of the claim for relief can be identified.

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, 15 U.S.C.S. § 1, prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. However, because almost all business agreements may be interpreted as restraining trade to some degree, § 1 has been construed for the most part to proscribe only those combinations that unduly restrain trade. Therefore, courts usually apply a rule of reason and examine the anticompetitive effects of the challenged activity.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5[] Antitrust & Trade Law, Sherman Act

Courts have developed a list of activities 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. These per se violations are made out solely by alleging the conduct. No public injury or anticompetitive effects need be specifically alleged because the courts assume that activities falling within per se categories have an anticompetitive effect.

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

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN6[] **Practices Governed by Per Se Rule, Boycotts**

Certain group boycotts are per se violations of the Sherman Act, *15 U.S.C.S. § 1*. Even though concerted refusals to deal are a form of group boycott, courts have not accepted the notion that all concerted refusals to deal fall automatically as per se violations of the antitrust laws.

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

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

HN7[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive.

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

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

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

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

HN8[] **Practices Governed by Per Se Rule, Boycotts**

A concerted activity is a per se group boycott if the purpose is to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both.

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

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

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

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

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

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

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

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

HN9[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

A vertical restraint is not usually subject to per se rules because manufacturers are given wide latitude with marketing decisions concerning exclusive dealerships. However, the horizontal nature of a conspiracy between existing dealers and a manufacturer to pressure a discounter has the requisite anticompetitive effects to be a per se violation.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Sherman Act, Claims**

Although a unilateral decision to refuse to deal is not in and of itself a violation of the antitrust laws, if the decision is not purely unilateral but is the product of competitors working in concert with themselves or in conjunction with the company to exclude a person or group from the market, the necessary elements of a boycott in the classical sense may be present, and hence a violation may be made out under the Sherman Act, *15 U.S.C.S. § 1*.

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

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

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

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

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

HN11[] Price Fixing & Restraints of Trade, Vertical Restraints

Because a manufacturer can deal or refuse to deal with whomever it likes if it does so independently, a terminated distributor must produce evidence which tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. Thus, although dealer substitution in response to complaints, or at the suggestion of another dealer, is not per se illegal, it may be per se illegal if the decision was prompted by dealer coercion.

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

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

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

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

HN12[] 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. 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.

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

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

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

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

HN13[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The "key element" in maintaining a case under a per se theory is simply probative evidence of some form of collusion between a supplier and a competing distributor which interjects horizontal conflict.

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

HN14[] Practices Governed by Per Se Rule, Boycotts

Price considerations in ***antitrust law*** and the centrality of price maintenance are essential to a court's decision that a per se rule be applied.

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 > ... > 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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Denial of Allegations

HN15[] **Per Se Rule & Rule of Reason, Per Se Violations**

If a plaintiff's allegations do not meet the standard for a per se violation under the Sherman Act, *15 U.S.C.S. § 1*, the facts are evaluated under the rule of reason. Under that rule, the plaintiff must show that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets.

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

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

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

HN16[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A rule of reason inquiry consists of examining the anticompetitive effects of an alleged restraint. Thus, to succeed, a plaintiff must allege the actual anticompetitive impact of the alleged conspiracy.

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

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

HN17[] **Private Actions, Remedies**

It is well established that the antitrust laws protect competition, not individual competitors. Thus, a plaintiff must allege antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent.

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

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

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN18[] **Tying Arrangements, Clayton Act**

A tie-in is an agreement by a party to sell one product, the tying product, but only on the condition that the buyer also purchase a different or tied product. The vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another. Although § 3 of the Clayton Act specifically deals with tying, many cases do not meet the Clayton Act's jurisdictional requirements. Thus, courts also analyze tying claims under the Sherman Act's, *15 U.S.C.S. § 1 et seq.*, prohibition of contracts in restraint of trade or commerce.

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

International Trade Law > General Overview

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

HN19[] **Tying Arrangements, Per Se Rule**

Certain tying arrangements are unreasonable per se. To succeed in a per se claim, a plaintiff must prove that a tying arrangement exists and that the defendant has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected.

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

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

HN20[] **Price Fixing & Restraints of Trade, Tying Arrangements**

For a per se violation in a typing arrangement, there must be a threshold determination of a substantial potential for impact on competition for the per se rule to be applicable. It emphasized that forcing is an indication that there is a restraint in competition for the tied product and that whether the per se rule applies depends on whether forcing is probable and on the probability of anticompetitive consequences in the market for the tied product.

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

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

HN21[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying claim must be evaluated under the rule of reason when the requirements for a per se violation are not met.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

HN22[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, makes it unlawful to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

HN23[] **Robinson-Patman Act, Claims**

Price discrimination under the Robinson-Patman Act, *15 U.S.C.S. § 13*, is simply defined as charging different prices to different purchasers. However, many courts have concluded that this means the net price actually received by the seller for the goods, including all discounts and allowances.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

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

HN24[] **Robinson-Patman Act, Claims**

A plaintiff must allege competitive injury in a Robinson-Patman Act, *15 U.S.C.S. § 13(a)* action. The two elements of a *§ 13(a)* violation are price discrimination and injury to competition. In order to meet this requirement, a plaintiff must show actual competitive injury, as shown by market analysis, or predatory intent, as shown by a competitor sacrificing short-term revenues to drive plaintiff out of the market.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN25[] Robinson-Patman Act, Claims

A naked demonstration of injury to a specific competitor without more is not sufficient to sustain a claim under the Robinson-Patman Act, *15 U.S.C.S. § 13*.

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

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

HN26[] Price Discrimination, Competitive Injuries

A plaintiff must allege a connection between an alleged discrimination in delivery practices and a difference in price.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

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

HN27[] Robinson-Patman Act, Claims

The Robinson-Patman Act, *15 U.S.C.S. § 13*, only covers discrimination in actual sales and does not cover refusals to deal. Likewise, a refusal to supply as much as a plaintiff wanted is also a refusal to deal that is not covered by *§ 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

HN28[] Robinson-Patman Act, Claims

The Robinson-Patman Act, *15 U.S.C.S. § 13(e)* concerns discrimination in services or facilities connected with the processing, handling, sale, or offering for sale of such commodity to purchasers in the resale business. It applies to discrimination in advertising and promotional services because these are connected with resale rather than an original sale. A plaintiff need not allege competitive injury to claim under this section. Liability under *§ 13(e)*, unlike *§ 13(a)*, does not depend upon competitive injury.

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

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

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

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

HN29[] **Price Discrimination, Competitive Injuries**

Delivery is not a service or facility within the meaning of the Robinson-Patman Act, *15 U.S.C.S. § 13(e)*.

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

Securities Law > RICO Actions > General Overview

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

HN30[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

To establish a violation of *§ 1962(c)* of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1962(c)*, a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. In order to maintain a private suit for treble damages, a plaintiff must also prove that it was injured in its business or property by reason of a violation of *§ 1962*.

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

Securities Law > RICO Actions > General Overview

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

HN31[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

See *18 U.S.C.S. § 1962(c)*.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Securities Law > RICO Actions > General Overview

HN32[] **Pleadings, Rule Application & Interpretation**

To establish that an association is a Racketeer Influenced and Corrupt Organizations enterprise, a plaintiff must demonstrate (1) that the enterprise is an ongoing organization with some sort of framework or superstructure for making or carrying out decisions; (2) that the members of the enterprise function as a continuing unit with established duties; and finally (3) that the enterprise must be separate and apart from the pattern of activity in which it engages. This is a difficult burden to meet. However, the burden of pleading an enterprise is less than the burden of proof. Thus, a plaintiff need plead nothing more than a bare allegation that defendant and others formed an enterprise.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

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

Securities Law > RICO Actions > General Overview

HN33[] **Racketeer Influenced & Corrupt Organizations, Claims**

A violation of the federal mail fraud statute, *18 U.S.C.S. § 1341*, requires a scheme to defraud and the mailing of a letter in furtherance of the scheme. Similarly, a violation of the federal wire fraud statute, *18 U.S.C.S. § 1343*, requires a scheme to defraud and the use of an interstate wire in furtherance of the scheme. Although a defendant need not be convicted under these criminal statutes for a plaintiff to maintain a civil claim against it under the Racketeer Influenced and Corruption Organizations Act, *18 U.S.C.S. § 1961 et seq.*, the plaintiff must allege a violation of at least one of the criminal statutes listed in *§ 1961(1)* to maintain a suit.

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

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

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Securities Law > RICO Actions > General Overview

HN34[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) requires that the circumstances of fraud be stated with particularity. This rule applies to allegations of fraud under Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.* The circumstances of fraud include such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby. Courts must balance this strict standard with the notice-pleading idea of *Fed. R. Civ. P. 8(a)*. Thus, a plaintiff is free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud. A plaintiff need not plead with temporal or geographic specificity, but must plead with sufficient particularity to place the defendants on notice of the conduct of which they are charged and to safeguard against spurious allegations.

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

Securities Law > RICO Actions > General Overview

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

HN35[] Racketeer Influenced & Corrupt Organizations Act, Elements

To constitute a pattern of racketeering activity, there must be at least two acts of racketeering activity within ten years. While two acts are necessary to establish a pattern, they may not be sufficient. A continuity plus relationship is required. However, a single scheme can constitute a racketeering pattern and the scheme need not be ongoing or open-ended. Continuity should not be subject to one verbal formula but should instead be reviewed on a case-by-case basis. The relevant factors include the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.

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

Securities Law > RICO Actions > General Overview

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

HN36[] Racketeer Influenced & Corrupt Organizations Act, Elements

The target of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., as its name suggests, is criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time.

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

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

HN37[] Amendment of Pleadings, Leave of Court

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

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Judges: Wright, Senior Judge.

Opinion by: WRIGHT

Opinion

[*1093] WRIGHT, Senior Judge.

This action is a motion to dismiss arising out of a suit filed by an automobile dealer against its supplier. Cemar, Inc., the plaintiff, alleges that the defendant, Nissan Motor Corporation in U.S.A., engaged in a pattern of conduct to discriminate against it with respect to the processing, handling, and sale of motor vehicles and parts, and to eventually replace it with a more favored dealer. Cemar seeks damages under the Dealer's Day in Court Act, the Sherman Act, the Robinson-Patman Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Maryland Transportation Code, and common law theories of fraud, negligent misrepresentation and breach of contract. Nissan Motor Corporation in U.S.A., in turn, counterclaims **[**2]** against Cemar, Inc., and William T. Murray, the president and principal shareholder of Cemar, Inc.

The suit was originally filed in the District of Maryland on June 28, 1985. On September 20, 1985, the defendant filed a Motion to Dismiss the counts under the Sherman Act, the Robinson-Patman Act, and RICO. The case was transferred to this Court on April 1, 1987, with this motion pending. The parties have since updated their briefs and reargued the Motion before this Court.

I. FACTS ALLEGED BY CEMAR

Because this action is ***HN1***[] a motion to dismiss, the facts alleged by Cemar in its complaint will be taken as true for the purpose of deciding the motion. *Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*. Plaintiff, Cemar, Inc., t/a Rising Sun Motors ("Cemar"), is a Delaware corporation which, at the time of the activities in question, operated an automobile dealership in Rising Sun, Maryland. Defendant, Nissan Motor Corporation in U.S.A. ("Nissan"), is a California corporation owned and controlled by Nissan Motor Corp. **[**3]** , Ltd., a Japanese corporation. Cemar became an authorized dealer in August 1974, and it operated under "Datsun Dealer Sales and Service Agreements" until it sold its dealership on May 6, 1983. Cemar alleges that Nissan discriminated against it while it was a dealer and conspired with Aubrey J. Cox, Tillman B. Cox, Cox Enterprises, Inc., and Tim Cox Enterprises, Inc. ("the Coxes"), and possibly others, to replace Cemar with the Coxes as an authorized Nissan dealer.

Cemar alleges that Nissan discriminated against it with respect to the delivery and allocation of vehicles and parts by making them more readily available to other dealers and on more favorable terms. Nissan **[*1094]** allegedly allotted Cemar a disproportionately large number of unpopular vehicles, which Cemar did not desire and which were difficult to sell for a profit, in comparison to what Nissan allotted to other similarly situated dealers. Nissan then coerced Cemar into buying the unpopular vehicles by refusing to sell Cemar popular vehicles without its also buying the unpopular ones. Under Nissan's "Equitable Distribution System", dealers' potential sales are supposed to be considered when allocating vehicles. **[**4]** Cemar alleges that Nissan ignored this system and instead allocated new vehicles to dealers based on past sales, the "travel rate". Cemar's sales were lower than other dealers due to its receiving a higher percentage of unpopular vehicles. This lower travel rate caused Cemar to continue to receive high proportions of unpopular vehicles. Nissan "compounded" this problem by delaying shipments to Cemar in order to further decrease Cemar's travel rate, and by knowingly using false Retail Delivery Reporting Cards submitted by other dealers in calculating their travel rates. With respect to the sale of parts, Cemar alleges discriminatory delivery and allocation practices. In addition, it claims that Nissan discriminated against it with respect to credit terms, requiring it to accept parts C.O.D. while allowing other dealers to maintain open accounts.

Cemar claims that the cause of the discrimination was that Nissan had personal antipathy towards it and had developed friendships with other dealers. It also alleges that other dealers used bribes, kickbacks, and other improper incentives in order to gain favorable treatment. Cemar refused to engage in such improper activities and sought **[**5]** a better location and fairer allocation. Consequently, Nissan treated it unfavorably.

Cemar alleges that Nissan's ultimate goal was to eliminate it as a dealer and replace it with the Coxes. Nissan carried this plan out with the consent and collaboration of the Coxes. Cemar desired to move to a potentially more lucrative location. Nissan led Cemar to believe that it approved of the move and would grant Cemar another franchise in perpetuity. However, after the deal was consummated and Cemar had moved from its old location and invested a substantial amount of money in the new location, Nissan informed Cemar that it would offer Cemar only a one-year franchise agreement, in breach of Cemar's understanding of the terms of its move. Cemar had no choice but to sign the agreement. The one-year agreement and Nissan's discriminatory practices created pressure for Cemar to sell its franchise. However, Nissan informed Cemar that the only dealer it would approve for that location was the Coxes, and it threatened not to renew the franchise agreement unless Cemar sold the dealership to the Coxes.

Cemar claims that Nissan engaged in several improper activities concerning the sale in addition **[**6]** to Nissan's discriminating against Cemar, conspiring with the Coxes, and using coercive methods. Nissan "transmitted" a false written notice to the Maryland Motor Vehicles Administration stating that Cemar was no longer a dealer and had already sold the franchise to the Coxes. This was done prior to the approval of the Coxes as a dealer and was allegedly designed to make it illegal for Cemar to sell vehicles in the future. Nissan made similar statements to other dealers. Nissan also gave confidential business information concerning Cemar to the Coxes that enabled them to obtain an advantage in negotiating with Cemar. The Coxes in turn disrupted employee relations at Cemar and bribed Cemar employees. Cemar finally sold the franchise to the Coxes and leased certain property to them with a purchase option on May 6, 1983. Cemar alleges that this sale and lease were at prices lower than what it could have obtained in a market free of improper behavior.

II. MOTION TO DISMISS

Rule 12(b)(6) ***HN2***[] states that a motion to dismiss can be granted for "failure to state a claim upon which relief can be **[**7]** granted." *Fed.R.Civ.P. 12(b)(6)*. The Court can dismiss the complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *Conley v. Gibson, **[*1095]** 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. To decide whether to grant Nissan's motion, the Court must take Cemar's allegations as true and draw any reasonable inferences in favor of Cemar.

Cemar ***HN3***[] is required only to plead "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed.R.Civ.P. 8(a)(2)*. A more liberal standard is often applied to antitrust pleadings. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1228 (1969) [hereinafter "Wright & Miller"]. Thus, "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co., 425 U.S. at 746* (citation omitted). Cemar is required to plead "enough data **[**8]** [so that] the elements of the claim for relief can be identified." 5 Wright & Miller, *supra* § 1228. The elements of each claim will be described in the discussion of each count.

III. COUNT II - CONCERTED REFUSAL TO DEAL

In Count II, Cemar incorporates the facts described above and claims that "Defendant contracted, combined, and conspired with the Coxes, *competitors of Plaintiff*, to terminate the Plaintiff's franchise, and to perform numerous acts of discrimination and bad faith, coercion, and intimidation in order to accomplish said termination, all of which constitutes a concerted refusal to deal in *per se* violation of [the Sherman Act,] *15 U.S.C. § 1*." Complaint para. 24 (emphasis added). Cemar then alleges that it suffered damages including lost profits and business opportunities "as a result of the acts complained of." Complaint para. 25. Nissan argues that its activities do not rise to the level of a *per se* violation and that Cemar cannot succeed under a rule of reason inquiry because it has not alleged "antitrust injury."

Section 1 **[**9]** of the Sherman Act ***HN4***[] prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1 (1982)*. However, "because almost all business agreements may be interpreted as restraining trade to some degree, *§ 1* of the Sherman Act has been construed for the most part to proscribe only those combinations that 'unduly' restrain trade." *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979)*. Therefore, courts usually apply a "rule of reason" and examine the anticompetitive effects of the challenged activity. *Malley-Duff & Assoc. v. Crown Life Ins. Co., 734 F.2d 133, 139 (3d Cir. 1984)*, *cert. denied sub nom. Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 469 U.S. 1072, 83 L. Ed. 2d 505, 105 S. Ct. 564 (1984)*. However, the ***HN5***[] courts have developed a list of activities "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 **[**10]** inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. These *per se* violations are made out solely by alleging the conduct. No "public injury" or anticompetitive effects need be specifically alleged because the courts assume that activities falling within *per se* categories have an anticompetitive effect. *See, e.g., Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)* (need only allege a violation and that plaintiff was damaged by it).

The Supreme Court has held that ***HN6***[] certain group boycotts are *per se* violations of the Sherman Act. *See United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*; *Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. Even though concerted refusals to deal are a form of group boycott, courts have not accepted "the notion that **[**11]** all concerted refusals to deal fall automatically as *per se* violations of the antitrust laws." *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council, 670 F.2d 421, 429* (3d Cir.), *cert. denied*, *459 U.S. 916, 74 L. Ed. 2d 182, 103 S. Ct. 229 (1982)*. Thus, ***HN7***[] "[a] plaintiff seeking application of the *per* ***[*1096]*** *se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 298, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*. Although the Third Circuit has not addressed this issue since the Supreme Court's decision in the *Northwest Wholesale* case, it has previously stated that it has "attempted to limit the application of the *per se* rule to the 'classic' boycott." *Larry v. Muko, 670 F.2d 421, 430*. **[**12]** Thus, ***HN8***[] a concerted activity is a *per se* group boycott if the "purpose is to" exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." *De Filippo v. Ford Motor Co., 516 F.2d 1313, 1318* (3d Cir.) (action by manufacturer and dealers that denied special terms to plaintiff but did not deny the opportunity to be a Ford dealer was not a *per se* violation) (citation omitted), *cert. denied*, *423 U.S. 912, 46 L. Ed. 2d 141, 96 S. Ct. 216 (1975)*.

A. Per Se Analysis

Cemar alleges that Nissan conspired with the Coxes to eliminate it as a Nissan dealer and replace it with the Coxes by coercing it to sell its franchise to the Coxes. The Coxes are not parties to this suit. This forced sale of the franchise situation is analogous to the situation where a supplier terminates a franchise. Such ***HN9***[] a "vertical" restraint is not usually subject to *per se* rules because manufacturers are given wide latitude with marketing decisions **[**13]** concerning exclusive dealerships. *See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)* (vertical non-price restrictions are subject to the rule of reason); *see also Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1497 (3d Cir. 1985)* (distinguishing horizontal and vertical restraints), *vacated*, *475 U.S. 1105, 106 S. Ct. 1509, 89 L. Ed. 2d 909 (1986)* (consideration of new precedent), *aff'd. on remand*, *823 F.2d 49 (3d Cir. 1987)*. On the other hand, the Supreme Court has concluded that the horizontal nature of a conspiracy between existing dealers and a manufacturer to pressure a discounter has the requisite anticompetitive effects to be a *per se* violation. *General Motors, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321*.

Some actions by suppliers against dealers have sufficient anticompetitive effects to be *per se* violations. Thus,

> ***HN10***[] although a unilateral decision to refuse to deal is not in and of itself a violation of the antitrust **[**14]** laws, if the decision is not purely unilateral but is the product of *competitors* working in concert with themselves or in conjunction with the company to exclude a person or group from the market, the necessary elements of a boycott in the classical sense may be present, and hence a *§ 1* violation may be made out.

Malley-Duff, 734 F.2d at 133 (emphasis added); *cf. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761-64, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)* (***HN11***[] Because a manufacturer can deal or refuse to deal with whomever it likes if it does so independently, a terminated distributor must produce evidence which "tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently."). Thus, although dealer substitution in response to complaints, or at the suggestion of another dealer, is not *per se* illegal, *A. H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302, 1306 (9th Cir. 1981)*, it may be *per se* illegal if the decision was prompted by dealer coercion. *Id* **[**15]** . at n.3 (citing *Cernuto, 595 F.2d 164*).

Cemar relies on *Cernuto, 595 F.2d 164*, to support its argument that the conduct it alleges constitutes a *per se* violation. In *Cernuto*, a former distributor sued another distributor and the manufacturer because of its termination at the urging of the other distributor. The court stated that ***HN12***[] "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 **[*1097]** be." *Id. at 168*. The court held that the facts alleged by plaintiff could make out a *per se* violation. Judge Adams reasoned that "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." Id*. (emphasis added).

Later cases have applied this concept and held that concerted **[**16]** activities between *competing distributors* and a manufacturer or supplier may be *per se* unlawful. For example, in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105* (3d Cir.), *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)*, Sweeney alleged that his hauling allowance as a Texaco dealer had been reduced because of complaints from competing distributors that he had been undercutting their prices. The court held that Sweeney had sufficiently alleged a *per se* violation, but had not presented sufficient evidence of a conspiracy. Likewise, in *Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469 (3d Cir. 1985)*, plaintiff alleged that its distributors and a competitor conspired to refuse to deal with it in order to restrain price competition by forcing it out of the market. The court held that Fragale did allege a *per se* violation. In *Malley-Duff, 734 F.2d 133*, the court held that there was sufficient evidence of a group boycott by plaintiff's insurance competitors to submit the case to a jury on a *per se* theory. Finally, in *Tunis Bros, 763 F.2d 1482*, a **[**17]** competing Ford dealer allegedly conspired with Ford to eliminate the plaintiff's franchise by terminating it and rejecting its credit applications. Judge Higginbotham stated that ***HN13***[] the "key element" in maintaining the case under a *per se* theory was "simply probative evidence of some form of collusion between a supplier and a *competing distributor* which interjects horizontal conflict." *Id. at 1498* (emphasis added).

The common element in all of these cases is that the plaintiffs alleged concerted activities between *competitors* and suppliers or manufacturers to accomplish *anticompetitive results*. All of them involved alleged conspiracies where *existing competitors* influenced the decision of their common supplier, and each case fits into a known category of *per se* violations. In *Malley-Duff*, there was a group boycott where several competitors sought to oust a competitor, thus reducing the number of competitors and competition in the market. Similarly, in *Tunis Bros*., a competitor sought to expand its geographic territory and reduce competition **[**18]** by eliminating the plaintiff's franchise. Finally, *Cernuto, General Motors*, and *Sweeney* each involved resale price maintenance or other price restraints. In his *Cernuto* opinion, Judge Adams emphasized the "pre-eminence of ***HN14***[] price considerations in ***antitrust law***," and the centrality of price maintenance to the court's decision that a *per se* rule applied. *Cernuto, 595 F.2d at 168-69*. Cemar has alleged no price restraint, territorial restriction, or group boycott.

Cemar alleges that Nissan "collaborated" with the Coxes in an effort to replace its franchise with the Coxes and that they conspired to coerce Cemar into selling to the Coxes. It alleges that Nissan collaborated with the Coxes, rather than acting independently, by revealing confidential information to the Coxes and coercing Cemar to sell only to the Coxes. These allegations are insufficient to make out a *per se* violation of *section 1*.

The first problem is that Cemar does not allege that the Coxes were Nissan dealers at the time of the activities in question. Although Cemar stated in Count II **[**19]** that the Coxes were "competitors of the plaintiff," Complaint para. 24, nowhere in the facts or description of the parties did Cemar allege that the Coxes were Nissan dealers. In fact, Cemar alleged to the contrary when it claimed that Nissan falsely advised the State "prior to the approval of the Coxes as a dealer." Complaint para. 19(b).

The pernicious effect on competition in the *Cernuto* line of cases is that existing competitors conspire to eliminate another competitor, thus reducing their competition and creating a horizontal restraint. Cemar has instead alleged a dealer substitution between it and the Coxes, thus leaving the **[*1098]** same number of Nissan dealers and not adversely affecting competition. *A.H. Cox & Co*., 653 F.2d at 1307. Even under the liberal standard of a motion to dismiss, the Court cannot infer from the pleadings that the Coxes were Nissan dealers in competition with Cemar. As such, the horizontal element of restraint referred to in *Cernuto* is not present here.

The Court recognizes that Cemar has alleged concerted activity to coerce Cemar into selling its franchise at below-market value. This may well be improper, but it is **[**20]** not a *per se* violation of *section 1*. Taking all allegations as true, and drawing all inferences in favor of Cemar, the Court finds that Cemar has not alleged the facts necessary to turn a dealer substitution or termination into a restraint in *per se* violation of the Sherman Act. Because Cemar has not alleged a claim upon which relief can be granted, Count II must be dismissed.

B. Rule of Reason Analysis

In most cases, ***HN15***[] if the plaintiff's allegations do not meet the standard for a *per se* violation, the facts are evaluated under the rule of reason. Under that rule, Cemar would have to show "that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets." *Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81 (3d Cir. 1977)*, *cert. denied*, *436 U.S. 913, 56 L. Ed. 2d 413, 98 S. Ct. 2253 (1978)*. Cemar limited its allegations to a *per se* violation of *section 1*. Complaint para. 24. Even if it had alleged a violation under the rule of reason, however, the claim would be **[**21]** dismissed.

Cemar's rule of reason claim would fail because Cemar alleges injury only to itself, not to competition. ***HN16***[] A rule of reason inquiry consists of examining the anticompetitive effects of an alleged restraint. *Glauser, 570 F.2d at 81*. Thus, to succeed, Cemar must allege the actual anticompetitive impact of the alleged conspiracy.

HN17[] It is also well established that the antitrust laws protect competition, not individual competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Thus, Cemar must allege "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent." *Id. at 489* (emphasis in original). Cemar has failed to do this. Although injury to an individual competitor can sometimes injure competition, Cemar has not alleged such an injury. Cemar simply alleges a case of improper dealer substitution. Although it is necessary that one dealer **[**22]** be injured in such a situation, there is usually no anticompetitive effect. *A.H. Cox & Co*., 653 F.2d at 1307. Therefore, because Cemar did not allege any anticompetitive effect and the Court cannot reasonably infer one, Cemar has not sufficiently alleged a *section 1* violation under the rule of reason and Nissan's Motion to Dismiss Count II must be granted.

IV. COUNT III - TYING

Cemar alleges that Nissan "utilized its total control of the allocation of scarce and unique popular Datsun vehicles, in order to force plaintiff, as a condition of receiving said vehicles, to accept delivery of unpopular vehicles which plaintiff did not order or desire, all of which constituted a tie-in in violation of [the Sherman Act,] *15 U.S.C. § 1*." Complaint para. 27. It further alleges that this activity caused it severe damages, including "loss of profits and business opportunities." Complaint para. 28. Nissan argues that Cemar has not alleged the necessary elements for a tying claim under the Sherman Act.

HN18[] A tie-in is an "agreement by a party to sell one product **[**23]** [the tying product] but only on the condition that the buyer also purchase a different (or tied) product." *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. "The vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another." *Id. at 11*. Although section 3 of the Clayton Act specifically deals with tying, many cases do not meet the Clayton Act's jurisdictional requirements. Thus, courts also analyze tying claims under the Sherman Act's prohibition **[*1099]** of contracts "in restraint of trade or commerce." *See, e.g., id. at 1*.

A. Per Se Violations

The Supreme Court has held that ***HN19***[] certain tying arrangements are unreasonable *per se. International Salt Co. v. United States, 332 U.S. 392, 396, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*. To succeed in a *per se* claim, Cemar must prove that a tying arrangement exists and that Nissan "has sufficient economic power with respect to the tying product to appreciably restrain **[**24]** free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." Northern Pac., 356 U.S. at 6, (citation omitted); Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir.), *cert. denied*, *429 U.S. 823, 50 L. Ed. 2d 84, 97 S. Ct. 74 (1976)*.

The Supreme Court in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984), raised the threshold needed **HN20**[] for a *per se* violation. It stated that there must be a threshold determination of a "substantial potential for impact on competition" for the *per se* rule to be applicable. Id. at 16. It emphasized that "forcing" is an indication that there is a restraint in competition for the tied product and that whether the *per se* rule applies depends on whether "forcing is probable" and on "the probability of anticompetitive consequences" in the market for the tied product. Id. at 15-16.

Cemar alleges that Nissan used its total control **[**25]** over popular vehicles, the tying product, to force Cemar into buying unpopular vehicles, the tied product. Cemar bases its claim that the arrangement is unlawful on the fact that it was forced to buy something it did not want. It relies on the language in *Jefferson Parish* "that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to *force the buyer into the purchase of a tied product that the buyer either did not want at all*, or might have preferred to purchase elsewhere on different terms." Jefferson Parish, 466 U.S. at 12 (emphasis added).

Nissan does not challenge that Cemar properly alleged two separate products and evidence of forcing. Nissan instead argues that Cemar has not alleged any restraint on competition in the market for the tied product, unpopular vehicles. Nissan claims that, even if Cemar were forced to buy vehicles it did not want, there would be no violation because no competition could be foreclosed. It relies on the language in *Jefferson Parish* that "when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller **[**26]** in the tied-product market, *there can be no adverse impact on competition* because no portion of the market which would otherwise have been available to other sellers has been foreclosed." Id. at 16.

The Court agrees with Nissan that Cemar cannot prove the probable anticompetitive consequences that *Jefferson Parish* requires. Cemar alleged that Nissan had "total control over the allocation of the popular vehicles." Complaint para. 16(c). It did not allege that it would have, or even could have, bought the unpopular vehicles elsewhere, and instead alleged that it did not want them at all. It is important to note that because Cemar was exclusively a Nissan dealer, it could only sell Nissan vehicles. Thus, there were no other sellers competing with Nissan to sell unpopular vehicles to Cemar [1] and the alleged tying arrangement could not foreclose competition in the market for unpopular vehicles. **[*1100]** *See* Jefferson Parish, 466 U.S. at 16.

[27]** An analogous situation in which one party controlled the sales of both products existed in the preseason football ticket cases. In this line of cases, plaintiff season ticketholders challenged the policy of certain teams that a customer could only purchase season tickets if it agreed to also purchase tickets to the team's preseason games. In Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir.), *cert. denied*, *419 U.S. 1022, 42 L. Ed. 2d 296, 95 S. Ct. 498 (1974)*, the Second Circuit held that the plaintiff could not make out a tying claim because the fact that the defendant had a monopoly over the tied product meant that it could not restrain competition in that market. Likewise, in Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974), the Fifth Circuit held that because the Cowboys had a complete monopoly in the tied product, "there can thus be no adverse effect on any competitors, even if a tying scheme exists." Thus, because Nissan had no competitors in selling unpopular vehicles to Cemar, the alleged situation could not restrain competition in that market and Cemar cannot make out a *per* **[**28]** *se* tying violation under section 1 of the Sherman Act.

B. Rule of Reason

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[1] During oral argument, counsel for Cemar discussed the fact that Cemar could buy Nissan vehicles from other dealers, albeit at inflated prices. This was not specifically alleged in the complaint. If there were other suppliers for the unpopular vehicles, substitutes could be available and competition could be foreclosed because Cemar may be forced to buy the vehicles from Nissan rather than from other sources. However, the fact that Cemar would not have bought the vehicles elsewhere means that no other sellers were foreclosed from the market because of the alleged tying arrangement.

As with Cemar's allegation of a concerted refusal to deal, its **HN21**[] tying claim must be evaluated under the rule of reason because the requirements for a *per se* violation are not met. *See, e.g.,* Jefferson Parish, 466 U.S. at 29; *see also* Innovation Data Processing v. IBM Corp., 603 F. Supp. 646 (D.N.J. 1984). Cemar does not allege any injury to competition, only injury to its own ability to compete. The Court has demonstrated that the alleged scheme cannot adversely affect competition in the tied product. Thus, for the same reasons described in Section IIIB, *supra*, Cemar has not sufficiently alleged a violation under the rule of reason, and Count III must be dismissed.

V. COUNT IV - ROBINSON-PATMAN ACT

Cemar alleges that Nissan "has discriminated against plaintiff with respect to the processing, handling, sale, and offering for sale of vehicles and other automotive products, all in violation of [the Robinson-Patman Act,] 15 U.S.C. § 13. **[**29]** " Complaint para. 30. Cemar alleges that it suffered damages including "loss of profits and business opportunities." Complaint para. 31. Although the complaint does not allege violations of specific sections of the Robinson-Patman Act, the parties have narrowed the claim down through the briefing to two sections: price discrimination, section 13(a), and discrimination in services and facilities regarding products sold for resale, section 13(e).

A. Section 13(a)

Section 13(a) **HN22**[] makes it unlawful "to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 13(a) (1982). Cemar alleges three situations that it believes violate this section. First, it alleges that Nissan required it to pay for parts C.O.D. while allowing other dealers to maintain open accounts. Cemar also alleges that Nissan engaged in discriminatory delivery practices by delaying deliveries to Cemar. Finally, it **[**30]** alleges that Nissan discriminated in the allocation of vehicles and parts, and that it was injured by Nissan's refusal to sell all that it wanted. Nissan argues that Cemar fails to state a claim in that it fails to allege any discrimination in *price* and fails to allege any competitive injury resulting from such discrimination.

1. Credit Terms

In the body of the complaint, Cemar alleged that Nissan discriminated against it "with respect to credit terms for purchases of parts, by requiring C.O.D. payments by plaintiff in circumstances in which other, similarly situated dealers were allowed to maintain open accounts." Complaint **[*1101]** para. 16(i). Although not stated in the complaint, Cemar now argues that this difference constitutes a price discrimination within the scope of section 13(a).

HN23[] Price discrimination under the Robinson-Patman Act is simply defined as charging different prices to different purchasers. FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960). However, many courts have concluded that this means the net **[**31]** price actually received by the seller for the goods, including all discounts and allowances. Conoco, Inc. v. Inman Oil Co., Inc., 774 F.2d 895, 902 (10th Cir. 1985). Cemar argues that the difference in credit terms meant that Cemar had to pay when receiving the goods while other similarly situated dealers kept their money and were able to invest it. This lost opportunity meant that other dealers were charged less relative to Cemar.

It is clear that the decision whether to extend credit is influenced by business judgment and the borrower's financial history, among other factors. Thus, some courts have "uniformly held that discrimination in credit terms is outside the Act's coverage." Diehl & Sons, Inc. v. Int'l Harvester Co., 426 F. Supp. 110, 122 (E.D.N.Y. 1976). However, the Tenth Circuit stated that it did not rule out the possibility that there could "be a discrimination in credit of such magnitude or nature as to constitute a violation." Craig v. Sun Oil Co. of Pa., 515 F.2d 221, 224 (10th Cir. 1975) (no violation because extreme situation not alleged), *cert. denied*, *429 U.S. 829, 50 L. Ed. 2d 92, 97 S. Ct. 88 (1976)*. **[**32]** Thus, in *Robbins Flooring, Inc. v. Federal Floors, Inc., 445 F. Supp. 4 (E.D.Pa. 1977)*, the court denied a Rule 12(b)(6) motion and held that the plaintiff had sufficiently alleged that different credit terms were given to different purchasers. In doing so, the court held that business justifications were defenses not properly considered on a motion to dismiss. *Id. at 9*. Thus, Cemar could make out a claim of discrimination on credit terms. This is because, even though not specifically alleged, the difference between open accounts and no credit at all, or requiring C.O.D. payments, is extreme enough that it could affect the price paid by Cemar.

The Court will grant Nissan's Motion to Dismiss this claim, however, because Cemar fails to allege that there was a reasonable probability that the price difference caused by the discrimination in credit terms may harm competition. *Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 438, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*. It is well established that ***HN24***[↑] a plaintiff must allege competitive **[**33]** injury in a *section 13(a)* action. *See, e.g., Conoco, 774 F.2d 895* (the two elements of a *section 13(a)* violation are price discrimination and injury to competition). In order to meet this requirement, Cemar would have to show actual competitive injury, as shown by market analysis, or predatory intent, as shown by a competitor sacrificing short term revenues to drive Cemar out of the market. *Double H. Plastics, Inc. v. Sonoco Prods. Co., 732 F.2d 351 (3d Cir. 1984)*, *cert. denied*, *469 U.S. 900, 105 S. Ct. 275, 83 L. Ed. 2d 212 (1984)*; *O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3d Cir. 1981)*, *cert. denied*, *455 U.S. 1017, 72 L. Ed. 2d 134, 102 S. Ct. 1711 (1982)*. Cemar alleged injury only to itself, not to competition, and this is "not enough from which a court may infer that an alleged price discrimination may 'substantially' injure competition." *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 548 (9th Cir. 1983)* (12(b)(6) motion granted for failure to allege competitive injury), *cert. denied*, *465 U.S. 1038, 79 L. Ed. 2d 712, 104 S. Ct. 1315 (1984)*. **[**34]** Because ***HN25***[↑] "the naked demonstration of injury to a specific competitor without more is not sufficient," *id*., the Court grants Nissan's Motion as to credit term discrimination.

2. Delivery Practices

Cemar also alleges that Nissan "arbitrarily and in bad faith, delayed the shipping of vehicles" to Cemar. Complaint para. 16(h). It claims that it also was injured by this practice. This claim fails because, as with the credit discrimination claim, it fails to allege any competitive injury. Furthermore, Cemar failed to ***HN26***[↑] allege any connection **[*1102]** between the alleged discrimination in delivery practices and a difference in price. Cemar cites *Corn Products Refining Co. v. FTC, 324 U.S. 726, 89 L. Ed. 1320, 65 S. Ct. 961 (1945)*, and *FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 89 L. Ed. 1338, 65 S. Ct. 971 (1945)*, for the proposition that discrimination in delivery terms can constitute price discrimination. These cases, however, involved the "base-point **[**35]** pricing" delivery system, and thus dealt with the *price* of delivery. Cemar has made no such allegation concerning the *price* of delivery. Thus, Nissan's Motion to Dismiss the *section 13(a)* claim of discrimination in delivery practices must be dismissed.

3. Allocation of Vehicles and Parts

Cemar also alleges that Nissan "made vehicles and automotive products available to other dealers more readily, and on more favorable terms, than with respect to plaintiff," Complaint para. 16(a), and that Nissan "arbitrarily and in bad faith, refused to honor orders placed by plaintiff, while honoring similar orders placed by similarly situated other dealers." *Id*. at para. 16(g). As with the other *section 13(a)* claims, this claim must be dismissed for failing to allege injury to competition. Even if competitive injury were alleged, however, Cemar would not have sufficiently alleged a *section 13(a)* claim because it did not allege any price effect.

Both of Cemar's claims involve a refusal to sell. Cemar alleged that Nissan refused to make some products readily available and refused to honor some orders altogether. **[**36]** ***HN27***[↑] The Robinson-Patman Act only covers discrimination in actual sales and does not cover refusals to deal. *L & L Oil Co., Inc. v. Murphy Oil Corp., 674 F.2d 1113, 1120 (5th Cir. 1982)*; *Reliable Tire Dist. Inc. v. Kelly Springfield Tire Co., 592 F. Supp. 127, 132 (E.D.Pa. 1984)*. Likewise, a refusal to supply as much as Cemar wanted is also a refusal to deal that is not covered by *section 13(a)*. *Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 682 (10th Cir. 1984)*, *cert. denied*, *469 U.S. 854, 105 S. Ct. 178, 83 L. Ed. 2d 113 (1984)*. Thus, Cemar's *section 13(a)* claims dealing with the allocation of vehicles and parts must be dismissed.

B. Section 13(e)

Section 13(e) ***HN28***[] concerns discrimination in "services or facilities connected with the processing, handling, sale, or offering for sale of such commodity" to purchasers in the resale business. *15 U.S.C. § 13(e) (1982)*. It applies to discrimination in advertising and promotional services because these are connected with resale rather than **[**37]** an original sale. *L & L, 674 F.2d 1113, 1119-29*; *Cole v. Ford Motor Co., 566 F. Supp. 558, 567 (W.D. Pa. 1983)*. Cemar need not allege competitive injury to claim under this section. *Great Atl. & Pac. Tea Co., Inc. v. FTC, 440 U.S. 69, 79, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)* ("liability under *[section 13(e)]*, unlike *[section 13(a)]*, does not depend upon competitive injury"). The Court grants Nissan's motion to dismiss, however, because Cemar does not allege the kind of discrimination that is covered under *section 13(e)*.

The only claim Cemar has pressed under this section is for discriminatory delivery practices. Whether *section 13(e)* applies to this type of claim is a controversial issue. Cemar cites *Centex-Winston Corp. v. Edward Hines Lumber Co., 447 F.2d 585 (7th Cir. 1971)*, *cert. denied*, *405 U.S. 921, 30 L. Ed. 2d 791, 92 S. Ct. 956 (1972)*, which held that discrimination in delivery practices promotes and facilitates (or hinders) resale. Many courts and commentators have criticized that decision. *See, e.g.,* *L & L, 674 F.2d 1113, 1118* ("*Centex-Winston* has met **[**38]** with much criticism and has been distinguished and rejected by other courts."); *see also* *Foremost, 703 F.2d at 546*; *Purdy Mobile Homes, Inc. v. Champion Home Builders Co., 594 F.2d 1313 (9th Cir. 1979)*; *Cecil Corley Motor Co. v. General Motors Corp., 380 F. Supp. 819 (N.D. Tenn. 1974)*. The Court agrees with the Fifth Circuit that "the overwhelming view . . . is that ***HN29***[] delivery is not a service or facility within the meaning of *[section 13(e)]*." *L & L, 674 F.2d 1113, 1119*. Thus, Cemar fails to state a claim for which relief can be granted **[*1103]** under *section 13(e)*, and Nissan's Motion to Dismiss Count IV is granted.

VI. COUNT V - RICO

A. The Claims

In Count V, Cemar alleges that "Defendant and its co-conspirators, including the Coxes, established an enterprise or joint venture, the purpose of which was to acquire, by illegal means, the franchise and related business property of Plaintiff, and in furtherance of said enterprise Defendant and its co-conspirators performed numerous predicate acts in interstate **[**39]** commerce *or by use of the mails*, including, but not necessarily limited to, *antitrust violations and bribery*, all in violation of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. §§ 1961 et. seq.*" Complaint para. 33 (emphasis added). It alleges that it substained damaged in the form of lost profits and the receipt of less money for its franchise than was warranted. Complaint para. 16.

Count V alleges specifically only antitrust violations and bribery as predicate acts. It contains no facts unto itself but incorporates other sections of the complaint. Through the exchange of briefs, however, Cemar has apparently withdrawn the claim that the predicate acts were antitrust violations and bribery, and instead argues that the predicate acts were violations of the federal mail fraud statute, *18 U.S.C. § 1341 (1982)*, and the federal wire fraud statute, *18 U.S.C. § 1343 (1982)*. In support of this claim, Cemar refers to its prior allegation that "well prior to the Plaintiff's sale of the franchise, Defendant *transmitted a written notice* to the Motor Vehicle Administration of Maryland, **[**40]** *falsely advising* that Plaintiff was no longer a franchised dealer." Complaint para. 19(b) (emphasis added). It also alleges that Nissan "*falsely advised other dealers* that the Coxes had replaced Plaintiff as a dealer, prior to the sale to the Coxes and prior to the approval of the Coxes as a dealer." *Id*. (emphasis added).

B. RICO

HN30[] To establish a violation of *section 1962(c)* [2] of RICO, Cemar must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 87 L. Ed.*

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[2] *Section 1962(c)* reads: ***HN31***[] "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *18 U.S.C. § 1962(c) (1982)*.

2d 346, 105 S. Ct. 3275 (1985) (footnote omitted). In order to maintain a private suit for treble damages, Cemar must also prove that it was "injured in [its] business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (1982). The Court holds that Count V must be dismissed because Cemar has failed to sufficiently allege a pattern of racketeering activity.

[41]** *1. Enterprise*

Cemar alleges that Nissan conspired with the Coxes and other unnamed co-conspirators to establish an enterprise to acquire Cemar's franchise. It claims that the alleged unlawful activities were done by Nissan with the collaboration and consent of the Coxes. Cemar alleges that this conspiracy constitutes "a group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4) (1982)*. This allegation is sufficient to put Nissan on notice of what its alleged enterprise is.

HN32[] To establish that an association is a RICO enterprise, Cemar must demonstrate "(1) that the enterprise is an ongoing organization with some sort of framework or superstructure for making or carrying out decisions; (2) that the members of the enterprise function as a continuing unit with established duties; and finally (3) that the enterprise must be separate and apart from the pattern of activity in which it engages." *Seville Indus. Mach. v. Southmost Mach. Corp., 742 F.2d 786, 789-90 (3d Cir. 1984)*, *cert. denied*, *469 U.S. 1211, 105 S. Ct. 1179, 84 L. Ed. 2d 327 (1985)*. **[**42]** This is a difficult burden to meet, and Cemar has not specifically alleged all of the characteristics of a RICO enterprise. However, the burden of **[*1104]** pleading an enterprise is less than the burden of proof. *Id. at 791*. Thus, Cemar need plead "nothing more at this early junction than that bare allegation" that Nissan and the Coxes formed an enterprise. *Id*. It has done so.

2. Racketeering Activity

Cemar claims that the predicate acts committed by the enterprise were acts of mail fraud and wire fraud. ***HN33***[] A violation of the federal mail fraud statute, *18 U.S.C. § 1341 (1982)*, requires a scheme to defraud and the mailing of a letter in furtherance of the scheme. *United States v. Murr, 681 F.2d 246* (4th Cir.), *cert. denied*, *459 U.S. 973, 74 L. Ed. 2d 286, 103 S. Ct. 307 (1982)*. Similarly, a violation of the federal wire fraud statute, *18 U.S.C. § 1343 (1982)*, requires a scheme to defraud and the use of an interstate wire in furtherance of the scheme. *Harris Trust and Savings Bank v. Ellis, 609 F. Supp. 1118, 1122 (N.D.Ill. 1985)*. **[**43]** Although Nissan need not be convicted under these criminal statutes for Cemar to maintain a civil claim against it under RICO, *Sedima, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346*, Cemar must allege a violation of at least one of the criminal statutes listed in *18 U.S.C. § 1961(1) (1982)* to maintain the suit.

Rule 9(b) of the Federal Rules of Civil Procedure ***HN34***[] requires that the "circumstances" of fraud "be stated with particularity." *Fed.R.Civ.P. 9(b)*. This rule applies to allegations of fraud under RICO. *See, e.g., Seville, 742 F.2d 791* (applying *Rule 9(b)* to mail and wire fraud allegations). The circumstances of fraud "include such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." *Bennett v. Berg, 685 F.2d 1053, 1062 (8th Cir. 1982)* (paragraph alleging fraud by "various other defendants" stricken). Courts must balance this strict standard with the notice-pleading idea of *Fed.R. **[**44]** Civ.P. 8(a)*. *Seville, 742 F.2d at 791*. Thus, Cemar is "free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Id*. Cemar need not plead "with temporal or geographic specificity," but must plead "with sufficient particularity to place the defendants on notice of the conduct of which they are charged and to safeguard against spurrious allegations." *Klapper v. Commonwealth Realty Trust, 657 F. Supp. 948, 959 (D.Del. 1987)*.

Cemar does not sufficiently allege either mail fraud or wire fraud. Nowhere in the complaint does Cemar allege that the racketeering activity consisted of *mail* or *wire* fraud. The two factual allegations it now makes contain no allegation of a use of the mail, *18 U.S.C. § 1343 (1982)*, or the use of an interstate wire communication. *18 U.S.C. § 1341 (1982)*. Even applying the more liberal standard for pleading fraud advocated in *Seville, 742 F.2d at 791*, the allegations in this complaint are insufficient.

The first allegation involves "transmitting" a notice to the Motor Vehicle Administration. **[**45]** Cemar identified the agency which received the notice, a rough idea of its content, and that it was "written." This allegation does not have sufficient "means of injecting precision and substantiation into" the claim. The complaint does not state that the notice was mailed, only that it was transmitted. Nor does it give any indication of the date of its transmittal. This is insufficient to put Nissan on notice of a mail fraud violation.

Cemar's allegation about false notices to other dealers is even more problematic. Not only does it fail to give the "date, place or time" of the notices, it fails to allege what dealers received them or the method of transmittal. The Court presumes that Nissan, as a supplier, frequently notifies its dealers of a variety of important information and uses a variety of methods of transmittal. Therefore, Cemar's allegation fails to have "the means of injecting precision and substantiation into" the claim and fails to place Nissan on notice of what the alleged violation is. Because Cemar has failed to adequately allege predicate acts of racketeering activity, Count V must be dismissed.

3. Pattern of Racketeering Activity

Even if Cemar had sufficiently **[**46]** alleged mail and wire fraud, however, its **[*1105]** claim would be dismissed because it failed to sufficiently allege a *pattern* of racketeering activity. ***HN35***[] To constitute a pattern, there must be "*at least two acts* of racketeering activity . . . within ten years." *18 U.S.C. § 1961(5) (1982)* (emphasis added). The Supreme Court stated that "while two acts are necessary [to establish a pattern], they may not be sufficient." *Sedima, 473 U.S. at 496 n.14*. The Court emphasized that "continuity plus relationship" is required. *Id*., (citing legislative history).

The Third Circuit recently clarified the requirements for a pattern of racketeering activity. The court held that a "single scheme can constitute a RICO pattern" and that the scheme need not be "ongoing or open-ended." *Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987)*. It stated that the "continuity" referred to in *Sedima* should not be subject to one verbal formula but should instead be reviewed on a case-by-case basis. The **[**47]** relevant factors include "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity." *Marshall-Silver Const. Co. v. Mark, 835 F.2d 63, 66 (3d Cir. 1987)* (*quoting Barticheck, 832 F.2d at 39*).

Cemar alleges one scheme in which Nissan conspired with the Coxes to coerce it to sell its franchise to the Coxes at below market value. It alleges several predicate acts, all dealing with notifying various people that Cemar was no longer a dealer. Cemar does not allege any time span for the activities in question, and it does not allege that any other dealers were the target of the scheme.

These allegations are insufficient to constitute a pattern of racketeering activity. As Judge Stapleton said in *Marshall-Silver*:

> ***HN36***[] the target of the RICO statute, as its name suggests, is criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series **[**48]** of injuries over a significant period of time. Here we have a single victim, a single injury, and a single short-lived scheme with only two active perpetrators [footnote omitted]. This is not criminal activity with the kind of continuity of which we spoke in *Barticheck*."

Marshall-Silver at 66-67. Therefore, Count V would have to be dismissed, even if Cemar had succeeded in making out its mail and wire fraud allegations.

VII. AMENDING THE COMPLAINT

The Court holds that Nissan's Motion to Dismiss Counts II through V shall be granted. Cemar desires to amend its complaint under *Rule 15(a)*. Nissan argues that amending the complaint is unnecessary and would unduly delay trying the case.

This lawsuit has an unusual procedural posture. This motion to dismiss was filed more than two years ago in the District of Maryland. Since then, the parties have continuously engaged in discovery. *Rule 15(a)* **HN37**[] instructs that leave to amend "shall be freely granted when justice so requires." *Fed.R.Civ.P. 15(a)*. The fact that Cemar has not previously amended its complaint means that the Court **[**49]** should strongly consider granting its request for leave to amend. Also, the fact that the case has not been set for trial means that no actual trial date will be delayed if the complaint is amended. Furthermore, the Court considers that Cemar may be prejudiced if the Court denies its request because discovery may have revealed that Cemar can prove its allegations.

The Court will grant Cemar thirty days to amend its complaint. However, because of the unusual posture of the case, the Court wishes to avoid purely cosmetic repairs to the complaint. If the Court were to allow Cemar to amend its complaint facially, there may be needless duplicative discovery and delay that would be prejudicial to Nissan. Therefore, the Court requires that Cemar proffer evidence to support the amendments. This is a procedure usually used only when a plaintiff seeks to amend a complaint after a summary judgment motion has been filed. *See, e.g., Carey* ***[*1106]*** *v. Beans, 500 F. Supp. 580, 582 (E.D.Pa. 1980)* (requiring substantial evidence to support the new claims), *aff'd. mem.*, *659 F.2d 1065 (3d Cir. 1981)*. It is warranted here because of the substantial discovery already **[**50]** conducted and the fact that Cemar should now know whether it can prove the allegations of Counts II through V. The Court will then rule on whether the amended complaint and supporting evidence are sufficient to allege the claims.

The Court also holds that Cemar must reimburse Nissan for any duplicative discovery not initiated by it and caused by the amended complaint. *See Outboard Marine Corp. v. Pezetel, 535 F. Supp. 248, 253 n.8 (D.Del. 1982)* (conditioning leave to amend of plaintiff's compensating defendant for fees and expenses on the duplicative discovery).

An Order will issue in conformity with this Opinion.

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Oahu Gas Service, Inc. v. Pacific Resources, Inc.

United States Court of Appeals for the Ninth Circuit

August 10, 1987, Argued and Submitted ; February 1, 1988, Filed

No. 86-2250

Reporter

838 F.2d 360 *; 1988 U.S. App. LEXIS 1198 **; 1988-1 Trade Cas. (CCH) P67,895; 1988 WL 5636

Oahu Gas Service, Inc., Plaintiff-Appellee, v. Pacific Resources Inc., Gasco, Inc., Defendants-Appellants

Prior History: [1]** Appeal from the United States District Court for the District of Hawaii, Paul G. Rosenblatt, District Judge, Presiding. D.C. No. CV-77-0444-PGR.

Disposition: Reversed.

Core Terms

propane, monopoly power, market share, customers, islands, prices, relevant market, Resources, barriers, refinery, energy, market power, antitrust liability, residential, jury's finding, monopolist's, competitors, users, price control, supplies, offers, sales, cases, outer, monopolization, predatory, anti trust law, geographical, contracts, campaign

LexisNexis® Headnotes

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

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

HN1[] **Monopolies & Monopolization, Actual Monopolization**

The offense of monopolization under § 2 of the Sherman Act, 15 U.S.C.S. § 2, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN2[] **Regulated Practices, Market Definition**

Both market definition and market power are essentially questions of fact. Thus, an appellate court reviews the evidence on these factual issues in the light most favorable to the non-movant and draw all reasonable inferences in its.

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

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

HN3[] **Market Definition, Relevant Market**

A determination of the relevant market typically requires an inquiry into the nature of the product and the geographical area of effective competition.

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

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

HN4[] **Regulated Industries, Sports**

The appellate court's review is limited to an assessment of the evidence in the light most favorable to the prevailing party. Thus, if the evidence was sufficient to allow a reasonable jury to determine the facts the court is required to accept the jury's fact-finding on an issue.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > Federal Circuit Court

HN5[] **Monopolies & Monopolization, Actual Monopolization**

Inquiries into the existence of monopoly power focus generally on a firm's ability to control prices or exclude competition. Although no single factor has been held determinative as to the existence of such power, inquiries in this area often depend heavily upon market share and barriers to entry. A firm with a high market share may be able to exert market power in the short run, but substantial market power can persist only if there are significant and continuing barriers to entry.

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

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

HN6[] **Regulated Practices, Market Definition**

Market share is just the starting point for assessing market power. A high market share, though it may ordinarily raise an inference of monopoly power will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors. By the same token, a declining market share may reflect an absence of market power, but it does not foreclose a finding of such power.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

The second element of monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, is the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

Determinations that specific conduct was anticompetitive in violation of the Sherman Act are questions of law that the appellate court reviews de novo.

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

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

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

Because of a monopolist's special position, the antitrust laws impose what may be characterized as affirmative duties. These duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor.

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

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

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

Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, a court determines antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct.

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

Energy & Utilities Law > Natural Gas Industry > Liquefied Natural Gas

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

HN11[] **Monopolies & Monopolization, Actual Monopolization**

Economic necessity distinguishes some conduct from willful acquisition or maintenance of monopoly power because it involved the "business acumen" that is specifically exempted from antitrust liability.

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

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

HN12[] **Monopolies & Monopolization, Actual Monopolization**

The test of willful maintenance or acquisition of monopoly power is whether the acts complained of unreasonably restrict competition.

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

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

Torts > Business Torts > Unfair Business Practices > General Overview

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

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

HN13[] **Monopolies & Monopolization, Actual Monopolization**

The goal of the antitrust laws, unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors. While it may be a tort for a defendant to induce another to deal in violation of his contract with the defendant's rival, it should not be an exclusionary practice. Buying an employee away from a rival, for example, does not impair competition any more when that employee was under a long term contract than when he was not. The competitive effect, if any, results from the transfer of resources or patronage away from the rival and to the monopolist. If there is a tort, so be it. But ***antitrust law*** should not make liability depend upon the existence or nonexistence of contracts which do not affect the competitive results.

Counsel: William S. Boyd, Brobeck, Phleger & Harrison, for the Defendants-Appellants.

Maxwell Blecher, Blecher, Collins & Weinstein, for the Plaintiff-Appellee.

Judges: Eugene A. Wright, Jerome Farris and David R. Thompson, Circuit Judges.

Opinion by: FARRIS

Opinion

[*362] ORDER

The Opinion filed October 9, 1987 and amended November 27, 1987 is withdrawn.

FARRIS, Circuit Judge:

Oahu Gas Services, Inc., sued Pacific Resources, Inc., under *Section 2* of the Sherman Act for monopolization and attempted monopolization of propane sales in Hawaii. Oahu Gas alleged that Pacific Resources' unlawful conduct included: (1) a decision in 1974 not to begin producing propane and (2) a campaign in 1982 to force Oahu to lower prices by offering sham cut-rate contracts to Oahu's customers. After trial, a jury found in favor of Oahu and awarded treble damages of $ 4,963,998.00. Pacific Resources appeals the denial of its motion for judgment notwithstanding the verdict.

BACKGROUND

Until 1972, Gasco, a subsidiary of Pacific Resources, **[**2]** was the sole retail seller of propane gas in Hawaii. It received virtually all its propane from Chevron, which operated the only propane refinery in Hawaii. In 1972, Oahu Gas Service was formed and began selling propane on Oahu. Its propane supplies also came from Chevron. Beginning in 1973, the federal government controlled the price and allocation of propane. The base period for determining allocations was May 1972, before Oahu Gas had begun business. Oahu therefore had to apply to the Department of Energy for a "base period volume" of propane that Chevron would be required to supply.

During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. During these years, Oahu Gas repeatedly applied to the Department of Energy for larger allocations of propane. Gasco opposed these applications because giving Oahu more low-cost domestic propane would require Gasco to buy more expensive foreign propane, thus increasing Oahu's cost advantage. The Department of Energy denied Oahu's requests until, in July 1979, the Department increased Oahu's **[**3]** share of domestic propane on the condition that Oahu pay Gasco $ 163,108.00 to offset some of Gasco's additional costs for importing more foreign propane.

One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc. -- a subsidiary of Pacific Resources -- not to produce propane in the 1970s. Hawaiian Independent Refinery **[*363]** began operating a petroleum refinery in 1972, producing chiefly military fuels. In early 1973, before price controls went into effect, Hawaiian planned to modify its refinery to permit production of propane and gasoline. The plans assumed that the modifications could be completed by 1976 and that Gasco would be the chief customer for propane. Under price controls, however, Hawaiian's propane would have had the same ceiling price as Chevron's. Thus the refinery expanded only to permit gasoline production, which began in May 1975. After price controls ended in 1981, the refinery was modified to produce propane. It has sold propane to Gasco and to Aloha Gas, a small new propane distributor. It has expressed a willingness to sell propane to Oahu Gas.

Another basis for Oahu's allegations was Gasco's marketing program **[**4]** in 1982. During the energy crisis, demand for propane fell as consumers turned to alternative energy sources. With the end of regulation in 1981 and the beginning of propane production at Hawaiian's refinery in 1982, propane supplies became more plentiful. Gasco began a marketing program in 1982 that included offers of low-cost long-term contracts to large-volume purchasers, both its own customers and customers served by Oahu Gas. The prices offered were above Gasco's average total cost of supplying propane, but Oahu asserted at trial that the offers were "shams," designed to force Oahu to cut prices to its own customers. Oahu did cut prices to those customers, resulting in such low profits, Oahu claims, that it was nearly put out of business. None of Oahu's customers accepted Gasco's offers. Several of Gasco's own customers accepted the offers. In June 1982, Oahu sought and obtained an injunction prohibiting Gasco from soliciting Oahu's customers while they were under contract to Oahu.

The record indicates several uncontroverted facts relating to the relevant market and market shares of Gasco and Oahu Gas. Before Oahu began business in 1972, Gasco served 100 % of the propane market **[**5]** on Oahu and in the "outer islands." After Oahu Gas began operating, Gasco's share of the market on Oahu declined steadily. By 1983, before the trial, Oahu sold about 30 % of the propane in Oahu. Oahu Gas dominated sales to high-volume commercial and industrial users on Oahu, supplying 78 % of that sub-market in 1985. Gasco supplied about 20 % of those customers; Aloha Gas supplied the remaining 2 %. Oahu Gas did not sell propane in the outer islands.

Oahu's claims of monopolization and attempted monopolization went to trial in 1985. The jury returned a verdict in favor of Oahu and found treble damages of $ 4,963,998.00. The court also awarded attorneys fees of $ 873,324.00.

DISCUSSION

I. MONOPOLY POWER IN THE RELEVANT MARKET

HN1[] The offense of monopolization under *Section 2* of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; **[**6]** *see also Catlin v. Washington Energy Co., 791 F.2d 1343, 1347 (9th Cir. 1986)* (making explicit as a third factor the implicit requirement of "causal antitrust injury"). We review first the jury's finding that Gasco possessed monopoly power in the Hawaiian propane market from 1972 to 1983, the relevant period for purposes of Oahu's allegations of exclusionary conduct. Our previous decisions establish that ***HN2***[] both market definition and market power are essentially questions of fact. *See, e.g., Twin City Sportservice v. Charles O. Finley & Co., 676 F.2d 1291, 1299 (9th Cir. 1982)* ("The definition of the relevant market is basically a fact question dependent upon the special characteristics of the industry involved . . ."); *Greyhound Computer Corp. v. International Business Machines Corp., 559 F.2d 488, 496-97 (9th Cir. 1977)*, *cert. denied*, *434 U.S. 1040,* ***[*364]*** *54 L. Ed. 2d 790, 98 S. Ct. 782 (1978)* (reviewing the jury's finding of monopoly power for sufficiency of the evidence). We thus review the evidence on these factual **[**7]** issues in the light most favorable to Oahu and draw all reasonable inferences in its favor, for this is an appeal from the denial of a motion for judgment notwithstanding the verdict. *See Peterson v. Kennedy, 771 F.2d 1244, 1252 (9th Cir. 1985)*, *cert. denied*, *475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986)* ("A JNOV is improper if reasonable minds could differ over the verdict").

A. *Market Definition*

HN3[] A determination of the relevant market typically requires an inquiry into the nature of the product, *see, e.g., United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*, and the geographical area of effective competition. *United States v. Grinnell, 384 U.S. at 575-76*. Although product definition and geographical definition are theoretically separable inquiries, in this case they are intimately intertwined. Oahu asks us to affirm the jury's finding that the relevant market was inclusive of all propane sales in Hawaii. Gasco, on the other hand, argues that the relevant market was limited to high-volume industrial and commercial users of propane. These high **[**8]** volume users, the evidence suggested, were located either primarily or exclusively in Oahu. The arguments made at trial and pressed before us, though not extensive on the issue of market definition, make clear that the crux of the parties' dispute is product definition rather than geographical definition. We thus focus on product definition first, keeping in mind the importance of delineating the geographical market as well for its bearing on Gasco's market power.

The issue of product definition, though always an inexact science often requiring distinctions in degree rather than kind, *see* 2 P. Areeda & D. Turner, ***Antitrust Law*** para. 518 (1978), is especially complicated in this case. During the course of the litigation, three plausible product markets have been suggested by the parties as the proper subjects of focus for purposes of our antitrust inquiry. On the broad end of the scale, it was suggested by Gasco at trial and in its motions before the district court, though not before us, that the jury erred by failing to include in its product definition numerous alternative energy sources that were said to constrain significantly any potential control over prices or competition **[**9]** in the propane market. A second possible delineation of the product market, the one with an intuitive if not necessarily a strong economic appeal, is all propane distribution in Hawaii; this is the market definition that the jury adopted. A third approach, first suggested by Gasco before the district court in its brief in support of its motion for a new trial and renewed on appeal, would be to define the relevant market in a relatively narrow fashion, limiting it to high-volume commercial and industrial users of propane.

HN4[] Our review is limited, of course, to an assessment of the evidence in the light most favorable to Oahu. Thus, if the evidence was sufficient to allow a reasonable jury to define the relevant market for antitrust purposes in terms of propane distribution in Hawaii, we are required to accept the jury's fact-finding on this issue. *See Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1392* (9th Cir.), *cert. denied sub nom. National Football League v. Oakland Raiders, Ltd., 469 U.S. 990, 83 L. Ed. 2d 331, 105 S. Ct. 397 (1984)*. **[**10]**

Unfortunately, a review of the evidence that was presented to the jury in this case does not shed considerable light on the proper market definition. The jury did hear testimony from Oahu's expert, Dr. Meier, to the effect that propane was the relevant market because conversion to alternative energy sources, such as electricity or heat pumps, would be too expensive for many propane users. This argument was made, of course, in response to Gasco's contention that the product market should have been defined *more* broadly than just propane, and we must view it in that light. It is clear from Dr. Meier's testimony, however, that his impression of **[*365]** the constraints upon cross-elasticity of demand was more applicable to small residential users of propane than to high volume commercial buyers. Arguably, in responding to the argument for a broader product market, Dr. Meier may be said to have opened the door inadvertently to a logical inference in favor of a narrow market definition.

This narrow definition also finds support in other materials relied upon by Oahu. In its memorandum before the district court in opposition to Gasco's motion to set aside the verdict, Oahu made **[**11]** much of the testimony of Howard Lee that "once a house is gassed, it's gassed, probably for ten, twenty, thirty years and to change it back to electricity, financially it's not practical." There was also the testimony of Lambert Lui-Kwan, Oahu's Director of Sales, that Oahu did not want residential customers because it viewed their business as unprofitable, and that Oahu therefore referred inquiries about residential service to Gasco. As a result, Oahu Gas, by 1983, had come to dominate sales to high-volume commercial and industrial users on the island of Oahu but had no business among either residential users on Oahu or on the outer islands.

Had Gasco reinforced this testimony regarding the differences between residential and commercial use of propane with further evidence of the constraints upon which residential and commercial suppliers operate, it is possible that a reasonable jury would have had no alternative but to conclude that high-volume industrial sales were the relevant market in this case. Gasco did not do this, however, preferring instead to focus at trial upon the theoretical interchangeability between propane and other energy sources. Gasco made no effort at trial **[**12]** to distinguish between residential and commercial use of propane. Consequently, the question submitted to the jury with regard to product definition was limited to its assessing the evidence of user substitutes and deciding whether alternative energy sources significantly impacted upon propane distribution. Viewing the evidence from this perspective and in the light most favorable to Oahu, we cannot say that the jury acted unreasonably in concluding that the relevant market included commercial and residential propane, but not other sources of energy such as electricity.

As to geography, this segment of the inquiry into market definition is clearly subsidiary to product definition. No effort was ever made, for example, to differentiate between commercial and residential propane sales on the island of Oahu on the one hand and propane sales on all the islands on the other. This is partly because commercial sales on the outer islands are negligible and partly because Oahu Gas sold only to commercial users on the island of Oahu. In either case, we are convinced, in part because of some of Gasco's own arguments, that the jury could reasonably have defined the geographical market for propane **[**13]** to include the outer islands. In contending that the ease of entry into the propane distribution business precluded its exercise of monopoly power, Gasco states, perhaps inadvertently: "The undisputed evidence surrounding [Oahu Gas]'s own entry into the propane business in 1972 demonstrated that [Pacific Resources] and Gasco had no power to exclude new entrants from selling propane *in Hawaii*." (Emphasis added). Gasco presented no evidence to the jury, nor to us, regarding transportation costs to the outer islands or other barriers between the island of Oahu and its smaller compatriots. Accordingly, we affirm the jury's definition of the geographical market to include all of Hawaii.

Our conclusion that the jury acted reasonably in its market definition is made with some questions as to whether the correct result was reached. These reservations might ordinarily give us pause, especially since our affirmance leads inexorably to the conclusion that Gasco wielded considerable power in the relevant market. *See* Section IB, *infra*. However, as our discussion of the second part of the test for monopolization demonstrates below, a finding of monopoly power has no bearing in **[**14]** this case on liability. We are therefore content to assume *arguendo* the existence of monopoly power, as we have done in **[*366]** previous cases in which the other requirements for maintaining a *Section 2* action were in doubt. *See, e.g., Transamerica Computer Co., Inc. v. International Business Machines Corp., 698 F.2d 1377, 1382 (9th Cir. 1983)*, *cert. denied*, *464 U.S. 955, 78 L. Ed. 2d 329, 104 S. Ct. 370 (1983)*; *California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727, 739 (9th Cir. 1979)*.

B. *Market Power*

The jury found that Gasco possessed monopoly power in the Hawaiian propane market. Our review of that finding is limited again to an assessment of the evidence in the light most favorable to Oahu. The evidence demonstrated that Gasco was the exclusive seller of propane to residential sellers on Oahu and on the outer islands. As a result of this dominance of certain parts of the market, Gasco's overall market share in the Hawaiian propane market was consistently above 68 % from 1972 to 1983. The parties are essentially in agreement on the computations of Gasco's market share, which **[**15]** declined from a figure of 100 % in 1972 to 95.5 % in 1973, to 89.7 % in 1974, to 69.6 % in 1981, and finally to 68.2 % in 1983. They disagree as to the legal conclusions that may be drawn from these statistics and other evidence. Oahu maintains that the evidence of Gasco's high market share and the lack of evidence of "meaningful entry" by other firms into the Hawaiian propane market from 1973 to 1984 support an inference of monopoly power. Gasco maintains that the evidence of its steadily declining market share during the relevant period, combined with what it contends is the absence of evidence in the record of barriers to entry or an ability on Gasco's part to control prices, precludes any finding that it possessed monopoly power.

HN5[] Inquiries into the existence of monopoly power focus generally on a firm's ability to "control prices or exclude competition." *Greyhound Computer, 559 F.2d at 496* (quoting *United States v. duPont, 351 U.S. at 391*). Although no single factor has been held determinative as to the existence of such power, inquiries in this area **[**16]** often depend heavily upon market share and barriers to entry. *See Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d 1325, 1336 (7th Cir. 1986)*. A firm with a high market share may be able to exert market power in the short run, but "substantial market power can persist only if there are significant and continuing barriers to entry." 2 Areeda & Turner, *supra*, at para. 505; *accord Cargill Inc. v. Monfort of Colorado, 479 U.S. 104, 107 S. Ct. 484, 494 n. 15, 93 L. Ed. 2d 427 (1986)*.

Keeping these factors in mind and viewing the evidence most favorably to Oahu Gas, we now address the parties' contentions. Oahu makes two arguments in support of the jury's finding of monopoly power. First, Oahu maintains that Gasco's high market share constitutes substantial evidence of monopoly power in spite of the evidence that that share constantly declined throughout the relevant period. Gasco argues, to the contrary, that the decline in its market share reflects an absence of monopoly power. Second, Oahu claims that the record, which reflects a virtual lack of entry by new firms into the Hawaiian propane market during the relevant time period, **[**17]** falls short of establishing the kind of competitive marketplace necessary to rebut the inference of monopoly power raised by Gasco's high market share. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 925 (9th Cir. 1980)*, *cert. denied*, *450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981)*.

If any conclusion may be gleaned from our prior decisions and those of the Supreme Court with regard to the first issue, it is that ***HN6***[] "market share is just the starting point for assessing market power." *Id.* A high market share, though it may ordinarily raise an inference of monopoly power, *see United States v. Grinnell, 384 U.S. at 571*, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors. By the same token, "A declining market share may reflect an absence of market power, but it does not foreclose a finding of such power." *Greyhound Computer, 559 F.2d at 496 n. 18* **[*367]** (citations omitted). Applied to this case, these principles **[**18]** lead to the conclusion that provided the jury heard substantial evidence of Gasco's high market share throughout the relevant period, the decline in its market share could not preclude a finding of monopoly power as a matter of law. If, however, the sole basis for the jury's finding was Gasco's high market share, this finding could not stand up in the face of a showing of low entry barriers or other significant constraints on Gasco's power over the marketplace.

Because the jury clearly heard substantial evidence relating to Gasco's market share, we proceed to the question of entry barriers, which are in dispute. Oahu maintains that the lack of entry by competitors into the market is sufficient to support an inference of high entry barriers. Gasco argues that the entry of Oahu and Aloha demonstrated that Gasco lacked the ability to control prices or to exclude new entrants.

We note preliminarily that both parties could theoretically be correct, if in fact Gasco lacked the power to exclude but there were external factors at work precluding entry into the market. In ordinary times, the failure of other firms to challenge Gasco on the outer islands and in the Oahu residential market **[**19]** might have supported an inference that Gasco had the power to exclude competitors or to control the price without much detailed inquiry. But because of the price controls that were in place from 1974 to 1981, Gasco clearly could not control the price and may not have had any control in the marketplace whatsoever. Thus, the question is whether Gasco could exclude rivals. In this regard, the jury learned of two entrants into the market from 1972 to 1984: Oahu and Aloha. Oahu entered the market in 1972 and consistently increased its market share thereafter, even during the period of price controls. Although this evidence of entry might tend to suggest that as of 1972, Gasco -- which was dependent upon Chevron for propane supplies -- could not exclude rivals, the jury also considered evidence that the founder of Oahu, once an executive with Gasco, took some large accounts with him when he left Gasco. This evidence supports an inference that Oahu's success may have owed not so much to its competition on the merits in an open market as to the "insider" status of its founder, and does not negate the inference of high entry barriers. The second entrant, Aloha Gas, did win some accounts, but **[**20]** the evidence that that firm remained very small could reasonably preclude a decision that Aloha's entry reflected a breakdown of barriers to entry. Viewed in the light most favorable to Oahu, therefore, the evidence reasonably supports the conclusion that high barriers to entry existed in the Hawaiian propane market throughout the relevant time period.

The ultimate focus of our inquiry, however, is Gasco's power, not barriers to entry. Oahu points to no further evidence of Gasco's ability to exclude competition, and Gasco's arguments regarding price controls go to its ability to control price, not to exclude competitors. Consequently, the question before us is whether the jury could reasonably have found that a firm with a consistently high, albeit declining, market share in a market with high barriers to entry possessed monopoly power. The answer is yes. "While market share is just the starting point for assessing market power, we think that market share, at least above some level, could support a finding of market power in the absence of contrary evidence." *Hunt, 627 F.2d at 925*. Clearly, Gasco had a high market share, and the record does not permit us to infer **[**21]** "contrary evidence" that would negate a finding of market power. Hence, we affirm the jury's finding that Gasco possessed monopoly power. [1]

II. ALLEGEDLY MONOPOLISTIC BEHAVIOR

HN7[] The second element of monopolization under *Section 2* of the Sherman Act is "the willful acquisition or maintenance of [monopoly] **[*368]** power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell, 384 U.S. at 570-71*. The jury was asked to determine whether two courses of conduct by Gasco -- a 1972 decision not to modify its refinery to permit propane production and a 1982 marketing campaign targeted at Oahu's clientele -- constituted predation within the **[**22]** meaning of *Section 2*. The jury found in the affirmative on both counts. These ***HN8***[] determinations that specific conduct was anticompetitive in violation of the Sherman Act are questions of law that we review *de novo. Western Concrete Structures Co. v. Mitsui & Company (U.S.A.), Inc., 760 F.2d 1013, 1016* (9th Cir.), *cert. denied*, *474 U.S. 903, 88 L. Ed. 2d 229, 106 S. Ct. 230 (1985)*.

A. *The Decision Not to Expand the Refinery*

The factual questions about Pacific Resources' allegedly exclusionary conduct in the early 70s were resolved at trial. It was clear that expanding the refinery to permit propane production would have been uneconomical under federal price controls in place at the time. It was also clear, however, that the decision not to produce propane had been based not only on economic factors but also on a desire to restrict the supply of propane potentially available to Oahu Gas. There is evidence in the record that the management of Pacific Resources feared that increasing the supply of propane in Hawaii would result in Oahu's getting more propane **[**23]** to sell, increasing its market share.

The desire to maintain or increase one's market share is not in itself an antitrust violation, of course. Nor is a decision to forego the production of propane an illegal act *per se*. But a monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power.

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[1] Because we uphold the jury's finding of monopoly power, we need not consider the attempted monopolization claim that was an alternative ground for the jury's verdict.

We therefore reject Pacific Resources' broad contention that the antitrust laws may never impose duties on a monopolist to aid its competitors. ***HN9***[] Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties. [2] These duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor.

[24]** ***HN10***[] Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*; *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)*; *Drinkwine v. Federated Publications, Inc., 780 F.2d 735, 740* (9th Cir.), *cert. denied*, *475 U.S. 1087, 106 S. Ct. 1471, 89 L. Ed. 2d 727 (1986)*.

The investment required of Pacific Resources to produce propane would have resulted in a negative return. In light of the then-existing price controls, it was not economically efficient for Pacific Resources to invest its resources in propane production. The decision to forego propane production did not exclude competition unnecessarily. The economic rationale, even if not the only rationale for the decision, excluded competition necessarily. **[**25]** ***HN11***[] Economic necessity distinguished this conduct from "willful acquisition or maintenance of [monopoly] power," *United States v. Grinnell, 384 U.S. at 570-71*, because it involved the "business acumen" that *Grinnell* specifically exempts from antitrust liability. *Id.*

The jury was instructed improperly. It was given an either/or choice: it could decide whether Pacific Resources' decision was based on economic motives *or* on a desire to maintain its market share. [3] It **[*369]** should have been instructed that the desire to maintain market power -- even a monopolist's market power -- cannot create antitrust liability if there was a legitimate business justification for refusing to produce propane.

[26]** Two lines of cases support our holding, though they are not directly controlling. A line of "product innovation" cases has consistently rejected antitrust liability for a monopolist's decision about when or whether to market new products. *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 545 (9th Cir. 1983)*, *cert. denied*, *465 U.S. 1038, 79 L. Ed. 2d 712, 104 S. Ct. 1315 (1984)*; *California Computer Products v. I.B.M. Corp., 613 F.2d 727 (9th Cir. 1979)*; *see also GAF Corporation v. Eastman Kodak Co., 519 F. Supp. 1203, 1232 (S.D.N.Y. 1981)* ("No court has yet found a monopolist's failure to market a product as satisfying § 2's conduct requirement.").

These cases, involving technological innovations, have held that the contested marketing decisions derived from "a superior product", and are therefore exempt from antitrust liability. Oahu Gas contends that such cases are inapposite, because the product at issue here is propane, hardly an innovation. But business acumen -- the economics of timing a technological innovation -- is also an aspect of these cases.

In *California Computer* we **[**27]** addressed specifically the issue of when a question of legitimate business purpose may go to a jury. Where IBM redesigned products in such a way that they were incompatible with a competitor's product, and where such design changes were justified "by reason of lower manufacturing cost and

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[2] For example, a ski resort with monopoly power was required to continue a marketing arrangement with its small neighbor where there was no legitimate business justification for discontinuing it, and the arrangement increased competition and benefited consumers. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*.

[3] The jury instruction on this issue was:

> To sum up, you must determine whether PRI and Gasco maintained monopoly power in a relevant market by policies and conduct which were not legitimate business decisions but were instead designed primarily to further any domination of a relevant market. . . . You should seek to determine if the challenged conduct is supported by legitimate business reasons or whether it was a deliberate effort to injure a smaller rival which caused defendants to sacrifice short-run benefits and consumer good will.

price or improved performance[,] . . . the reasonableness of IBM's conduct . . . did not present a jury issue." California Computer Products, 613 F.2d at 744.

Another line of cases that Oahu asks us to consider are "supply restriction" cases. It contends that Pacific Resources impermissibly sought to restrict the supply of propane in the Hawaiian Islands. *See, e.g.,* NCAA v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984); Litton Systems, Inc. v. AT & T, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, *464 U.S. 1073, 79 L. Ed. 2d 220, 104 S. Ct. 984 (1984)*; Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, *425 U.S. 959, 48 L. Ed. 2d 204, 96 S. Ct. 1741 (1976)*. A theory of liability based on "supply restriction" **[**28]** must fail because Pacific Resources had no monopoly power over supplies of propane to Hawaii. Chevron produced all Hawaiian propane until 1982. [4] Contrary to Oahu's argument, the regulatory scheme in place in the 70s did not give Pacific Resources control over propane supplies. Oahu appealed to the Department of Energy for larger allocations of propane, and it was ultimately successful. Oahu's supply restriction theory cannot support antitrust liability for Pacific Resources' decision not to produce propane.

As a matter of law, we reverse the judgment of antitrust liability based on the refinery episode. Pacific Resources' decision to refrain from producing propane because it was **[**29]** not economically efficient is sufficient justification to preclude antitrust liability.

B. *Gasco's 1982 Marketing Campaign*

The jury found that Gasco's 1982 campaign to offer cut-rate contracts to large propane purchasers was anticompetitive and predatory. Oahu defends this result on the ground that Gasco "made false 'offers' **[*370]** without ever intending to compete for that business." Gasco disputes the finding of predatory conduct, arguing that it "had the absolute right to offer reduced prices so long as those offers were not shown to be below costs or shown to be predatory by clear and convincing evidence."

The parties' legal dispute may be summarized as follows. Neither party argues that Gasco set prices below its costs for the purposes of alluring Oahu's customers. The allegation of exclusionary conduct is not founded, therefore, on a theory of predatory pricing. Rather, Oahu's claim is that the insincerity or "sham" nature of Gasco's offers is sufficient to support a finding of predatory conduct.

The first question -- whether the offers were "shams" -- may be disposed of quickly. Reviewing the factual evidence in this appeal from a denial of a JNOV motion, we **[**30]** draw all reasonable inferences in Oahu's favor. The jury having returned a general verdict, we must presume it to have accepted Oahu's claim that Gasco's offer of cut-rate contracts were "shams." This finding was reasonably supported by the evidence. The jury heard evidence, for example, that most of the customers of Oahu Gas that Gasco solicited were known to have long-term contracts with Oahu that they would be unlikely to break. A Gasco employee testified, moreover, that when making an offer to an Oahu customer, she invited the customer to ask Oahu to meet or beat the offered price-cut. This testimony provides support for an inference that Gasco's true goal was not to attract customers, but to cut into Oahu's profits. Oahu also offered evidence, which we must presume the jury found credible, that Gasco did not make the same offers to its own customers as it did to Oahu's. This evidence, taken in full, is substantial enough to sustain Oahu's claim that Gasco's offer did not reflect a business risk on its part but only constituted a ploy to entice Oahu to lower *its* prices.

The harder question is whether this "sham" offer violated Sherman Act *Section 2*. Although the evidence **[**31]** supports the jury's finding of a predatory intent underlying Gasco's marketing campaign, the net result of this campaign seems to have been to increase competition in the market by inducing Oahu to lower its prices. Thus, we have before us a situation in which conduct with a predatory rationale had a procompetitive effect.

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[4] For this reason the "essential facilities" theory would not apply either. *See* *MCI Communications Corp. v. AT & T Co., 708 F.2d 1081, 1132* (7th Cir.), *cert. denied*, ***464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*** (plaintiff must show control of the essential facility by a monopolist).

In order to sustain the jury's finding of predation, we would have to turn our back on a large body of case law holding that ***HN12***[] "the test of willful maintenance or acquisition of monopoly power is whether the acts complained of unreasonably restrict competition." *Drinkwine v. Federated Publications, Inc., 780 F.2d 735 (9th Cir. 1985)*, *cert. denied*, *475 U.S. 1087, 106 S. Ct. 1471, 89 L. Ed. 2d 727 (1986)*. Here, there was no restriction on competition, let alone an unreasonable restriction. To be sure, Gasco's intent is not irrelevant to the inquiry. *See id.* (citing *Aspen Skiing, 472 U.S. at 602-03*) ("Intent must also exist but is subsumed in an analysis of the exclusionary conduct"). But a finding of anticompetitive **[**32]** intent will not sustain a *Section 2* claim in the face of evidence of procompetitive effects.

This analysis should not be taken as an endorsement of Gasco's conduct. A campaign to harm or destroy rivals through deceptive marketing smacks of unfair competition, whose hallmark is harm to competitors. In seeking to induce Oahu's clients to abandon Oahu or to force Oahu to accept lower profits, Gasco engaged in activity that in some jurisdictions is actionable under the law of torts.

HN13[] The goal of the antitrust laws, however, unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Professors Areeda and Turner, in their discussion of the antitrust liability of firms that engage in unfair competition, stated in a passage of particular relevance here:

> While it may be a tort for a defendant to induce another to deal in violation of his contract with the defendant's rival, it **[**33]** should not be an exclusionary practice. Buying an employee away from a rival, for example, does not impair competition any more when that employee was under **[*371]** a long term contract than when he was not. The competitive effect, if any, results from the transfer of resources or patronage away from the rival and to the monopolist. . . . If there is a tort, so be it. But ***antitrust law*** should not make liability depend upon the existence or nonexistence of contracts which do not affect the competitive results.

P. Areeda & D. Turner, ***Antitrust Law*** para. 7381 (1978).

We reverse the jury's finding of antitrust liability growing out of Gasco's 1982 marketing campaign. The undisputed evidence in the record that this campaign resulted in no anticompetitive effects precludes a finding of liability even though we accept the jury's conclusion that Gasco intended the campaign to harm Oahu and thereby to increase its market share.

CONCLUSION

We reverse the jury's findings of antitrust liability with respect to both the refinery decision and the marketing campaign. Consequently, we need not address the parties' respective contentions on the subject of damages.

REVERSED.

McElderry v. Cathay Pacific Airways, Ltd.

United States District Court for the Southern District of New York

February 2, 1988, Decided ; February 3, 1988, Filed

No. 86 Civ. 7783(MEL)

Reporter

678 F. Supp. 1071 *; 1988 U.S. Dist. LEXIS 660 **; 1988-1 Trade Cas. (CCH) P67,878

Andrea McElderry, on behalf of herself and all others similarly situated, Plaintiff, v. Cathay Pacific Airways, Ltd., Defendant

Subsequent History: As Amended, March 15, 1988.

Core Terms

baggage, flight, airline, air carrier, weight-based, passengers, tariffs, Allowance, antitrust, charges, piece-based, sanctions, private right of action, commerce, Sherman Act, overcharged, alleges, travel, air, destination, carriers, aboard, federal court, anticompetitive, originating, undisputed, Transport, violates, ticket

LexisNexis® Headnotes

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

Transportation Law > Air & Space Transportation > Commercial Airlines > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN1[] **Justiciability, Standing**

There is no private right of action under §§ 403(b) and 404(b) of the Federal Aviation Act, 49 U.S.C.S. §§ 1373(b), 1374(b). Four factors are considered in determining whether a private right of action exists. First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Transportation Law > Air & Space Transportation > Airline Deregulation Act > General Overview

Transportation Law > Air & Space Transportation > Commercial Airlines > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Tariffs

Transportation Law > Commercial Vehicles > Foreign Commerce

HN2[] **Common Carrier Duties & Liabilities, Rates & Tariffs**

§ 403(b) of the Federal Aviation Act, 49 U.S.C.S. § 1373(b), states that no foreign air carrier shall charge a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in then currently effective tariffs of such foreign air carrier.

Transportation Law > Commercial Vehicles > Foreign Commerce

Transportation Law > Air & Space Transportation > Airline Deregulation Act > General Overview

Transportation Law > Air & Space Transportation > Commercial Airlines > General Overview

HN3[] **Commercial Vehicles, Foreign Commerce**

§ 404(b) of the Federal Aviation Act, 49 U.S.C.S. § 1374(b), states that no foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

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

Transportation Law > Air & Space Transportation > Airline Deregulation Act > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Transportation Law > Air & Space Transportation > Commercial Airlines > General Overview

HN4[] **Justiciability, Standing**

A plaintiff who simply alleges that she was over-charged for her baggage because of its weight, and does not allege that she was a member of a group subject to discrimination, cannot claim that either § 403(b) or § 404(b) of the Federal Aviation Act, 49 U.S.C.S. §§ 1373(b), 1374(b), was passed especially for her benefit.

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

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN5[] **Sales of Goods, Remedies**

Only where there is some countervailing national interest should the federal courts imply a federal private remedy when an adequate state remedy already exists.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

International Law > Authority to Regulate > General Overview

HN6[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Under the Foreign Trade Antitrust Improvement Act, *15 U.S.C.S. § 6a(1)(A) (1982)*, federal courts do not have jurisdiction under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, over conduct involving trade or commerce with foreign nations unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on United States domestic, import, or export commerce. An anticompetitive effect on United States commerce is required for jurisdictional nexus, regardless of whether there is anticompetitive conduct in the United States. The applicable test is whether the effect would have been evident to a reasonable person making practical business judgments.

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Sherman Act, Penalties**

An allegation of mere monetary injury is not enough to state a claim under the Sherman Act, *15 U.S.C.S. § 1 et seq.* A Sherman Act plaintiff must show injury to a market or to competition in general, not merely injury to individuals.

International Law > Dispute Resolution > Act of State Doctrine

International Law > Authority to Regulate > Anticompetitive Activities

International Law > Dispute Resolution > Comity Doctrine > General Overview

HN8[] **Dispute Resolution, Act of State Doctrine**

Where there is a direct conflict between the United States and another country, the continuance of which could clearly exacerbate stated differences between the two countries, the proper course is to avoid the unnecessary irritant of a private antitrust action by declining jurisdiction. The related "act of state" doctrine constitutes a further basis for declining jurisdiction in such a case. This doctrine is a principle of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government.

International Law > Dispute Resolution > Act of State Doctrine

HN9[] **Dispute Resolution, Act of State Doctrine**

In a case in which the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of a foreign government, and where the conduct of the defendant has been compelled by the foreign government, the defendant is entitled to assert the defense of foreign government compulsion and the act of state doctrine is applicable.

Civil Procedure > Attorneys > General Overview

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN10[] **Civil Procedure, Attorneys**

Fed. R. Civ. P. 11 sanctions do not, of course, automatically attach as a result of the dismissal of plaintiff's claims. Rather, the relevant inquiry is whether a competent attorney could have formed the reasonable belief that plaintiff's pleading was warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Counsel: **[**1]** Kreindler & Kreindler, Esqs., Attorneys for Plaintiff, of Counsel: Paul S. Edelman, Esq., Henry Gluckstern, Esq. and Lori B. Lasson, Esq.

Robert H. Morse, Esq., Galland, Kharasch, Morse & Garfinkle, P.C., Albert F. Grisard, Esq., Susan B. Jollie, Esq., Andrew B. Sacks, Esq., Bruce Regenstreich, Esq., Callan, Regenstreich & Kosher, Esqs., Attorneys for Defendant.

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

Opinion by: LASKER

Opinion

[*1072] MORRIS E. LASKER, U.S.D.J.

Plaintiff Andrea McElderry challenges, on antitrust and Federal Aviation Act grounds, a ten dollar excess baggage charge assessed against her by defendant Cathay Pacific Airways, Ltd. ("Cathay Pacific") prior to her flight aboard Cathay Pacific from Hong Kong to Taipei.

In May 1986, McElderry purchased a round-trip airplane ticket which included flights from Louisville, Kentucky to Tokyo, Tokyo to Hong Kong, and Hong Kong to Taipei, ending with a flight back to Louisville by way of domestic stops in Chicago and San Francisco. All the flights on this itinerary were aboard United Airlines, Inc., except for the flight from Hong Kong to Taipei, which was aboard Cathay Pacific. On May 24, 1986, McElderry flew aboard United Airlines from Louisville, Kentucky to Tokyo, Japan. On June 8, 1986, McElderry **[**2]** flew from Tokyo to Hong Kong, again aboard United Airlines. When she landed in Hong Kong, McElderry removed her baggage from the United Airlines airplane. Eight days later, on June 16, 1986, McElderry flew from Hong Kong to Taipei, Republic of China, this time aboard Cathay Pacific Flight 450. When McElderry checked her baggage with Cathay Pacific before boarding this flight, Cathay Pacific assessed her a $ 10.64 baggage charge on the grounds that her baggage weighed seven kilograms over the twenty kilogram free baggage allowance which Cathay Pacific alleges was applicable to McElderry on that flight. McElderry claims that this weight-based baggage allowance system **[*1073]** was not applicable to her, that she should not have been charged $ 10.64 for her baggage, and that, instead, Cathay Pacific should have applied a piece-based allowance system to her baggage, under which she alleges that she would have been able to check her baggage for free.

McElderry, who alleges that she "is one of a class of thousands of passengers who have paid improper excess baggage charges on defendant's airline since 1976," [1] claims that she is entitled to relief for the infliction of this excess baggage charge **[**3]** under §§ 403 and 404(b) of the Federal Aviation Act ("FAA"), 49 U.S.C. §§ 1373, 1374(b); *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*; and *§ 1* of the Robinson-Patman Price Discrimination Act, *15 U.S.C. § 13*. [2]

Cathay Pacific moves to dismiss the complaint under *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)* and moves for sanctions against McElderry's attorneys under *Fed. R. Civ. P. 11*. As discussed below, Cathay Pacific's motion to dismiss is granted [3] and its motion for sanctions is denied.

[4]** I. *Federal Aviation Act Claims*

McElderry claims that the weight-based baggage charge assessed against her by Cathay Pacific is prohibited by Civil Aeronautics Board ("CAB") No. 55, Rule No. 16, [4] **[**5]** a tariff applicable to Cathay Pacific and in effect at the time of McElderry's flight. McElderry argues that this "tariff, on its face, did not permit a weight-based system to apply to plaintiff's journey, and specifically required application of a piece-based allowance and overcharge system . . . ." [5] McElderry also asserts that Cathay Pacific's baggage charge system violates a 1976 Civil Aeronautics Board ("CAB") decision, *Baggage Allowance Tariff Rules in Overseas and Foreign Air Transportation* ("*Baggage Allowance*"), Docket No. 24869, [6] which invalidated two then-existing tariffs under which passengers were allowed to check baggage weighing up to a certain amount freely, but were charged at a rate of one percent of the applicable first-class fare per kilogram above that weight. McElderry contends that she is entitled to relief for these alleged violations under FAA §§ 403(b) and 404(b), 49 U.S.C. §§ 1373(b), 1374(b).

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[1] Second Amended Complaint at para. 8 (October 2, 1987).

[2] McElderry also seeks relief under common law principles of fraud, breach of contract and unjust enrichment. Given the dismissal of McElderry's federal claims by this opinion, as discussed below, the court declines to exercise pendent jurisdiction over McElderry's state law claims, and they are accordingly dismissed. Diversity jurisdiction under *28 U.S.C. § 1332* is not alleged.

[3] The primary basis for dismissal of both McElderry's Federal Aviation Act claims and her antitrust claims is lack of subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*. To the extent that the motion to dismiss was also brought under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted, the motion is properly converted to a motion for summary judgment under *Fed. R. Civ. P. 56*, as required by *Rule 12(b)* when "matters outside the pleading are presented to and not excluded by the court." *See* *Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir. 1985)*. Here, conversion is appropriate because both parties have availed themselves of the opportunity to provide affidavits, numerous exhibits and other materials outside the pleadings and the court has considered such materials. Moreover, regardless of how the motion is labelled, dismissal is warranted: it is clear not only that "there is no genuine issue as to any material fact" as required by *Rule 56*, but also that McElderry can prove no set of facts in support of her claims which would entitle her to relief, the standard for dismissal under *Rule 12(b)(6)*, *see* *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*.

[4] *See* Memorandum in Support of Motion to Dismiss and For Sanctions ("Cathay Pacific Memorandum"), Exhibit 11, Passenger Rules Tariff No. PR-3, Local and Joint Rules and Regulations Governing the Carriage of Passengers and Baggage Applicable Between Points Throughout the World, Rule No. 16 ("Rule 16").

[5] Second Amended Complaint at para. 14.

[6] *See* affidavit of Paul S. Edelman, Counsel for McElderry ("Edelman Affidavit") (Feb. 26, 1987), Exhibit A, CAB Decision of Feb. 25, 1976.

McElderry's FAA claims are without merit. First, I determine that ***HN1***[] there is no private right of action under these provisions of the FAA under the four-factor analysis set forth in *Cort v. Ash, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080* ***[*1074]*** *(1975)*. [7] The Court of Appeals for the Third Circuit has concluded, under similar circumstances, that there is no private right of action available under either § 403(b), *see Wolf v. Trans World Airlines, Inc., 544 F.2d 134, 137 (3d Cir. 1976)* (no private right of action where airline passengers allegedly provided with airline package tour accommodations impracticably far from airport), *cert. denied*, *430 U.S. 915, 51 L. Ed. 2d 593, 97 S. Ct. 1327 (1977)*, or § 404(b), *see Polansky v. Trans World Airlines, Inc., 523 F.2d 332 (3d Cir. 1975)* (no private right of action where airline passengers allegedly provided with unacceptable ground accommodations in airline package tour). Although these decisions are not binding on this court, they are persuasive and I conclude that they are correct.

[6]** ***HN2***[]

Section 403(b) states that:

> No . . . foreign air carrier . . . shall charge . . . a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in then currently effective tariffs of such . . . foreign air carrier . . . .

49 U.S.C. § 1373(b). ***HN3***[] § 404(b) states that:

> No . . . foreign air carrier . . . shall make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . or subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

49 U.S.C. § 1374(b). In finding no private right of action under either section, the Third Circuit focussed on the first and fourth factors articulated in *Cort*, which inquire whether the plaintiff is "'one of the class for whose *especial* benefit the statute was enacted,'" and whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States," *Cort, 422 U.S. at 78* (citation omitted and emphasis in the original). [8]

[7]** Applying the first *Cort* factor to § 403(b), the Third Circuit found in *Wolf*:

> Plaintiffs here are not the special beneficiaries of § 403(b). That section prohibits the charging of fares either higher or lower than those established by the tariff. Yet a passenger could claim to be injured only by a higher charge. Because § 403(b) proscribes violations of the tariff that inure to passengers' benefit as well as to their detriment, we conclude that § 403(b) could not have been passed especially for the benefit of those in plaintiffs' position.

Wolf, 544 F.2d at 137. As to § 404(b), the Third Circuit found in *Polansky* that plaintiffs, who complained of poor ground accommodations provided by an airline package tour, were not the special beneficiaries of § 404(b) under *Cort* because they had not suffered the harm that § 404(b) was designed to prevent:

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[7] The four factors articulated in *Cort* are:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. at 78 (citation omitted) (emphasis in original).

[8] For reasons similar to those discussed above, the third *Cort* factor -- whether implication of a private remedy is consistent with the underlying purpose of the legislative scheme -- also cuts against a finding of a private right under §§ 403(b) and 404(b), *see Wolf, 544 F.2d at 136-37*; *Polansky, 523 F.2d at 337-38*, while the second *Cort* factor -- indication of legislative intent -- sheds no light on the question, *Wolf, 544 F.2d at 138 n.3*; *Polansky, 523 F.2d at 336*.

> [§ 404(b)] aims to protect the right of to air facilities from discriminatory interference by the air carrier. The airline is required to treat all potential passengers and users equally. Thus, the airline may not prohibit minority groups from equal access to flights or terminal facilities . . . . It is this denial **[**8]** of access **[*1075]** to air facilities, whether caused directly, by outright refusal of permission to board, or indirectly, by burdening the potential user with special requirements not applied to the general public, which is critical.

Polansky, 523 F.2d at 335-36 (emphasis in original). *See also* Sanders v. Air India, 454 F. Supp. 1371, 1374-78 (S.D.N.Y. 1978) (travel agents' claim of discrimination in compensation did not fall within interest to be protected by § 404(b)).

Application of the first *Cort* factor to the case at hand would lead to a similar negative result as to both § 403(b) and § 404(b). Because, as in *Wolf*, McElderry can "claim to be injured only by a higher charge," *544 F.2d at 137*, and ***HN4***[] she simply alleges that she was over-charged for her baggage because of its weight, and does not, as in *Polansky*, allege that she was a member of a group subject to discrimination, she can not claim that either § 403(b) or § 404(b) was passed especially for her benefit.

Turning next to the fourth *Cort* factor -- whether the cause of action is traditionally relegated to state courts -- both the *Polansky* and the *Wolf* courts concluded that this inquiry cut against **[**9]** implication of a private right of action under §§ 403(b) and 404(b):

> As the premise of this discussion, we recognize that a state remedy for breach of contract, breach of warranty and fraudulent misrepresentation was and, perhaps, still is, readily available. ***HN5***[] Only where there is some countervailing national interest should the federal courts imply a federal private remedy when an adequate state remedy already exists. No countervailing national interest has been brought to the attention of the court in this case.
>
> . . . .
>
> Where little reason for implying a federal remedy can be articulated, federal courts should be wary of bringing entirely new areas of conduct under federal control . . . . In the instant case, appellants have never alleged, and could not rightly allege, that state remedies for breach of contract are inadequate. Neither have they suggested any reason why the efficacy of the Federal Aviation Act would be improved by a federal breach of contract remedy in this case.

Polansky, 523 F.2d at 337-38; *accord, Wolf, 544 F.2d at 138*. This analysis applies equally in the case at hand. McElderry has pointed to no reason why she can not pursue her over-charge claim in state court. **[**10]** In sum, I conclude that McElderry has no private right of action under either § 403(b) or § 404(b).

Furthermore, even if McElderry had the right to press her claims under the FAA in federal court, her claims are without merit. It is undisputed that Cathay Pacific charges for excess baggage originating in the United States under the following method:

> Baggage that originates in the United States is assessed on the United States' "piece" system, regardless of the number of stopovers or changes of aircraft, so long as the baggage is either checked through from point of origin or is rechecked within 24 hours onto a connecting flight. On the other hand, baggage removed from the system and then rechecked onto a continuing flight, except where the connection time is less than 24 hours, is assessed based on the system applicable in the country where it is rechecked. [9]

McElderry alleges that this baggage charge policy violates Rule 16, the Cathay Pacific tariff filed with CAB which governs, among other things, baggage charges. However, there is no possible reasonable interpretation of Rule 16 which could support this claim. To the contrary, for the following reasons, Rule 16 indicates **[**11]** that while Cathay Pacific must maintain a piece-based baggage charge system for flights to or from the United States, it is allowed to maintain a weight-based baggage charge system for those flights for which both the point of origin and the point of destination are outside the United States.

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[9] Affidavit of Hans B. Olsen, Commercial Director of Cathay Pacific, at para. 6 (Jan. 8, 1987).

[*1076] Section (E) of Rule 16 explicitly provides that a weight-based baggage charge system may be employed on certain Cathay Pacific flights. Because Rule 16(E) clearly states that this weight-based system is *not* applicable to Cathay Pacific "between points in the U.S.A. and points outside the U.S.A./Canada," [10] it appears to follow that the weight-based system is allowable on Cathay Pacific flights between two foreign destinations. While Section (V) of Rule 16 provides for a piece-based baggage charge system, the very title of the rule -- "*Free Baggage Allowance and Baggage Charges Between Points in the U.S.A. and Points Outside the U.S.A*." -- indicates that Rule 16(V) applies only to flights where either the point of origin or the point of destination is in the United States. [11] Here, **[**12]** it is undisputed that McElderry's flight on Cathay Pacific originated in Hong Kong and landed in Taipei.

McElderry makes two arguments in support of her claim that, despite the language of Rule 16 cited above, Rule 16(V) rather than Rule 16(E) controls the appropriate baggage charge applicable to her on the flight in question. First, McElderry argues that because she was travelling on a round-trip ticket -- of which only the Hong Kong-Taipei leg was on Cathay Pacific -- and her final destination was Louisville, Kentucky, "the flight in question *must* be construed, under DOT requirements and other authority, as a flight between the U.S.A. and points outside the U.S.A.," [12] which would then be governed by Rule 16(V). However, there is insufficient legal support for this interpretation: the cases which McElderry cites in support of it are not on point. *In re Alleged Food Poisoning Incident, March 1984, 770 F.2d 3 (2d Cir. 1985)*, concerned the correct interpretation of the phrase "place of destination" under the Warsaw Convention in a flight with stop overs and using different **[**13]** air carriers. Here, however, Rule 16 does not use the "destination" phraseology, using instead the "point to point" language cited above, and, of course, interpretation of the Warsaw Convention is not at issue. *Barkanic v. General Admin. of Civil Aviation, 822 F.2d 11* (2d Cir.), *cert. denied*, *484 U.S. 964, 108 S. Ct. 453, 98 L. Ed. 2d 393 (1987)*, involving jurisdictional issues under the Foreign Sovereign Immunities Act, has no direct bearing on this issue. Moreover, the undisputed fact that McElderry stayed in Hong Kong for eight days and had been out of the United States for more than three weeks before she took the Cathay Pacific flight -- as well as the undisputed fact that at that time Cathay Pacific provided no airplane service to or from the United States -- further undercuts McElderry's argument that her Cathay Pacific flight from Hong Kong to Taipei can reasonably be viewed as a flight to or from the United States.

Second, McElderry argues that only Rule 16(V) rather than Rule 16(E) may be legitimately applied to her because Rule 16(V) "conform[s] on its face" to CAB's 1976 *Baggage Allowance* **[**14]** decision, [13] whereas Rule 16(E) does not. However, the *Baggage Allowance* decision and the subsequent CAB and Department of Transportation ("DOT") orders reaffirming the principles underlying it, [14] upon which McElderry relies, are not applicable to Cathay Pacific: these orders, on their face, refer only to tariffs filed with CAB by members of The International Air Transport Association ("IATA"), a trade organization of air carriers which seeks to establish joint tariffs and rates for its members. It is undisputed that Cathay Pacific is not an IATA member. Moreover, these orders do not, on their face, prohibit the weight-based charges: instead, they reflect CAB's policy of granting antitrust immunity only to those rate-setting air carrier organizations **[*1077]** whose members employ the piece-based baggage system.

In sum, even if a private right of action existed under the relevant sections of the FAA, Rule 16(E)'s weight-based rules rather than Rule 16(V)'s piece-based rules governed the appropriate **[**15]** baggage charge system on McElderry's Cathay Pacific flight from Hong Kong to Taipei, and hence the $ 10 excess baggage fee charged to McElderry was legal.

II. Antitrust Claims

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[10] Cathay Pacific Memorandum at Exhibit 11, Rule 16(E) at 32-B.

[11] *Id*., Rule 16(V) at 44-P.

[12] Letter to the court of Paul S. Edelman, Counsel to McElderry, at 3 (Oct. 1, 1987) ("Edelman letter").

[13] Edelman letter at 4 (emphasis deleted).

[14] *See* Memorandum in Support of Motion to Dismiss and For Sanctions, Exhibits 1-10, ten of the CAB and DOT orders cited in Complaint.

McElderry alleges that Cathay Pacific's baggage charge system violates *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1-2*, and *§ 4* of the Clayton Act, *15 U.S.C. § 15*. She argues that Cathay Pacific violated *§ 1* of the Sherman Act because it

> knowingly and unlawfully did combine or conspire with other air carriers, in restraint of trade or commerce of American-based carriers in foreign markets, to adopt an unapproved and illegal baggage charge system for application to passengers with itinerary origins or termination within the United States, [15]

and violated *§ 2* of the Sherman Act because it

> knowingly and unlawfully did combine or conspire with other air carriers to monopolize a part of the trade or commerce with foreign nations by adopting baggage allowance and excess baggage charges which had been agreed to by the International Air Transport Association . . . for application to service not involving itineraries with origins or terminations in the United States. By doing so, defendant applied a schedule **[**16]** of charges which are economically disadvantageous to travelers like plaintiff. . . . The charges imposed by defendant are economically advantageous to air carriers. [16]

For the reasons discussed below, these claims are dismissed for failure to meet the requirements of the Foreign Trade Antitrust Improvement Act, *15 U.S.C. § 6a(1)(A) (1982)*, and for reasons of comity. [17]

[17]** ***HN6***[]

Under the Foreign Trade Antitrust Improvement Act, federal courts do not have jurisdiction under the Sherman Act over conduct involving "trade or commerce . . . with foreign nations" unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on United States domestic, import or export commerce. *15 U.S.C. § 6a(1)(A)*. An anticompetitive effect on United States commerce is required for jurisdictional nexus, regardless whether there was anti-competitive conduct in the United States, *see* *Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920, 924 (E.D.N.Y. 1985)*, and the applicable test is "whether the effect would have been evident to a reasonable person making practical business judgments," *Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102, 1106 n.4 (S.D.N.Y. 1984)*.

Although McElderry's second amended complaint does allege that Cathay Pacific's acts have a direct anticompetitive effect on United States commerce, the complaint presents no facts in support of those allegations. In McElderry's memorandum of law, however, she contends that:

> Every time a passenger protected by the CAB/DOT-approved tariff scheme is overcharged, there is a direct and cognizable **[**18]** effect on U.S. commerce . . . . Furthermore, the overcharges present both an immediate competitive disadvantage **[*1078]** to complying, essentially United States-based carriers through reduced revenues as compared to their competitors, as well as an indirect loss through adverse effects on business good will when a United States-based joint fare through-ticketing carrier is concerned. In Professor

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[15] Second Amended Complaint at para. 40.

[16] *Id*. at para. 41.

[17] McElderry also alleges that Cathay Pacific violated *§ 1* of the Robinson-Patman Price Discrimination Act, *15 U.S.C. § 13*, by establishing

> a baggage allowance and charge system which resulted in the discrimination in price between different purchasers of commodities of like quality, to wit, an airline through-ticket providing for passage from Hong Kong to Taipei on defendant's airline and a similar passage on an airline obeying United States laws and tariff requirements.

Second Amended Complaint at para. 42. This claim is without merit: the Robinson-Patman Act applies only to the sale of goods, not services, and applies only to discriminatory sales that take place in the United States. *See generally*, ABA Antitrust Section, ***Antitrust Law*** Developments at 222, 226-27 (2d Ed. 1984 and Supp.).

> McElderry's case, United Airlines lost out as compared to Cathay Pacific -- it was compromised as the issuer of a ticket on which a passenger was improperly overcharged. [18]

These arguments are without merit. First, even accepting, for the purposes of this motion to dismiss, McElderry's contention that thousands of American passengers have been overcharged for their baggage by Cathay Pacific, ***HN7***[] an allegation of mere monetary injury is not enough to state a Sherman Act claim: a Sherman Act plaintiff must "show injury to a market or to competition in general, not merely injury to individuals." *Fine v. Barry and Enright Productions, 731 F.2d 1394, 1399* (9th Cir.), *cert. denied*, *469 U.S. 881, 83 L. Ed. 2d 186, 105 S. Ct. 248 (1984)*; *accord, McGlinchy v. Shell Chemical Co*., 1985-2 Trade Cas. CCH para. 66,672 at 63,169 (N.D. **[**19]** Cal. 1984). Second, McElderry's argument that Cathay Pacific's weight-based system is anticompetitive because it increases Cathay Pacific's revenues as compared to those air carriers which follow the piece-based baggage charge system is illogical, even assuming in McElderry's favor that 1) Cathay Pacific in fact *has* any United States competitors on its Hong Kong-Taipei flights -- which it denies, and 2) the weight-based system necessarily generates more revenue than the piece-based system -- which Cathay Pacific also denies. As Cathay Pacific points out,

> if U.S. carriers ever *did* compete with Cathay Pacific on this route, the U.S. carriers' allegedly beneficial baggage pricing would, under Plaintiff's theory, cause consumers to choose the U.S. carriers over Cathay Pacific. Rather than harm hypothetical U.S. competitors, Cathay Pacific['s] challenged baggage charges would benefit them. [19]

Finally, McElderry's assertion that Cathay Pacific causes loss of good will to United States-based air carriers which issue tickets which include flights on Cathay Pacific is, at best, speculative. In sum, it cannot be concluded that Cathay Pacific's excess baggage charge system has a **[**20]** direct, substantial and reasonably foreseeable anticompetitive effect on United States commerce.

Moreover, even if McElderry's claim were held to have met the requirements of the Foreign Trade Antitrust Improvements Act, the better course would still be to decline to exercise jurisdiction under principles of international comity. *See O.N.E. Shipping v. Flota Mercante Grancolombiana, 830 F.2d 449, 451 (2d Cir. 1987)* (affirming district court's dismissal of antitrust action involving interests of Colombian government on comity grounds). The United States and the United Kingdom disagree on the appropriate method for measuring and assessing excess baggage: since the 1976 CAB *Baggage Allowance* decision the United Kingdom has continued to approve weight-based systems for its air carriers and has objected to any attempts to impose a piece-based system on foreign air carriers engaged in purely foreign travel. [20]

[21]** In this case, the United Kingdom has filed a diplomatic note with the Department of State expressing the view that this court has no jurisdiction over this dispute under principles of international law:

> Her Majesty's Government can see no basis in international law for the exercise of jurisdiction by the United States. Neither Hong Kong nor Taiwan are US territories. **[*1079]** Cathay Pacific Airways is a United Kingdom airline which at the time of the plaintiff's flight did not operate to the United States. The right for it to fly between Hong Kong and Taipei, and the conditions on which passengers may be carried on such flights, is a matter within the jurisdiction of Hong Kong and Taiwan. The fact that the plaintiff is a US citizen and the ticketing for the journey between Hong Kong and Taipei (but not the carriage) had been effected by United Airlines in the United States, where she happened to begin her series of journeys, is insufficient to justify the exercise of jurisdiction by the United States.

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[18] Plaintiff's Memorandum of Law In Opposition to Defendant's Motion to Dismiss and for Sanctions at 87.

[19] Defendant's Reply to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and For Sanctions at 8-9 (April 8, 1987).

[20] *See* Affidavit of Robert H. Morse, Counsel for Cathay Pacific, ("Morse Affidavit"), at paras. 5-7 and Exhibits 6-8 (describing history of U.S./U.K conflict over baggage charges) (April 8, 1987).

> . . . If in such circumstances the governments of courts of third States were entitled to superimpose unilaterally their own conditions of carriage the resulting conflicts between national **[**22]** rules would result in total uncertainty as to which conditions applied to any particular passenger on any particular flight.
>
> Whereas uniform conditions of carriage may be a desirable objective -- particularly for passengers who make a series of journeys using two or more airlines -- the objective cannot be achieved by the purported exercise of extra-territorial jurisdiction which infringes the sovereignty of other States. [21]

HN8[] Where, as here, there is a direct conflict between the United States and United Kingdom, the continuance of which could clearly exacerbate the stated differences between the two countries, the proper course seems clearly to be to "avoid the unnecessary irritant of a private antitrust action" by declining jurisdiction. *O.N.E. Shipping, 830 F.2d at 454 (2d Cir. 1987)*. [22]

[23]** Moreover, the related "act of state" doctrine constitutes a further basis for declining jurisdiction in this case. The court of appeals for the this circuit has recently explained that this doctrine

> is a principal of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government.

O.N.E. Shipping, 830 F.2d at 452. Here, Cathay Pacific has convincingly demonstrated that its baggage charge system for baggage originating in the United States is necessitated by the United Kingdom's regulatory system. Hans B. Olsen, the Commercial Director of Cathay Pacific, explains in his affidavit that:

> Cathay Pacific's applicable tariffs filed in the United States state that the piece-system would apply for travel to or from the United States. Cathay Pacific's applicable tariffs filed with the United Kingdom state that the weight-based system would apply for travel to or from Hong Kong, except for direct flights to or from the United States. Cathay Pacific has reconciled these two conflicting regulatory schemes with regard to travel **[**24]** originating in the United States passing through Hong Kong to points outside of Hong Kong, consistent with the principles contained in the U.S.-U.K. Bilateral Aviation Agreement, by implementing the . . . excess baggage charge policy [outlined above]. [23]

J.T. Thorpe, Director of Civil Aviation of the Civil Aviation Department of the Government of Hong Kong, confirms in his affidavit that:

> Cathay Pacific has been authorized by the appropriate aeronautical authorities to operate air services between Hong Kong and Taiwan based on specified tariffs . . . . At present, the utilization by Cathay Pacific Airways of any other excess **[*1080]** baggage charge system [than the weight-based system] would be outside its operating authority. [24]

These affidavits establish that this is ***HN9***[] case in which, as in *O.N.E. Shipping*, "the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government," and because "the conduct of the [defendant] has been compelled by the foreign government,"

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[21] Morse Affidavit at Exhibit 6, Note No. 21.

[22] It is also noted that it is undisputed that Cathay Pacific, which is incorporated in Hong Kong and has its principal place of business there, did not provide any airplane service to or from the United States at the time of McElderry's flight, and that the conduct complained of in this action also took place outside of the United States, two factors which cut against assertion of jurisdiction in cases raising comity concerns. *Cf. Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement, 451 F.2d 727, 729 (2d Cir. 1971)* (per curiam) (articulating comity balancing test), *cert. denied*, ***406 U.S. 906, 31 L. Ed. 2d 816, 92 S. Ct. 1609 (1972)***.

[23] Olsen Affidavit at para. 6.

[24] Affidavit of J.T. Thorpe at para. 2 (Jan. 6, 1987).

the defendant "is entitled to **[**25]** assert the defense of foreign government compulsion and the act of state doctrine is applicable." *O.N.E. Shipping, 830 F.2d at 453*.

For the reasons stated above, McElderry's antitrust claims are dismissed.

III. *Rule 11* Sanctions

Cathay Pacific has moved for sanctions against McElderry's attorneys under *Fed.R.Civ.P. 11*. Although, in view of the disposition above it can not be said that the motion was made without reason, it is nevertheless denied. ***HN10***[] *Rule 11* sanctions do not, of course, automatically attach as a result of the dismissal of McElderry's claims. Rather, the relevant inquiry is whether a competent attorney could have formed the reasonable belief that McElderry's pleading was warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. *Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985)*.

Here, McElderry presented novel claims which are essentially of first impression. While I have concluded that McElderry's claims may not be presented in a federal court and are otherwise lacking in merit, McElderry's theories in support of jurisdiction and on the merits of her claims were at least colorable. **[**26]** The advisory committee notes to *Rule 11* warn that *Rule 11* "is not intended to chill an attorney's enthusiasm or creativity in pursuing . . . legal theories," and that "the court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading . . . was submitted," including whether "the pleading . . . was based on a plausible view of the law . . . ." Under these circumstances, Cathay Pacific's motions for sanctions is denied. *See* *Skepton v. County of Bucks, PA, 613 F. Supp. 1013, 1022 (E.D. Pa. 1985)* (denying sanctions after dismissal of antitrust claims, where "although . . . plaintiff's complaint [was found] to be without merit, . . . plaintiff's complaint was an attempt, albeit unsuccessful, to create a novel cause of action"); *Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324, 1326 (S.D.Fl. 1984)* (denying sanctions after dismissal of antitrust claims because "plaintiff did have at least a colorable claim based on an extension of existing law").

* * *

McElderry's complaint is dismissed. Cathay Pacific's motion for sanctions is **[**27]** denied. It is so ordered.

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![LexisNexis]

North Cent. Watt Count, Inc. v. Watt Count Engineering Systems, Inc.

United States District Court for the Middle District of Tennessee, Nashville Division

February 2, 1988, Decided

No. 3-86-0836

Reporter

678 F. Supp. 1305 *; 1988 U.S. Dist. LEXIS 958 **; 1988-1 Trade Cas. (CCH) P67,940

North Central Watt Count, Inc. v. Watt Count Engineering Systems, Inc., et al.

Core Terms

territorial, dealers, entity, enterprise, horizontal, defendants', Licensing, upstream, restrictions, Contractor, dealership, summary judgment motion, vertical, heatshield, sales, downstream, courts, racketeering activity, interstate commerce, price competition, competitor, conspiracy, extortion, franchise, per se violation, present evidence, antitrust claim, circuits, commerce, restrain

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > General Overview

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

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

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

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

HN1[] **Judgments, Summary Judgment**

Historically, courts have been reluctant to dispose of complex antitrust litigation on motions for summary judgment. This reluctance stems from the crucial role that intent and motive have in antitrust claims and the difficulty of proving conspiracy by means other than factual inference. This does not mean, however, that summary judgment should never be granted in antitrust actions. To survive a motion for summary judgment, the plaintiff must provide some factual basis from which elements of intent and conspiracy may be reasonably inferred. In disposing of such motions, the evidence must be viewed in a light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences. Only if the evidence is not disputed as to any genuine issue of material fact should the case be decided as a matter of law.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2[] Sherman Act, Claims

Section 1 of the Sherman Act proclaims that every contract, combination or conspiracy in restraint of trade or commerce is illegal. 15 U.S.C.S. § 1. To establish a claim under § 1, a plaintiff must prove: (1) that the defendant entered into a contract, combination, or conspiracy; (2) that the contract, combination, or conspiracy was either "in" or affected interstate or foreign commerce; and (3) that the contract, combination, or conspiracy unreasonably restrained such commerce.

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN3[] Private Actions, Remedies

It is well established that proof of actual "antitrust injury" is a necessary prerequisite to recovering damages under 15 U.S.C.S. § 15. Similarly, in order to obtain injunctive relief under 15 U.S.C.S. § 26, a plaintiff must show a threat of "antitrust injury." The plaintiff must show more than an injury causally linked to an antitrust violation. It must show both an actual and threatened injury of the type the antitrust laws were designed to prevent and that flows from that which makes a defendants' acts unlawful.

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

Business & Corporate Law > Foreign Corporations > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Per Se Rule & Rule of Reason, Sherman Act

Traditionally, courts have applied a "rule of reason" approach to determine whether a particular business arrangement unreasonably restrains interstate or foreign commerce in violation of 15 U.S.C.S. § 1. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Per Se Rule & Rule of Reason, Per Se Violations

Although most business arrangements are analyzed under the "rule of reason" approach, courts have characterized certain types of business agreements or practices as per se violations of *15 U.S.C.S. § 1*. Such agreements or practices 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. It is only after considerable experience with certain business relationships, however, that courts will classify them as per se violations of *§ 1*.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Restraints of trade generally are characterized as either vertical or horizontal. Although there may be occasional problems in distinguishing between vertical and horizontal restrictions, such a distinction is critical. Vertical restraints are agreements between persons or business entities at different levels of the market structure. Horizontal restraints, on the other hand, are agreements between competitors at the same level of the market structure. Because vertical non-price restraints are generally found to be potentially beneficial to interbrand competition, such restrictions traditionally have been scrutinized under the "rule of reason" approach. Horizontal restraints, however, have been characterized as naked restraints of trade with no purpose except stifling competition. Such restraints, therefore, are generally regarded as per se violations of *15 U.S.C.S. § 1*.

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

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

HN7[] Price Fixing & Restraints of Trade, Vertical Restraints

Although a particular market restriction may, at first glance, appear to be vertical in nature, a more thorough examination of the underlying business arrangement involved may reveal that the restriction is, in fact, a per se unreasonable horizontal restraint. To determine whether a particular market restriction is vertical or horizontal in nature, district courts in this circuit must focus their inquiry upon the effect and purpose of the restriction. The purpose of a given market restriction may be discovered by identifying the source of the restriction and determining whether the restriction is consistent with the source's market strategy.

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

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

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

HN8[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Some circuit courts have held that such an agreement constitutes a per se violation of *15 U.S.C.S. § 1* if the "upstream" entity's refusal to deal was primarily motivated by a desire to protect the "downstream" entity from price competition at the horizontal level. These circuits subscribe to the view that although the "upstream" entity's refusal to deal appears to be a unilaterally-imposed vertical restraint, if the refusal to deal is made at the direction of a "downstream" entity seeking to suppress its competition by utilizing the power of a common "upstream" entity, the restraint's purpose and effect becomes primarily horizontal in nature. If the purpose and effect of the challenged conduct is to restrain price movement and the free play of market forces, it is illegal per se. The court agrees that if the "upstream" entity's decision to refuse to deal with the horizontal competitor was in fact its own, the result of its own marketing strategy and judgment, the alleged conduct would be unilateral in nature and might be found to possess the pro-competitive redeeming virtues that would defeat the application of a per se rule. If, however, the "upstream" entity's decision was made at the "downstream" entity's request and with an intent to restrain intrabrand price competition, application of a per se rule would be appropriate.

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

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

HN9[] Private Actions, Racketeer Influenced & Corrupt Organizations

In order to establish a violation under the Racketeer Influenced and Corrupt Organization Act, *18 U.S.C.S. § 1962(c)*, a plaintiff must prove: (1) the existence of an enterprise which affects interstate or foreign commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated in the conduct of the enterprise's affairs; and (4) that the defendant participated through a pattern of racketeering activity.

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

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

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

HN10[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1962(c) provides: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

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

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview

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

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

HN11[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The term "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *18 U.S.C.S. § 1961(4)*. An enterprise is proven by the existence of a continuing organization and by evidence that members function as a continuing unit for a common purpose. Although the existence of an enterprise is a separate element of a *18 U.S.C.S. § 1962(c)* violation, there need not be proof of an enterprise distinct from proof of a pattern of racketeering. It is well settled that the enterprise need only have a minimal impact upon interstate commerce.

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

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

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

HN12[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1962(c) applies to legitimate as well as illegitimate enterprises.

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

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

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

HN13[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A plaintiff must prove more than the existence of an enterprise which affects interstate commerce. It must also prove that each individual defendant participated in the conduct of that enterprise's affairs through a pattern of racketeering activity. The term "racketeering activity" encompasses a variety of federal and state crimes, including the racketeering activity alleged in this case; extortion in violation of *18 U.S.C.S. § 1951* and *Tenn. Code Ann. § 39-2-701* (1982), and mail fraud in violation of *18 U.S.C.S. § 1341*. A "pattern" of racketeering activity requires at least two acts of racketeering activity the last of which occurred within 10 years after the commission of a prior act of racketeering activity. *18 U.S.C.S. § 1961(5)*. These acts are more commonly referred to as "predicate acts." In order to prove that defendants conducted the affairs of the alleged enterprise "through" a pattern of racketeering activity, there must be a nexus between the enterprise and the racketeering activity.

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

HN14[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Tenn. Code Ann. § 39-2-701 (1982) makes it unlawful for any person to: maliciously threaten to accuse another of a crime, offense, or immoral act, or to do any injury to the person, reputation or property of another, with intent to extort any money, property, or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will.

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

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

HN15[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1951(a) makes it unlawful for any person to obstruct, delay, or affect commerce or the movement of any article in commerce by using, attempting to use, or conspiring to use extortionate means. An essential element of a *§ 1951(a)* violation, therefore, is proof that the extortionate transaction has at least a de minimus effect on interstate commerce.

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

Criminal Law & Procedure > ... > Racketeering > Extortion > Elements

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

HN16[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

"Extortion" is defined in *18 U.S.C.S. § 1951(b)(2)* as the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. It is well settled that fear of economic loss may be a sufficient basis for a finding of extortion, but only if it is actual and reasonable and the defendant knew of and intentionally made use of such actual fear.

Counsel: [1]** Michael A. Meyer, David N. Burn, Burn & Meyer, for Plaintiff also for Third-Party Defts. Ray Busby and Allen Bowman.

Gail P. Pigg, Esq., for Defendant.

Henry E. Hildebrand, Jane P. North, Passino, Delaney & Hildebrand, for Third-Party Deft. Michael Busby.

Judges: Thomas A. Wiseman, Jr., Chief Judge.

Opinion by: WISEMAN

Opinion

[*1306] MEMORANDUM

THOMAS A. WISEMAN, JR., CHIEF JUDGE

Plaintiff North Central Watt Count, Inc. (NCWC) initiated this lawsuit in September, 1986 against defendants Watt Count Engineering Systems, Inc. (WCES), Watt Count Marketing Corporation (WCM), Watt Count of Middle Tennessee, Inc. (WCMT), and several individually-named defendants. [1] In its complaint, NCWC alleged that defendants violated both the Sherman Act, *15 U.S.C. § 1 et seq. (1973)*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-68 (1984). In October, 1986, the Court issued a preliminary injunction against defendants, restraining them from engaging in certain types of activity. [2] Defendants subsequently moved to dismiss NCWC's complaint for failing to state a claim upon which relief could be granted and for lack of subject-matter jurisdiction. The Court denied defendants' motions on July 2, 1987. The case is presently before **[**2]** the Court on cross-motions for summary judgment filed by NCWC and defendants on both the antitrust and RICO

[1] The individually-named defendants are all members of WCES' Board of Directors: Donald Terrell, Keith Crowe, Reese Smith, Jr., Reese Smith, III, Stephen B. Smith, and W. C. Allen. Defendants Terrell, Crowe, Smith, Jr., Smith, III, and Stephen Smith were also members of WCMT's Board of Directors.

[2] Specifically, the Court enjoined defendants from:

1. Refusing to provide engineering, design or other consulting or support services to North Central Watt Count;

2. Refusing to sell heatshield, caulking or other materials or supplies which defendants offer for sale to Watt Count franchises and/or refusing to sell or attempting to sell such items at prices which are higher than the regularly posted prices for such items;

3. Revoking or suspending plaintiff's Watt Count franchise or engaging in, or attempting to do any act to restrict plaintiff's business activities to any specified area;

4. Engaging in any other conduct or causing others to engage in any conduct which would restrict or interfere with plaintiff's conduct of business under its Watt Count franchise.

In doing so, the Court held that NCWC had shown a likelihood of success on the merits of its antitrust claim.

claims. For the reasons explained below, the Court denies both NCWC's and defendants' motions for summary judgment on the antitrust claim, and grants defendants' motion for summary judgment on the RICO claim.

[3]** I. *Factual Background*

A. *The Watt Count Organization and System*

WCES and WCM, its wholly-owned subsidiary, form the basis of a business organization that provides and markets energy conservation systems primarily for new and existing single and multi-family residential housing units. WCES, the parent corporation, provides computerized engineering analyses, designs insulation, ventilation and air-conditioning specifications, and issues written guarantees which insure that annual energy consumption levels in units equipped with the Watt Count System will not exceed a particular guaranteed amount. The issuance of these written guarantees is what distinguishes the service provided by the Watt Count Organization from that provided by other energy conservation system businesses. [3] **[**4]** In return **[*1307]** for its services, WCES charges its area dealers a flat rate of fourteen cents per square foot of conditioned living space. [4]

WCM is the marketing arm of the Watt Count Organization. Although its primary function is to sell Watt Count area dealerships, WCM also provides area dealers with certain technical support, and marketing and promotional aids and supplies. In return for its services, WCM receives approximately four percent of an area dealer's gross sales.

The Watt Count System is actually promoted, sold, and installed by Watt Count area dealers. At the time this lawsuit was filed, Watt Count area dealers were located in several states. [5] In addition to caulking the framework of a structure, blowing insulation into cavities created by wall t's and corners, and installing heatshield -- a metallized polyethylene material that is placed between the structure's insulation and dry wall on virtually all exterior walls and top-floor ceilings -- area dealers inspect the installation of insulation, and heating and cooling duct systems to make certain that such installation complies with the design specifications provided by WCES.

[5]** B. *The Present Dispute*

In essence, this lawsuit involves a rather convoluted territorial dispute between two Watt Count area dealers -- NCWC and WCMT. WCMT first became associated with the Watt Count Organization in 1982 when it purchased the Watt Count area dealership for Williamson County, Tennessee. [6] Shortly thereafter, WCMT purchased the Watt Count area dealership for Davidson County, Tennessee. [7] Defendants Keith Crowe, Reese Smith, Jr., Reese Smith, III, and Stephen B. Smith were the original shareholders of WCMT and were members of WCMT's original Board of Directors. Defendant Donald Terrell was a member of WCMT's original Board, but only recently became a WCMT shareholder. WCMT has had no other shareholders or directors since its incorporation. Although collectively the Smiths constitute a majority of WCMT's Board, defendants Terrell and Crowe are responsible for conducting WCMT's daily operations.

Like WCMT, NCWC first became involved in the Watt Count Organization in 1982. At that time, NCWC purchased the Watt Count area dealership **[**6]** for Sumner, Macon, Trousdale, Smith, and Wilson counties in Tennessee. NCWC originally was owned by a group of investors which included William Cutting, Charles Parks, Porter Jones, and WCES. WCES' interest in NCWC was represented by its President at the time, Michael Busby. Michael Busby,

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[3] Various companies throughout the Middle and Northern Tennessee area provide services similar to those provided by Watt Count. Only Your Energy Service, however, issues a written guarantee similar to the one provided by Watt Count. Compared to the Watt Count Organization, Your Energy Service controls a relatively insignificant share of the relevant market.

[4] For certain repeat work, however, WCES charges its area dealers seven cents per square foot of conditioned space.

[5] As of April 11, 1987, there were 19 Watt Count area dealers located in nine different states. *See* Deposition of Keith Crowe at 32.

[6] WCMT paid $ 37,500 for the Williamson County dealership.

[7] WCMT paid an additional $ 40,000 for the Davidson County dealership.

who has been named as a counterclaim defendant in this lawsuit, served as President of WCES until the fall of 1986. In 1983, the ownership of NCWC changed hands. Since that time, NCWC has been owned by Raymond Busby -- Michael Busby's father and Secretary-Treasurer of NCWC -- and Allen Bowman -- Michael Busby's brother-in-law and President of NCWC.

Toward the latter part of 1983, WCMT learned that NCWC was actively soliciting customers and engaging in business in Davidson County. Believing that such conduct violated NCWC's dealership agreement, which WCMT interpreted as providing for exclusive sales territories, [8] **[**8]** defendants **[*1308]** Terrell and Crowe contacted Michael Busby, then President of WCES, and asked him to stop NCWC from engaging in business in WCMT's territory. According to both Michael Busby and defendant Crowe, Michael Busby informed defendants Terrell and Crowe that WCES could not legally **[**7]** impose territorial restrictions on NCWC in order to stop it from doing business in WCMT's territory. [9] According to defendant Terrell, however, Michael Busby informed them that he had talked to and reprimanded NCWC, and that he had taken care of the problem. [10]

In September, 1983, WCMT's attorney sent a letter to Michael Busby objecting to NCWC's continued intrusion into WCMT's territory. In a letter addressed to WCMT's attorney dated October 28, 1983, Michael Busby purportedly set forth WCES' response to WCMT's complaint. In that letter, he stated:

> First, as to the matter of exclusivity of geographical area, the franchise prospectus was prepared to provide that no other [area dealership] would be established by Watt Count in the franchisee's territory during the term of his contract . . . . To avoid a violation of antitrust laws, Watt Count could not prohibit the salespersons of one franchise from selling in another franchise territory. [11]

According to this letter, therefore, WCES' position, was that it never intended to restrict or prohibit salespersons of one area dealer from selling in another area dealer's territory, and that neither WCES nor any of its sales representatives made any representations to the contrary. It was WCES' belief that the most it could do was prohibit area dealers from establishing **[**9]** an office or place of business in another area dealer's territory. [12] **[**10]** This was also the understanding of both the original and present owners of NCWC. [13]

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[8] Both NCWC and WCMT entered into identical dealership agreements with WCM. By the express terms of those agreements, WCM granted area dealers "the exclusive right to promote, sell, and service the Watt Count System. . . in the geographic area specified in Paragraph 1.4" *See* Authorized Total Energy Center Dealership Agreement, Paragraph 1.1. Paragraph 1.4 of the agreements required the area dealer to operate a business, and maintain a retail sales outlet in a defined area, and provided that WCM would not grant any other "dealer franchise" in a particular geographic territory. In Paragraph 1.6 of the agreements, the area dealers acknowledged WCM's right to authorize other area dealers to sell and promote the Watt Count System "outside the geographic area specified in Paragraph 1.4." The agreements, however, did not *explicitly and unambiguously* state that one franchise's salespersons could not solicit business in another franchise's territory.

[9] *See* Deposition of Michael Busby at 27; Deposition of Keith Crowe at 19.

[10] *See* Deposition of Donald Terrell at 56.

[11] Defendants Terrell and Crowe claim that a franchise prospectus was not used when they negotiated to purchase WCMT's two area dealerships. *See also* Affidavit of Jim Pemberton at 2 (Pemberton, along with Michael Busby, negotiated the sale of WCMT's two area dealerships on behalf of WCM). In any event, although the franchise prospectus is somewhat ambiguous, it may reasonably be construed to support defendants' claim that WCES and WCM initially intended to impose territorial sales restriction. Section 13(ii) of the prospectus provided that "[WCM] limits the geographic area in which . . . [a] franchise may promote and sell the Watt Count System." Section 13(iii) further provided that "[WCM] does provide territorial protection . . . in that [it] agrees not to establish another . . . franchise within the geographic area designated in the . . . Dealership Agreement."

[12] WCES' position is supported by the testimony of Michael Busby, Clinton Swafford, Thomas Moody, and Robert Brown. *See* Deposition of Michael Busby at 16-17; Affidavit of Clinton Swafford at 2; Affidavit of Thomas Moody at 3; Affidavit of Robert Brown at 2.

[13] *See* Deposition of Charles Parks at 7-10; Transcript of October 3, 1986 Preliminary Injunction Hearing at 25-26 (testimony of Raymond Busby); 82 (testimony of Allen Bowman).

WCMT's Board was "stunned" by WCES' response. Defendants contend that at the time defendants Terrell and Crowe negotiated for the purchase of the Williamson and Davidson County area dealerships, both Michael Busby and Jim Pemberton, then President of WCM, represented that the dealership territories would be exclusive and that area dealers would not be permitted to solicit or do business in another area dealer's territory. [14] It is the defendants' **[*1309]** position that the dealership agreements were intended to, and did in fact impose such territorial restrictions. [15] Defendants further contend that Michael Busby never presented WCMT's letter to WCES' Board, that the Board, therefore, never addressed WCMT's objection to NCWC's actions, and that Michael Busby falsified the portion of WCES' response which concerned that objection. [16] **[**12]** NCWC, however, claims that Busby distributed a copy of the letter to all directors present at WCES' October 25, 1983 Board meeting, and that the Board addressed all of the issues **[**11]** presented by the letter and directed Busby to draft the above response. [17]

During the months following this exchange of letters, both NCWC and WCMT solicited customers and engaged in business in each other's territories. [18] **[**13]** WCMT, however, continued to complain and object. Apparently in response to WCMT's complaints, Michael Busby prepared and WCES' Board, at its September 25, 1984 meeting, adopted a proposed policy statement which would have required area dealers who solicited and did business in another dealer's territory to pay that dealer a five percent commission on any completed project. By its terms, however, the policy did not become effective unless it was approved by all area dealers. Because NCWC refused to approve the policy, it was never adopted. [19] Interterritory competition between NCWC and WCMT, therefore, continued.

In late 1985 and early 1986, WCES was sold to a group of investors, including defendants Terrell, Crowe, and the Smiths. Following the completion of that transaction, the composition of WCES' Board changed drastically. The new board consisted of defendants Terrell, Crowe, the Smiths, W. C. Allen, and Michael Busby. Although defendants

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[14] The testimony of defendants Terrell and Crowe, as well as that of Jim Pemberton support this contention. *See* Deposition of Donald Terrell at 15-19; Deposition of Keith Crowe at 10-11; Affidavit of Jim Pemberton at 1-2. Furthermore, defendants contend that Michael Busby, himself, acknowledged the truth of this contention at an informal WCES Board meeting just three days prior to the preliminary injunction hearing held in this case on October 3, 1986. For testimony in support, *see* Affidavit of W. C. Allen at 3; Affidavit of Kimberly Redd at 2. Finally, the testimony of Glenn Lawrence, who served as a WCES director until January, 1986, also supports this contention. *See also* Affidavit of John Baugh at 2 (a member of WCES' Board at time dealership first sold and considered).

[15] Defendants argue persuasively that it would have made no economic sense for them to have paid $ 40,000 for a second area dealership, unless they truly believed that the dealership agreements imposed protective territorial sales restrictions.

[16] WCMT's letter contained two objections; one concerning NCWC's territorial crossings and another concerning engineering fees. The response drafted by Michael Busby addressed both of these complaints. The minutes of the October 25, 1983 board meeting, however, do not indicate that the Board discussed WCMT's objection to NCWC's actions, nor do they indicate that a copy of WCMT's letter was distributed to the directors. NCWC has not offered any explanation for these omissions. Furthermore, John Baugh, who in his affidavit claims to have been on WCES' Board until mid-1985 but who NCWC alleges was not present at the time WCES' Board discussed its response to WCMT's letter, contends that Michael Busby never advised the Board that NCWC was selling in another dealer's territory, and that the Board was never asked to change its original policy and permit territorial crossings. *See* Affidavit of John Baugh at 3.

[17] This version of the facts is supported by the testimony of both Michael Busby and Clinton Swafford, a member of WCES' Board at the time who was present at the October 25, 1983 meeting and who drafted the cover letter under which WCES' response was sent to WCMT. *See* Affidavit of Clinton Swafford at 4-5.

[18] According to defendant Terrell, at the time WCMT received Michael Busby's response to their letter, WCMT had no reason to believe that he was misrepresenting the position of WCES and thought that the best thing to do was avoid a costly court battle and begin selling in NCWC's territory. *See* Affidavit of Donald Terrell at 4.

[19] All other area dealers were willing to sign and approve the policy statement.

Terrell, Crowe, and the Smiths acquired only 44 percent of WCES, they constituted a majority of WCES' newly-formed Board.

Shortly after ownership of WCES changed hands, WCMT lost several jobs in Davidson County in direct competition with NCWC. Had WCMT secured those jobs, it would have received approximately $ 120,000 to $ 150,000 in gross revenues. WCMT admittedly lost those jobs because NCWC submitted a lower bid for identical service. According to WCMT, NCWC was able to submit a lower bid solely because it "took a **[*1310]** free ride" on WCMT's good will and reputation in Davidson County.

Following the loss of these jobs, defendants took several actions. First, in June, 1986, defendant Terrell, acting independently [20] but admittedly on behalf of WCMT, decided to stop selling heatshield to NCWC. **[**14]** WCES, through WCM, initially purchased heatshield in bulk quantities from Metallized Products, Inc., a company located in Boston, Massachusetts. WCM then resold the heatshield to area dealers at a price substantially lower than that charged by any other area supplier. Sometime in 1983, because WCES was financially unable to continue this practice, WCMT voluntarily assumed the responsibility for doing so. According to a letter written by defendant Terrell to Ace Insulation Company dated August 12, 1985, WCMT was appointed by Metallized Products, as an authorized heatshield dealer. Despite this letter, defendants contend that WCMT was simply a Watt Count area dealer purchasing material in bulk and selling to other area dealers as a professional courtesy. At no time were Watt Count dealers required to purchase heatshield from WCES, WCM, or WCMT.

Second, in late July or early August, 1986, defendants Terrell and Crowe began contemplating filing a complaint against NCWC with the State of Tennessee Board of Licensing Contractors (Contractor **[**15]** Licensing Board). The idea to file the complaint originated shortly after NCWC obtained a job in WCMT's territory worth approximately $ 70,000 to $ 80,000. Defendant Crowe initiated the process by calling the Contractor Licensing Board to determine whether NCWC was required to obtain a license for such a large job. After describing the nature of NCWC's work to the Contractor Licensing Board representative, Crowe asked whether a complaint against NCWC should be filed. According to Crowe, the representative advised him to do so. Crowe, therefore, asked the representative to send him a complaint form and a copy of the contractors' license law. On August 6, 1986, after reading the license law, defendants Terrell and Crowe, believing that NCWC was required to obtain a contractors' license, filed a complaint against NCWC for engaging in heating, ventilating and air-conditioning subcontractor work worth in excess of $ 50,000. At the time the complaint was filed, defendant Crowe was aware that defendant Smith, III was a member of the Contractor Licensing Board. Defendants Smith, Jr., Smith, III, and Stephen Smith, however, did not know that the complaint was contemplated or filed until after **[**16]** the fact. [21] The Contractor Licensing Board subsequently dismissed the complaint. Smith, III took no part in the decision and had nothing to do with processing the complaint.

Finally, in August, 1986, defendant Terrell, speaking on behalf of WCMT, asked WCES' Board to stop NCWC from soliciting or doing business in WCMT's territory. [22] After discussing the problem at length, the Board passed a resolution directing WCES' attorney to write letters to both NCWC and WCMT. [23] The letters were to inform both companies that WCES would refuse to provide engineering services for or guarantee any work performed outside an area dealer's assigned territory. The letters were also to warn both companies that WCES would terminate their franchises if they violated the territorial restrictions. At the time this resolution was passed, the board of WCMT constituted a majority of WCES' Board. With the **[**17]** exception of Michael Busby, who voted against the resolution, and defendant **[*1311]** Smith, III, [24] who was not present at the meeting, all of WCES' board members -

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[20] NCWC contends that although defendants Crowe and the Smiths were not directly involved, they either approved of or acquiesced in Terrell's action.

[21] NCWC contends, however, that WCMT's remaining board members subsequently approved of or acquiesced in defendants Terrell and Crowe's actions. NCWC further contends that the complaint was meritless and that it was filed by defendants Terrell and Crowe with full knowledge of its groundless nature.

[22] Prior to addressing WCES' Board, Terrell consulted with WCMT's remaining board members on an informal basis.

[23] Defendant Allen moved that the Board adopt the resolution.

- defendants Terrell, Crowe, Smith, Jr., Stephen Smith, and Allen -- voted for the resolution. WCES' attorney sent a letter to this effect to NCWC on August 21, 1986. [25] This litigation followed.

II. *Legal Discussion*

A. *Antitrust Claim*

HN1[] Historically, courts have been reluctant to dispose of complex antitrust litigation on motions for summary judgment. *See* *Smith v. Northern Michigan Hospitals, Inc., 703 F.2d 942, 947 (6th Cir. 1983)*. This reluctance "stems from the crucial role that intent and motive have in antitrust claims and the difficulty of proving conspiracy by means other than factual **[**18]** inference." *Id*. This does not mean, however, that summary judgment should never be granted in antitrust actions. To survive a motion for summary judgment, "the plaintiff must provide some factual basis from which elements of intent and conspiracy may be reasonably inferred." *Potters Medical Center v. The City Hospital Association, 800 F.2d 568, 572 (6th Cir. 1986)*. In disposing of such motions, the "evidence must be viewed in a light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences." *Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1197 (6th Cir. 1982)*, *cert. denied*, *466 U.S. 931, 80 L. Ed. 2d 190, 104 S. Ct. 1718 (1984)*. [26] "Only if the evidence is not disputed as to any genuine issue of material fact should the case be decided as a matter of law." *Hand v. Central Transport, Inc., 779 F.2d 8, 10 (6th Cir. 1985)*.

HN2[] *Section 1* of the Sherman Act proclaims that "every **[**19]** contract, combination . . . or conspiracy in restraint of trade or commerce . . . is . . . illegal." *15 U.S.C. § 1 (1973)*. To establish a claim under *section 1*, a plaintiff must prove:

(1) that the defendant entered into a contract, combination, or conspiracy;

(2) that the contract, combination, or conspiracy was either "in" or affected interstate or foreign commerce; and

(3) that the contract, combination, or conspiracy unreasonably restrained such commerce. [27]

See *White and White, Inc. v. American Hospital Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983)*; *Continental Cablevision of Ohio, Inc. v. American Electric Power Co., 715 F.2d 1115, 1118 (6th Cir. 1983)*.

[20]** In their motion for summary judgment, defendants argue that NCWC has failed to present evidence sufficient to create a genuine issue for trial as to both the alleged conspiracy in this case and the alleged restraint's effect on interstate commerce. Defendants' arguments, however, are unpersuasive. Although evidence of WCES'

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[24] Although Smith, III was not present, NCWC claims that he impliedly approved of the Board's action and the content of the letter sent to NCWC by failing to subsequently dissent.

[25] It is unclear whether a similar letter was ever sent to WCMT.

[26] *But see* *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 553, 106 S. Ct. 1348 (1986)* ("***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case").

[27] NCWC seeks both damages under *15 U.S.C. § 15 (Supp. 1987)* and permanent injunctive relief under *15 U.S.C. § 26 (Supp. 1987)*. ***HN3***[] It is well established that proof of *actual* "antitrust injury" is a necessary prerequisite to recovering damages under *section 15*. *See* *Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 712, 97 S. Ct. 690 (1977)*. Similarly, in order to obtain injunctive relief under *section 26*, NCWC must show a *threat* of "antitrust injury." *See* *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 438, 107 S. Ct. 484 (1986)*. NCWC must show more than an injury causally linked to an antitrust violation. *Id. 93 L. Ed. 2d at 435*. It must show both an actual and threatened injury "of the type the antitrust laws were designed to prevent and that flows from that which makes a defendants' acts unlawful." *Brunswick, 50 L. Ed. 2d at 712*. Contrary to defendants' contention, NCWC has met this burden by presenting evidence which tends to show that defendants' alleged unlawful conduct reduced competition in the Middle Tennessee market for Watt Count services and that NCWC has been and will be injured by that reduction in competition. Defendants' motion for summary judgment, therefore, to the extent that it was based on this issue, is denied.

[*1312] refusal to deal with NCWC cannot, by itself, support a finding of antitrust liability under section 1, *see* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 782-86, 104 S. Ct. 1464 (1984), NCWC clearly has presented evidence that reasonably "'tends to exclude the possibility' that [WCES and WCMT] acted independently." Matsushita, 89 L. Ed. 2d at 553. [28]. Futhermore, although the alleged restraint in this case was not itself "in commerce," NCWC has presented evidence of conduct that, "'as a matter of practical economics' . . . [has] a not insubstantial effect" on interstate commerce. [29] McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 62 L. Ed. 2d 441, 453, 100 S. Ct. 502 (1980) (quoting Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 48 L. Ed. 2d 338, 344, 96 S. Ct. 1848 (1976)). Accordingly, defendants' motion **[**21]** for summary judgment on NCWC's antitrust claim is denied. [30]

Although NCWC **[**22]** has presented sufficient evidence from which a reasonable finder of fact could conclude that WCES conspired with WCMT and the individually-named defendants to restrain interstate commerce, the difficult issue presented by this case is whether NCWC has presented evidence sufficient to create a genuine issue for trial as to the reasonableness of that restraint. Defendants argue that NCWC has not, and therefore that NCWC's motion for summary judgment on this issue should be denied.

HN4[] Traditionally, courts have applied a "rule of reason" approach to determine whether a particular business arrangement unreasonably restrains interstate or foreign commerce in violation of section 1. *See* United States v. Topco Associates, Inc., 405 U.S. 596, 31 L. Ed. 2d 515, 525 92 S. Ct. 1126 (1972). The United States Supreme Court described this "rule of reason" approach in Chicago Board of Trade v. United States, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily **[**23]** consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.

62 L. Ed. at 687, *quoted with approval in* Davis-Watkins, 686 F.2d at 1196.

HN5[] Although most business arrangements are analyzed under this "rule of reason" approach, courts have characterized certain types of business agreements or practices as *per se* violations of section 1. Such "agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 549, 78 S. Ct. 514 ***[*1313]*** (1958). "It is only after considerable experience with certain business relationships," however, that courts will classify them as *per se* violations of section ***[**24]*** 1. Topco, 31 L. Ed. 2d at 525.

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[28] It is undisputed that WCES and WCMT, while separate economic entities, are commonly-controlled corporations. Furthermore, defendants do not dispute that WCES' refusal to deal with NCWC was designed to either impose or enforce territorial sales restrictions, and that WCMT had a practical economic motive for encouraging such action on WCES' part. Finally, it is clear that WCES' alleged misconduct did not occur until after WCMT gained some measure of control over WCES.

[29] As NCWC points out, by threatening to terminate NCWC's franchise, WCES effectively restricted NCWC's business activity to a limited territory. NCWC's consumption of heatshield -- a product that traveled in interstate commerce -- therefore, decreased. The record clearly shows that NCWC purchased heatshield produced by Metallized Products, Inc., a corporation located in Boston, Massachusetts. It is therefore irrelevant that NCWC could have obtained heatshield from an intrastate source.

[30] *See also, supra*, n. 25 (disposing of defendants' only other argument -- that NCWC has not presented evidence of an "antitrust injury").

HN6[] Restraints of trade generally are characterized as either vertical or horizontal. Although "there may be occasional problems" in distinguishing between vertical and horizontal restrictions, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 585 n.28, 97 S. Ct. 2549 (1977), such a distinction is critical. Vertical restraints are agreements between persons or business entities at different levels of the market structure. *See* Topco, 31 L. Ed. 2d at 526. Horizontal restraints, on the other hand, are agreements between competitors at the same level of the market structure. *Id. at 525*. Because vertical non-price restraints "are generally found to be potentially beneficial to interbrand competition," Davis-Watkins, 686 F.2d at 1196, such restrictions traditionally have been scrutinized under the "rule of reason" approach. Horizontal restraints, however, "have been characterized as 'naked restraints of trade with no purpose except stifling competition.'" Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir.), *cert. denied*, *439 U.S. 946, 58 L. Ed. 2d 338, 99 S. Ct. 340 (1978)* (quoting White Motor Co. v. United **[**25]** States, 372 U.S. 253, 9 L. Ed. 2d 738, 746, 83 S. Ct. 696 (1963)), *quoted in,* Com-Tel, Inc. v. Dukane Corp., 669 F.2d 404, 409 (6th Cir. 1982). Such restraints, therefore, are generally regarded as *per se* violations of *section 1*.

The truly difficult question presented by this case is whether defendants' conduct should be characterized as a vertical or horizontal restraint of trade. HN7[] Although a particular market restriction may, at first glance, appear to be vertical in nature, a more thorough examination of the underlying business arrangement involved may reveal that the restriction is, in fact, a *per se* unreasonable horizontal restraint. *See, e.g.,* United States v. Sealy, Inc., 388 U.S. 350, 18 L. Ed. 2d 1238, 87 S. Ct. 1847 (1967); Topco, supra. To determine whether a particular market restriction is vertical or horizontal in nature, district courts in this circuit must focus their inquiry upon the effect and purpose of the restriction. *See* Davis-Watkins, 686 F.2d at 1197; Advisory Information and Management Systems, Inc. v. Prime Computer, Inc., 598 F. Supp. 76, 84-85 (M.D. Tenn. 1984). The purpose of a given market restriction may be discovered **[**26]** by identifying the source of the restriction and determining whether the restriction is consistent with the source's market strategy. *Id*.

NCWC argues that defendants' conduct constitutes a *per se* unreasonable horizontal restraint. It contends that WCMT and the individually-named defendants conspired with WCES to prevent NCWC from competing with WCMT in the Middle Tennessee market for Watt Count area dealer services. More specifically, NCWC claims that defendants, after acquiring control over WCES, attempted to force NCWC to comply with territorial sales restrictions by refusing to deal with NCWC and threatening to terminate NCWC's franchise. According to NCWC, territorial sales restrictions were never intended and are inconsistent with WCES' market strategy.

NCWC further contends, and presents sufficient evidence from which a reasonable finder of fact could conclude, that defendants were motivated by a desire to protect WCMT from price competition in the Middle Tennessee area. Although the majority of the economic pressure exerted upon NCWC appears to have been applied unilaterally by WCES -- a vertical "upstream" entity -- NCWC argues that WCES was nothing more than a tool **[**27]** "for the imposition and enforcement of horizontal restrictions." According to NCWC, defendants took advantage of their control over WCES "to initiate a course of conduct that could benefit only [WCMT]." Com-Tel, 669 F.2d at 412. Such conduct, NCWC argues, "must be viewed as a horizontal attempt to exclude a competitor on the horizontal level and to restrict intrabrand **[*1314]** competition without an offsetting benefit to interbrand competition. *Id*.

Defendants disagree. They contend that their conduct should be characterized as a vertical attempt to enforce territorial sales restrictions and, therefore, analyzed under the "rule of reason" approach. Defendants have presented evidence which suggests that territorial sales restrictions were always intended and that Watt Count area dealerships were sold based upon that understanding. According to defendants' version of the facts, WCES did not alter that policy until after Michael Busby's father and brother-in-law purchased NCWC and began selling the Watt Count System in WCMT's territory.

Defendants deny that their attempt to enforce territorial sales restrictions was motivated by a desire to protect WCMT from legitimate price competition. **[**28]** Instead, defendants claim that they merely sought to enforce NCWC's area dealership agreement as it was written and originally intended. According to defendants, such territorial restrictions remain vital if WCES is to compete successfully with other energy conservation system providers. [31]

The peculiar facts of this case present an unresolved question in this circuit: Does an agreement between a *single* "upstream" entity, such as WCES, and a *single* "downstream" entity, such as WCMT, under which the "upstream" entity agrees to refuse to deal with a price-cutting horizontal competitor of the "downstream" entity, constitute a *per se* violation of section 1 of the Sherman Act? The United States Court of Appeals for the Sixth Circuit specifically avoided reaching this issue in *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241, 245 (6th Cir. 1982)*. *See also Com-Tel, **[**29]** 669 F.2d at 413 n.16*. Fortunately, this question has been the subject of considerable litigation in other circuits. Those circuits, however, have disagreed on how to resolve the issue.

Several circuit courts have held that such an agreement does not constitute a *per se* violation of section 1 *unless* the refusal to deal was made pursuant to a *price-maintenance agreement* between the "upstream" and "downstream" entities. *See McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323, 329 (8th Cir. 1986)*; *Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1435 (7th Cir. 1986)*; *Westman Commissions Co. v. Hobart Int., Inc., 796 F.2d 1216, 1222-24 (10th Cir. 1986)*; *Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212, 1216 (5th Cir. 1986)*. According to these circuits, it is not enough for the jury to find that the "upstream" entity refused to deal with the competitor to *reduce price competition* at the horizontal level. *See, e.g., Business Electronics, 780 F.2d at 1216*. There must be evidence that the horizontal competitor was terminated pursuant to an agreement between the "upstream" and "downstream" entities to fix prices at a specific **[**30]** level. *Id*. "The mere fact that the ["upstream" entity] may be motivated by antipathy to price competition is irrelevant." *Morrison, 797 F.2d at 1440*. The rationale of these circuits appears to be that because the "upstream" entity's *motivation* in refusing to deal with the competitor may be either legitimate [32] or illegitimate, and because regardless of the "upstream" entity's motivation its *attitude* will appear to be "one of hostility toward price cutters," neither the jury nor the court should be permitted to choose which motive may have predominated. *See, e.g., Morrison, 797 F.2d at 1440*; *Business Electronics, 780 F.2d at 1217-18*. *But see McCabe's, 798 F.2d at 329* ("jury must determine whether . . . nonprice justifications . . . are legitimate, or are mere pretext to disguise a per se illegal agreement . . . to maintain resale prices").

[31]** ***HN8***[]

[*1315] Other circuit courts, however, have held that such an agreement constitutes a *per se* violation of section 1 if the "upstream" entity's refusal to deal was primarily motivated by a desire to protect the "downstream" entity from price competition at the horizontal level. *See O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986)*; *Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466, 469 (8th Cir. 1985)*; *Zidell Explorations, Inc. v. Conval International, Ltd., 719 F.2d 1465, 1469-71 (9th Cir. 1983)*; *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 170 (3d Cir. 1979)*. These circuits subscribe to the view that although the "upstream" entity's refusal to deal appears to be a unilaterally-imposed vertical restraint, if the refusal to deal is made "at the direction of [a "downstream" entity] . . . seeking to suppress its competition by utilizing the power of a common ["upstream" entity]," the restraint's purpose and effect becomes primarily horizontal in nature. *See Cernuto, 595 F.2d at 168*. According to these circuits, "if the purpose and effect of the challenged conduct is to restrain price movement and the free play of market forces, **[**32]** it is . . . illegal *per se." Id. at 169*.

This Court agrees with the *Cernuto* court that if the "upstream" entity's decision to refuse to deal with the horizontal competitor "was in fact its own -- the result of its own marketing strategy and judgment -- . . . the alleged conduct would be unilateral in nature and might be found to possess the pro-competitive redeeming virtues that would defeat the application of a *per se* rule." *Id. at 170*. If, however, the "upstream" entity's decision was made at the

[31] According to defendants, territorial restrictions also enhance intrabrand competition "by forcing each dealer to develop and promote his own territory rather than take a free ride off another dealer's efforts." Brief of Defendants in Opposition to Plaintiff's Motion for Summary Judgment at 12.

[32] For example, an "upstream" entity's refusal to deal may be motivated by a desire to enforce a reasonable non-price vertically-imposed territorial restriction. Defendants contend that this is exactly what WCES was doing in this case.

"downstream" entity's request and with an intent to restrain intrabrand price competition, application of a *per se* rule would be appropriate. The plaintiff need not present evidence of a price-fixing agreement between the "upstream" and "downstream" entities. Such an approach is consistent with the limited direction provided by the Sixth Circuit in *Davis-Watkins*.

In light of the above, it is clear that the merits of NCWC's antitrust claim must ultimately turn on the question of motive. The ultimate question must be: Was WCES' refusal to deal motivated by a desire to enforce pre-existing, vertically-imposed territorial sales restrictions as defendants suggest, **[**33]** or did WCES refuse to deal with NCWC at WCMT's request in order to eliminate intrabrand price competition in the Middle Tennessee market for Watt Count area dealer services and thereby enable WCMT to maintain prices at its own preferred levels? Given that both parties have presented sufficient conflicting evidence concerning WCES' original market strategy and defendants' motive in refusing to deal with NCWC, this question must be answered by the finder or fact. Summary judgment on this claim, therefore, is inappropriate.

B. *RICO Claim*

NCWC also claims that defendants violated the substantive RICO offense set forth in *18 U.S.C. § 1962(c) (1984)*. [33] ***HN9***[] In order to establish a *section 1962(c)* violation, NCWC must prove:

(1) the existence of an enterprise which affects interstate or foreign commerce;

(2) that the defendant was employed by or associated with the enterprise;

(3) that the defendant participated in the conduct of the enterprise's affairs; and

(4) that the defendant participated through a pattern of racketeering activity.

See United States v. Sinito, 723 F.2d 1250, 1260 (6th Cir. 1983), *cert. denied*, *469 U.S. 817, 83 L. Ed. 2d 33, 105 S. Ct. 86 (1984)*. **[**34]**

HN11[] The term "enterprise" includes "any individual, partnership, corporation, association, **[*1316]** or other legal entity, and any union or group of individuals associated in fact although not a legal entity." [34] *18 U.S.C. § 1961(4) (1984)*. An enterprise "is proven by the existence of a continuing organization and by evidence that members function as a continuing unit" for a common purpose. *Sinito, 723 F.2d at 1262*. Although the existence of an enterprise is a separate element of a *section 1962(c)* violation, there need not be "proof of an enterprise distinct from proof of a pattern of racketeering." *United States v. Qaoud, 777 F.2d 1105, 1115 (6th Cir. 1985)* (citing with approval *United States v. Mazzei, 700 F.2d 85, 89* (2d Cir.), *cert. denied*, *461 U.S. 945, 77 L. Ed. 2d 1304, 103 S. Ct.* ***[**35]*** *2124 (1983))*. *But see United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1982)*, *cert. denied*, *459 U.S. 1110, 74 L. Ed. 2d 960, 103 S. Ct. 739 (1983)* (holding that enterprise must have existence separate and apart from the alleged pattern of racketeering activity). It is well settled that the "enterprise need only have a minimal impact upon interstate commerce." *United States v. Robinson, 763 F.2d 778, 781 (6th Cir. 1985)*. [35]

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[33] ***HN10***[] *Section 1962(c)* provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1984).

[34] It is well settled that ***HN12***[] *section 1962(c)* applies to legitimate as well as illegitimate enterprises. *See United States v. Turkette, 452 U.S. 576, 69 L. Ed. 2d 246, 253, 101 S. Ct. 2524 (1981)*.

[35] It is the enterprise itself, not the conduct of each individual defendant that must affect interstate commerce. *See United States v. Groff, 643 F.2d 396, 400* (6th Cir.), *cert. denied*, ***454 U.S. 828, 70 L. Ed. 2d 103, 102 S. Ct. 121 (1981)***.

Defendants argue that NCWC has not presented sufficient evidence of an enterprise distinct from the individual RICO defendants. In addition, defendants contend that the enterprise alleged by NCWC has no effect whatsoever on interstate commerce. The Court disagrees. NCWC has presented uncontroverted evidence **[**36]** which establishes the existence of a legitimate "association in fact" consisting of Watt Count area dealers, WCM, and WCES. It is undisputed that this "association in fact" is a continuing organization, the purpose of which is to provide and sell energy conservation systems. Its individual members function as a continuing unit and engage in business in several states. While it is true that some courts have held that a defendant cannot simultaneously be both a "person" and an "enterprise" under *section 1962(c)*, *see, e.g., Bennett v. United States, 770 F.2d 308, 315 (2d Cir. 1985)*, *cert. denied*, *474 U.S. 1058, 88 L. Ed. 2d 776, 106 S. Ct. 800 (1986)*, the facts of this case do not present such a dilemma. NCWC has presented uncontroverted evidence of a distinct RICO enterprise. The fact that defendants WCMT, WCM, and WCES are members of that enterprise is irrelevant.

HN13[] NCWC, however, must prove more than the existence of an enterprise which affects interstate commerce. It must also prove that each individual defendant participated in the conduct of that enterprise's affairs through a pattern of racketeering activity. [36] The term "racketeering activity" encompasses a variety **[**37]** of federal and state crimes, including the racketeering activity alleged in this case; extortion in violation of *18 U.S.C. § 1951 (1984)* and *Tenn. Code Ann. § 39-2-701* (1982), and mail fraud in violation of *18 U.S.C. § 1341 (1984)*. *See 18 U.S.C. § 1961(1) (Supp. 1987)*. A "pattern" of racketeering activity "requires at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." *18 U.S.C. § 1961(5) (1984)*. These acts are more commonly referred to as "predicate acts." In order to prove that defendants conducted the affairs of the alleged enterprise "through" a pattern of racketeering activity, "there must be a nexus between the enterprise and the racketeering activity." *Qaoud, 777 F.2d at 1115*.

NCWC alleges that defendants have committed four predicate acts of racketeering activity. It argues that defendants extorted or attempted to extort property from NCWC in violation of both *18 U.S.C. § 1951* and *Tenn. Code Ann. § 39-2-701* by: (1) threatening **[**38]** to terminate NCWC's Watt Count franchise unless NCWC agreed to **[*1317]** comply with territorial sales restrictions; (2) refusing to sell NCWC heatshield; and (3) filing a meritless complaint against NCWC with the Contractor Licensing Board. NCWC also argues that defendants committed a single act of mail fraud in violation of *18 U.S.C. § 1341* by using the mails for the purpose of executing a scheme to fraudulently induce the Contractor Licensing Board to take action against NCWC. According to NCWC, defendants intentionally misrepresented to the Licensing Board that NCWC was doing business in violation of *Tenn. Code Ann. § 62-6-103* (1986). In response, defendants argue, and the Court agrees, that NCWC has not presented sufficient evidence to establish a valid civil RICO claim for the predicate offenses it alleges.

Even if the Court assumes that defendants knew that the complaint filed against NCWC with the Contractor Licensing Board was meritless and contained false representations of fact, such conduct is neither chargeable under *Tenn. Code Ann § 39-2-701*, nor indictable under either *18 U.S.C. § 1341* or *18 U.S.C. § 1951*. By filing a meritless and false complaint against NCWC, defendants may **[**39]** have attempted to harass, but they did not "maliciously threaten" NCWC in violation of *Tenn. Code Ann. § 39-2-701*. [37] Furthermore, because defendants did not, in any way, delay, obstruct, interrupt or otherwise adversely affect interstate commerce by taking such action, no violation of *18 U.S.C. § 1951* has occurred. [38] **[**40]** Finally, because the alleged misrepresentations made by

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[36] It is undisputed that defendants are all "employed by or associated with" the alleged enterprise. *See 18 U.S.C. § 1962(c) (1984)*.

[37] ***HN14***[] *Tenn. Code Ann. § 39-2-701* (1982) makes it unlawful for any person to:

> maliciously threaten to accuse another of a crime, offense, or immoral act, or to do any injury to the person, reputation or property of another, with intent . . . to extort any money, property, or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will . . . .

[38] ***HN15***[] *18 U.S.C. § 1951(a) (1984)* makes it unlawful for any person to obstruct, delay, or affect commerce or the movement of any article in commerce by using, attempting to use, or conspiring to use extortionate means. An essential element

defendants in the complaint "could not have been reasonably calculated to deceive" a government entity such as the Contractor Licensing board, NCWC has not established a "scheme to defraud" -- an essential element of mail fraud in violation of *18 U.S.C. § 1341*. [39]

Similarly, WCMT's refusal to sell heatshield to NCWC, although admittedly motivated by NCWC's territorial crossings, does not constitute an act of extortion under either *Tenn. Code Ann. § 39-2-701* [40] or *18 U.S.C. § 1951*. ***HN16***[] "Extortion" is defined in *18 U.S.C. § 1951(b)(2)* as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." It is well settled that fear of economic loss may be a sufficient basis for a finding of extortion, but "only if it [is] actual and reasonable and [the] defendant knew of and intentionally made use of such actual fear." *United States v. Russo, 708 F.2d 209, 214* (6th Cir.), *cert. denied*, *464 U.S. 993, 78 L. Ed. 2d 682, 104 S. Ct. 487 (1983)*. *See also United States v. Cusmano, 659 F.2d 714, 715 (6th Cir. 1981)*. Given that the individual **[**41]** defendants effectively controlled WCMT, WCM, and WCES at the time, WCMT's refusal to sell heatshield to NCWC could have *created* in NCWC a reasonable fear of economic loss -- a fear of further economic reprisals. There is absolutely no evidence in the extensive record of this case, however, which suggests that NCWC **[*1318]** actually had such a fear. [41] Furthermore, even if WCMT's refusal aroused an actual fear of economic loss in NCWC, there is no evidence to indicate that defendants did anything to exploit or use that fear in an attempt to obtain property from NCWC.

Consequently, even if defendants committed an act of extortion in violation of *Tenn. Code Ann. § 39-2-701* and/or *18 U.S.C. § 1951(a)* by threatening to terminate NCWC's franchise, NCWC has not presented sufficient evidence **[**42]** from which a reasonable finder of fact could conclude that defendants conducted or participated in the conduct of a RICO enterprise through a pattern of racketeering activity. Defendants' motion for summary judgment on this claim, therefore, is granted. Defendants, however, are not entitled to an award of attorney's fees and costs incurred as a result of defending this claim.

ORDER

For the reasons stated in the accompanying Memorandum, the Court denies both plaintiff's and defendants' motions for summary judgment on the antitrust claim and grants defendants' motion for summary judgment on the RICO claim. Defendants, however, are not entitled to an award of attorney's fees and costs incurred as a result of defending the RICO claim.

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of a *section 1951(a)* violation, therefore, is proof that the extortionate transaction has at least a *de minimus* effect on interstate commerce. *See United States v. Harding, 563 F.2d 299, 301-02 (6th Cir. 1977)*.

[39] The Court is convinced that an ordinary and prudent government board such as the Contractor Licensing Board would not have merely accepted the representations made in the complaint. In fact its function is to verify those representations and determine whether a license is required. *Cf. Blount Financial Services, Inc. v. Walter E. Heller and Co., 819 F.2d 151, 153 (6th Cir. 1987)*.

[40] By refusing to sell heatshield to NCWC, defendants in no way "maliciously threatened" to take any action against NCWC. Such conduct, therefore, did not violate *Tenn. Code Ann. § 39-2-701*.

[41] In fact, Allen Bowman, President of NCWC at the time, has admitted that he did not even now why WCMT refused to sel NCWC heatshield. *See* Transcript of October 3, 1986 Preliminary Injunction Hearing at 104.

Pinney Dock & Transp. Co. v. Penn Cent. Corp.

United States Court of Appeals for the Sixth Circuit

October 29, 1985, Argued ; February 3, 1988, Decided ; February 3, 1988, Filed

Nos. 84-3653, 84-3654, 84-3876, 84-3877

Reporter
838 F.2d 1445 *; 1988 U.S. App. LEXIS 1514 **; 1988-1 Trade Cas. (CCH) P67,876; 1988 WL 6387

Pinney Dock and Transport Co., Plaintiff-Appellant (84-3653), Plaintiff-Cross Appellee (84-3654), and Litton Industries, Inc.; Litton Systems, Inc.; Litton Great Lakes Corp.; and Erie Marine, Inc., Plaintiffs-Appellees (84-3876), Plaintiffs-Cross Appellants (84-3877) v. Penn Central Corp.; The Chessie System Co.; N & W Railway Co.; NWS, Inc.; and Bessemer & Lake Erie Railroad Co., Defendants-Appellees (84-3653), Defendants-Cross Appellants (84-3654), Defendants-Appellants (84-3876), Defendants-Cross Appellees (84-3877), Chesapeake & Ohio Railroad Co.; Baltimore & Ohio Railroad Co.; and CSX Corp., Defendants-Appellants (84-3876), Defendants-Cross Appellees (84-3877)

Subsequent History: [1]** Petition for Rehearing and Petition for Rehearing En Banc Denied April 13, 1988.

Prior History: On Appeal from the United States District Court for the Northern District of Ohio.

Core Terms

docks, district court, concealment, rates, railroads, antitrust, statute of limitations, defendants', self-unloaders, iron ore, conspiracy, handling, anti trust law, damages, cases, fraudulent concealment, affirmative act, charges, vessels, competitors, transportation, Lakes, cause of action, limitations, commodities, plaintiffs', meetings, immunity, parties, discovery

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN1[] **Common Carrier Duties & Liabilities, Rates & Tariffs**

Under the Interstate Commerce Act, *49 U.S.C.S. §§ 10101-11917*, the carriers themselves initiate rates and include them in tariffs which must be filed with the Interstate Commerce Commission. *§ 10762(a)(1)*. Unless and until suspended, set aside or disapproved, these rates become the lawful rate as between carrier and shipper.

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

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

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN2[] **Transportation, Railroads**

Under the Interstate Commerce Act, *49 U.S.C.S. §§ 10101-11917*, rail carriers have long been permitted to act jointly in setting rates despite the potential for antitrust liability.

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

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Charters

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN3[] **Regulated Industries, Transportation**

Parties to an Interstate Commerce Commission-approved rate agreement are exempt from the antitrust laws with respect to making and carrying out the agreement. *49 U.S.C.S. § 10706(a)(2)(A)*.

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

Transportation Law > Carrier Duties & Liabilities > Damages

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

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

HN4[] **Filed Rate Doctrine, Common Carriers**

The Keogh doctrine, as developed and announced in *Keogh v. Chicago & Northwestern Ry., 260 U.S. 156, 67 L. Ed. 183 (1922)*, protects carriers from antitrust damages based on alleged discriminatory rates which have been approved by the Interstate Commerce Commission.

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Antitrust & Trade Law > Regulated Industries > General Overview

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

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN5[] **Transportation, Railroads**

The Reed-Bulwinkle Act, *49 U.S.C.S. § 10706*, gives the parties to an Interstate Commerce Commission-approved ratemaking agreement immunity from the antitrust laws.

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

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN6[] **Regulated Industries, Transportation**

See *49 U.S.C.S. § 10706(a)(2)(A)*.

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

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN7[] **Regulated Industries, Transportation**

The Reed-Bulwinkle Act exempts the parties to a rate agreement from antitrust liability with respect to carrying out the agreement. Thus, if the parties to a rate agreement conform with the agreement when setting rates, they are exempt from antitrust liability.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN8[] **Reviewability of Lower Court Decisions, Preservation for Review**

It is the general rule that a federal appellate court does not consider an issue not passed upon below. This rule is not jurisdictional; the Supreme Court of the United States has referred to it as a "practice" and a "rule of procedure." Deviations are permitted in exceptional cases or particular circumstances, or when the rule would produce a plain miscarriage of justice.

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

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

HN9[] **Private Actions, Standing**

When considering antitrust standing, a court should consider the following factors: (1) the causal connection between the antitrust violation and the harm to plaintiff and whether that harm was intended to be caused; (2) the nature of plaintiff's alleged injury including the status of plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages, and; (5) the existence of more direct victims of the alleged antitrust violation. This list of factors is not exhaustive.

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

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

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

Civil Procedure > Judicial Officers > Judges > General Overview

HN10[] **Justiciability, Standing**

Like common-law adjudication, antitrust standing analysis must be done case-by-case. There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise makes it virtually impossible to announce a black-letter rule that will dictate the result in every case.

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

HN11[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A conspiracy to charge higher than competitive prices is an antitrust violation but actually benefits the conspirators' competitors.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN12[] **Tolling of Statute of Limitations, Fraud**

Under the doctrine of fraudulent concealment, if defendant conceals from plaintiff the existence of a cause of action, the statute of limitations is tolled. To toll the statute, plaintiff must allege in the complaint that: (1) defendant concealed the conduct that constitutes the cause of action; (2) defendant's concealment prevented plaintiff from discovering the cause of action within the limitations period; and (3) until discovery plaintiff exercised due diligence in trying to find out about the cause of action.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN13[] **Tolling of Statute of Limitations, Fraudulent Concealment**

The equitable doctrine of fraudulent concealment represents a longstanding exception to the rule that plaintiff must commence his action within the period provided by the relevant statute of limitations.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Statutory Construction

Civil Procedure > Discovery & Disclosure > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN14[] **Tolling of Statute of Limitations, Fraudulent Concealment**

Where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. However, because statutes of limitation are vital to the welfare of society and are favored in the law, plaintiff who invokes the doctrine of fraudulent concealment will be held to stringent rules of pleading and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Time Limitations

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

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN15[] **Tolling of Statute of Limitations, Fraudulent Concealment**

In the context of private anti-trust actions the doctrine of fraudulent concealment is well recognized by the federal courts.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Time Limitations

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

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN16[] Tolling of Statute of Limitations, Fraud

The statute of limitations applicable to private anti-trust actions may be tolled where plaintiff did not file its action in time because of ignorance resulting from defendant's fraudulent concealment.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

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

Governments > Fiduciaries

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

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > Defenses

HN17[] Tolling of Statute of Limitations, Fraud

Although self-concealing misconduct may be sufficient for purposes of the first element of fraudulent concealment, the cases involving such conduct are not incompatible with the rationale underlying the principle that affirmative acts of concealment must be shown except in cases founded on fraud or breach of fiduciary duty. Self-concealment of a conspiracy sufficient to toll the statute of limitations refers to activities in furtherance of the conspiracy which by their nature defy detection. Mere silence, or one's unwillingness to divulge one's allegedly wrongful activities, is not sufficient. Where the underlying cause of action is based upon alleged antitrust violations not fraud, plaintiff should be required to prove affirmative acts of concealment, particularly in light of the strong policy in favor of statutes of limitations.

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

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

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

HN18[] Standards of Review, De Novo Review

When an appellate court reviews a grant of summary judgment, the district court decision is reviewed de novo.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

HN19[] Standards of Review, Abuse of Discretion

In reviewing a district court's ruling denying a summary judgment motion on grounds that a material issue of fact exists appellate review is governed by an abuse of discretion standard.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

HN20[] Entitlement as Matter of Law, Appropriateness

Discretion plays no real role in the grant of summary judgment: the grant of summary judgment must be proper under the above principles or the grant is subject to reversal. The trial court may, however, exercise a sound discretion in denying summary judgment where, although the movant may have technically shouldered his burden, the court is not reasonably certain there is no triable issue of fact; where a portion of an action may be ripe for summary judgment but is intertwined with another claim(s) that must be tried; and in certain other situations.

Governments > Legislation > Statute of Limitations > Tolling

Torts > Procedural Matters > Statute of Repose > Tolling of Statutory Period

Governments > Legislation > Statute of Limitations > General Overview

HN21[] Statute of Limitations, Tolling

To hold that a tolling or suspension of the limitation of actions must continue unless or until proof positive existed of a wrong (which might never be established in fact) would abort the policy of the law of repose in statutes of limitations of diligence in the equitable principles permitting suspension of them.

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

Governments > Legislation > Statute of Limitations > General Overview

HN22[] Private Actions, Standing

See *Oh. Rev. Code Ann. § 1331.12*.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Governments > Legislation > Statute of Limitations > General Overview

HN23[] Antitrust & Trade Law, Clayton Act

Federal antitrust actions are limited by the four-year period of the Clayton Act, 15 U.S.C.S. § 15b.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN24[] **Federal & State Interrelationships, Federal Common Law**

State law in a given field can be preempted either entirely or to the extent that it conflicts with federal law. A conflict between state and federal law arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

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

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Federal Preemption

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN25[] **Private Actions, Standing**

The four-year federal statute of limitations, under 15 U.S.C.S. § 15b, does not preempt Ohio Rev. Code Ann. § 1331.12.

Counsel: Attorneys in Case No. 84-3653:

Richard T. Colman, Robert G. Abrams, and Thomas N. Heyer, Howrey & Simon; Harry C. Nester, Hahn, Loeser, Freedheim, Dean and Wellman, for Appellants.

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Richard T. Colman, Howrey & Simon; Robert G. Abrams and Thomas N. Heyer; Harry C. Nester, Hahn, Loeser, **[**3]** Freedheim, Dean & Wellman, for Cross-Petitioner.

Judges: Engel and Kennedy, Circuit Judges, and Higgins, * District Judge.

Opinion by: ENGEL

Opinion

[*1448] ENGEL, Circuit Judge.

These consolidated antitrust cases are before the court pursuant to *28 U.S.C. § 1292(b)* after a panel of this court granted permission on August 14, 1984 to appeal several orders of the United States District Court for the Northern District of Ohio.

Plaintiffs originally commenced these separate actions in district court, seeking treble damages and injunctive relief for injuries to their business and property allegedly caused by defendants' violations of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*; section 3 of the Clayton Act, *15 U.S.C. § 14*; and parallel provisions of Ohio's antitrust laws under the Valentine Act, *Ohio Rev. Code §§ 1331.01-02*, *1331.04*, *1331.06*, *1331.08*, *1331.12*, and *1331.14*. Plaintiffs' actions are based on similar allegations that "from at least the mid-1950's" the defendant railroads **[**4]** conspired to restrain trade in, and monopolize, the movement of iron ore by ship across the Great Lakes to docks located on the south shore of Lake Erie, the unloading of these ships at those docks, and the subsequent movement of the ore to steel mills located inland.

The issues certified for interlocutory appeal involve a number of jurisdictional questions, including antitrust immunity under the Interstate Commerce Act, *49 U.S.C. § 10706*, application of the *Keogh* doctrine which bars antitrust damage claims in certain situations, exclusive and primary jurisdiction **[*1449]** of the Interstate Commerce Commission, standing, statute of limitation/fraudulent concealment under the antitrust laws, and federal preemption of the Ohio antitrust statute of limitations.

I.

A. The Parties

The plaintiffs in this consolidated action are Pinney Dock and Transport Company (Pinney) and Litton Industries, Inc., Litton Great Lakes Corporation, and Erie Marine, Inc., (collectively Litton). Pinney provides dock services at Ashtabula, Ohio, for iron ore and other bulk commodities moving over the Great Lakes by ship. For at least part of the time period **[**5]** relevant to these cases, Litton was engaged in the design and construction of large self-unloading vessels and the operation of these vessels, along with conventional bulker vessels, in the movement of iron ore and other commodities over the Great Lakes. In 1974, however, Litton ceased operating such vessels on the Great Lakes.

The defendants are certain railroad companies, including Penn Central Corporation (Penn Central), Baltimore & Ohio Railroad Company (B & O), Chesapeake & Ohio Railway Company (C & O), CSX Corporation, Chessie Systems Company (Chessie), Norfolk & Western Railway Company (N & W), and Bessemer & Lake Erie Railroad Company (B & LE). [1] The defendant railroad companies are all engaged in the business of providing common

* Honorable Thomas A. Higgins, United States District Judge for the Middle District of Tennessee, sitting by designation.

carriage of goods and commodities by rail to or from Lake Erie docks. In addition, each of the railroad companies owns or has owned, was affiliated with, or operated one or more of these Lake Erie docks.

[6]** *B. Historical Background*

Pursuant to its authority under the Interstate Commerce Act, [2] **[**7]** the Interstate Commerce Commission (ICC) has for many years regulated the rates set by railroads for the common carriage of goods and commodities by rail to and from Lake Erie. *See Iron Ore Rate Cases*, 44 I.C.C. 181 (1916), *as supplemented*, 44 I.C.C. 368 (1917). ***HN1***[] Under the Act, the carriers themselves initiate rates and include them in tariffs which must be filed with the ICC. *49 U.S.C. § 10762(a)(1)*. [3] Unless and until suspended, set aside or disapproved, these rates become the lawful rate as between carrier and shipper. [4]

[8]** **[*1450]** In setting rates under the Act, a carrier may provide interstate transportation services only at the rate specified and the tariff filed with the ICC. *Id.* § 10761. In addition, a carrier is strictly prohibited from charging any person a different rate for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances." *Id.* § 10741(a). These provisions reflect one of the preeminent purposes of the Act: the prevention of unjust discrimination in interstate commerce. [5] Differences in rates, classifications,

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[1] Pursuant to Rule 27(a) of the Local Rules of this court, and the order of the district court of May 23, 1985, we entered an order on June 5, 1985 dismissing from Nos. 84-3653 and 84-3654 B & O, C & O and CSX, collectively referred to as the "Chessie defendants," the parties having reached a settlement.

[2] The initial Act to Regulate Commerce was enacted in 1887. Ch. 104, 24 Stat. 379. Its successor, the Interstate Commerce Act, as amended, was subsequently codified at 49 U.S.C. §§ 1-66. These and related provisions were repealed and recodified by Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, and are currently codified in scattered sections of *49 U.S.C. §§ 10101-11917*. Although this recodification was not intended to effect any "substantive change," *see* § 3(a), 92 Stat. 1337, 1466, it substantially revised the language and structure of the Act. The parties have cited the old version of the Act, but we have cited the current version.

For a good overview of the Interstate Commerce Act, including subsequent amendments, and its relationship to the antitrust laws, see Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of this Endangered Species*, *32 Am. U. L. Rev. 335 (1983)*.

[3] A tariff is a filed publication in which a carrier states its rates and charges and which may include rules governing other related services. *See* Rosenak, *Rate Procedures and Proceedings*, 12 Transp. L. Inst. 1, 1 (1979).

[4] Once a proposed tariff is filed with the ICC, the Commission has a limited time within which to suspend or reject the tariff. During this notice period the ICC may suspend the tariff either on its own motion or on the motion of an interested party. *49 U.S.C. § 10707(a)*. If the ICC fails to reject the proposed tariff within the applicable notice period the tariff automatically becomes effective. *49 U.S.C. § 10707(b)*. After a rate becomes effective, the Commission can still investigate violations of the Act and compel compliance with the Act. *Id.* *§ 11701(a)*. Judicial review of the ICC's decision under these proceedings is also available but subject to certain limitations. Thus, a decision by the Commission following a *§ 10707(a)* investigation to approve or disapprove a set of rates is a judicially reviewable final decision as is a decision to approve or disapprove a set of rates following a *§ 11701(a)* investigation. In addition, although a decision *not* to investigate the lawfulness of a proposed rate schedule under *§ 10707(a)* is *not* reviewable, an interested party may require the Commission to "investigate the lawfulness of any rate at any time -- and may secure judicial review of any decision not to do so -- by filing a *§ [11701(a)*] complaint." *Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 454, 60 L. Ed. 2d 1017, 99 S. Ct. 2388 (1979)*.

[5] See *Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 59 L. Ed. 853, 35 S. Ct. 494 (1915)*:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. . . . This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

rules, or practices, however, do not violate the anti-discrimination provisions of the Act if they reflect substantive differences in services performed.

[9]** ***HN2***[] Under the Interstate Commerce Act, rail carriers have long been permitted to act jointly in setting rates despite the potential for antitrust liability. Indeed, although the Interstate Commerce Act of 1887 was silent on the issue of collective ratemaking, the ICC condoned the practice even after the enactment of the federal antitrust laws. *See In re Trans-Continental Freight Bureau*, 77 I.C.C. 252 (1923). [6] Beginning in the 1940's, however, the Department of Justice began enforcing the antitrust laws against related common carriers. In 1944, the State of Georgia brought an action against 21 railroads alleging rate discrimination, antitrust violations and price fixing. This suit culminated in *Georgia v. Pennsylvania Railroad, 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*, in which the Supreme Court held that a conspiracy "to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed" stated a cause of action under the antitrust laws. *Id. at 462*. In so holding, however, the Court emphasized that the State could not directly challenge the continuance of any tariff, since such an action **[**10]** would be within the jurisdiction of the ICC.

Congress responded to this decision in 1948 with the Reed-Bulwinkle Act. [7] This Act specifically authorizes rate bureaus to agree collectively upon "rates . . ., classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, publication, or establishment of them. . . ." *49 U.S.C. § 10706(a)(2)(A)*. This Act further provides that ***HN3***[] parties to an ICC-approved rate agreement are exempt from the antitrust laws with respect to making and carrying out the agreement. *49 U.S.C. § 10706(a)(2)(A)*. **[**11]** [8] In addition to the qualified immunity under the Reed-Bulwinkle Act, ***HN4***[] the *Keogh* doctrine [9] has long **[*1451]** protected carriers from antitrust damages based on alleged discriminatory rates which have been approved by the ICC.

[12]** Although these protections from the antitrust laws are considerable, an aggrieved party is not without a remedy for injuries inflicted in violation of the Act. The Act permits any person to bring a complaint at any time for violations of the Act. The Commission must investigate the complaint unless the complaint "does not state reasonable grounds for investigation and action." *49 U.S.C. § 11701(b)*. Also, a person injured by a violation of the Act can seek damages in a civil action or in a proceeding before the ICC. *Id.* § 11705. In addition to these private remedies, a carrier which willfully violates the Act may be subject to various penalties, fines, and civil damages, as well as other equitable relief, which may be sought by the Government. *Id.* §§ 11703, 11901-11907.

C. Factual Background

The defendant railroads in the instant case formed a rate bureau and entered into a collective ratemaking agreement shortly after the passage of the Reed-Bulwinkle Act. This agreement was subsequently approved by the ICC in 1950 pursuant to 49 U.S.C. § 5b (now codified at *49 U.S.C. § 10706*). *See Eastern Railroads -- Agreements*, 277 I.C.C. 279 (1950). **[**13]** No challenge is made here to the original agreement or to the defendants' right collectively to set rates pursuant to the terms and conditions of this agreement. Rather, plaintiffs challenge an

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Id. at 97.

[6] This collective ratemaking was, and continues to be, effected through rate bureaus, which are associations of two or more carriers that disseminate information regarding the rates to be charged for various services by participating rate bureau members. *See* Dempsey, *supra* note 2, at 354.

[7] Pub. L. No. 80-662, 62 Stat. 472 (1948) (originally codified at 49 U.S.C. § 5b, and currently codified at *49 U.S.C. § 10706*).

[8] Although the Reed-Bulwinkle Act has been substantially amended by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), there is no claim that this amendment is applicable to the facts of the instant case.

[9] The *Keogh* doctrine was announced in *Keogh v. Chicago & Northwestern Ry., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*, and recently reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)*.

alleged anticompetitive conspiracy which, plaintiffs contend, was formulated outside the scope of the agreement and in response to the emergence of self-unloaders and the threat they posed to defendants' control of the dock unloading and land transportation business. According to plaintiffs:

> Historically, iron ore had been carried across the Lakes in "bulker" vessels, which had to be unloaded by shore-side cranes, called huletts. Defendants owned all of the docks equipped with huletts, and their docks were exclusively used for unloading bulkers. Defendants collected "handling charges" for unloading bulkers and "line-haul rates" for carrying ore from their lake front docks to inland steel mills. By use of a conveyor system built into a self-unloading vessel, these boats could unload without the assistance of huletts. Self-unloaders threatened to render obsolete defendants' investment in huletts, and elevated the competitive importance of non-railroad docks such as Pinney because they **[**14]** were not incumbered by huletts and were ideally suited for self-unloaders. To eliminate the competitive threat of non-railroad docks and to monopolize the dock handling business, defendants, *inter alia* assessed the bulker handling charge to self-unloaders even though no unloading services were performed, thereby eliminating the primary economic incentive to develop self-unloaders, and refused to publish a commodity line-haul rate from Pinney for the movement of iron ore, thereby eliminating the economic incentive to use Pinney instead of defendants' docks.
>
> Litton entered the Great Lakes transportation market in the mid-1960's and embarked on a venture to construct and operate large, technologically advanced self-unloading vessels. Litton's venture was frustrated by defendants' efforts to exclude self-unloaders and non-railroad dock competition and by defendants' concerted refusals to deal with Litton. In particular, defendants refused to cooperate with Litton in developing an unloading dock facility and refused to sell or lease dock space to Litton. Defendants' boycott of Pinney prevented Litton froin using Pinney even though Pinney was capable of handling Litton's large self-unloaders. **[**15]** As a result, Litton withdrew from the market after constructing only two vessels.

According to plaintiffs, therefore, it was in response to this competitive threat posed by the development of self-unloaders that the defendants entered into a new and separate agreement and took actions pursuant to this agreement "from at least the mid-1950's," all of which plaintiffs alleged were outside the permissible bounds and protection **[*1452]** of the original ICC approved agreement of 1950.

D. The Parties' Allegations

In its amended complaint, Pinney's principal allegation is that the defendants conspired to restrain trade in, eliminate competition in, and monopolize the business of providing both dock services for iron ore and other goods moving over docks on the lower Great Lakes and water carriage for iron ore moving to the same docks. Pinney alleges that the defendants accomplished their illegal purposes by engaging in secret meetings, by refusing to grant non-railroad owned docks, such as Pinney, a competitive rail rate (i.e., a commodity line-haul rate), by arbitrarily placing Pinney in a switching district where it would be ineligible for rail rates competitive **[**16]** with those available at railroad owned docks, by imposing an arbitrarily and unjustifiably high switching charge on cars of a railroad competitor which sought to carry iron ore from Pinney Dock at competitive rail rates, by intentionally impeding the construction and use of self-unloading vessels through the imposition of artificial, arbitrary, and unjustifiably high dock handling charges on such vessels and thereby foreclosing Pinney Dock's development as an iron ore handling facility, and by forcing railroads to forgo their right to independent action with respect to rail rates and services and other matters. [10]

Pinney alleges that as a result of the defendants' acts and violations, it was injured in its business and property because it was "forestalled and excluded **[**17]** from participating in the business of providing dock services for various commodities, including iron ore, coal and coke." Pinney seeks to recover damages based on the amount of business it lost as a result of the defendants' efforts to drive it out of the iron ore business. They state that "one way to calculate the amount of business Pinney lost is to determine the amount of iron ore Pinney would have handled absent defendants' conspiracy and multiply that amount by the charges Pinney would have assessed for handling

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[10] In paragraph 18 of its amended complaint, Pinney incorporates by reference and realleges, with respect to coal and coke shipments, the allegations and claims regarding iron ore shipments as set forth in paragraph 13 of the amended complaint.

the ore." Pinney also claims that it was injured in its business by the defendants' assessment of bulker handling charges to self-unloaders, which, according to Pinney, was intended to impede the development and operation of such vessels, vessels which Pinney claims it was uniquely capable of handling.

Litton's damage claims are in many respects similar to those of Pinney. Litton's principal allegation is that the defendants conspired to restrain trade in, eliminate competition, and monopolize the business of providing dock services for iron ore and other bulk commodities moving over the docks on the Great Lakes, and also conspired to restrain and suppress trade in **[**18]** the business of carrying iron ore and other bulk commodities in self-unloading and certain bulker vessels moving on the Great Lakes. Litton also claims that the defendants conspired to foreclose and prevent Litton from developing, selling, or chartering, or using technically advanced vessel, dock and related products and services.

Litton asserts that the defendants accomplished these illegal purposes by continuous secret meetings, by refusing to permit Litton to purchase, lease or use dock facilities which could have accommodated self-unloading vessels, by refusing to handle self-unloading vessels, by taking affirmative action to prevent non-railroad controlled docks from handling bulk commodities transported in self-unloading vessels, by arbitrarily placing unjustifiably high dock handling charges on iron ore discharged from self-unloading vessels, and by forcing railroads to forego their right of independent action. Litton claims that as a result of the defendants' acts and violations, it was forced to cease the design, construction, sale and charter of its advanced self-unloading vessels, the operation of its self-unloading and bulker vessels for the transportation of iron ore **[**19]** and other bulk commodities, and prevented in its efforts to secure and operate dock facilities. **[*1453]** Litton claims that, as a result, it was forced to withdraw from the Lake Erie transportation market in 1974.

E. History of the Proceedings

Pinney filed its complaint on September 17, 1980, and a first amended complaint on October 8, 1980, in the United States District Court for the Northern District of Ohio. Litton filed its complaint on March 5, 1981. After extensive discovery was taken, defendants filed a number of motions for summary judgment seeking to dismiss all or some of plaintiffs' claims on jurisdictional grounds. When this onslaught was concluded, United States District Judge Thomas had issued over six rulings consisting of over 500 pages of written memoranda and orders.

In the first two opinions, issued June 21, 1983, Judge Thomas denied defendants' summary judgment motions in *Pinney*. In the first opinion, Judge Thomas rejected each of the defendants' five grounds for dismissal of Pinney's claims: (1) express immunity from antitrust liability under the Reed-Bulwinkle Act; (2) immunity from antitrust damages under the *Keogh* doctrine; (3) exclusive **[**20]** jurisdiction of the Interstate Commerce Commission; (4) primary jurisdiction of the Interstate Commerce Commission; and (5) lack of standing to raise certain claims. *Pinney Dock & Transport Co. v. Penn Central Corp., 600 F. Supp. 859 (N.D. Ohio 1983)*. In the second opinion, Judge Thomas denied defendants' motions for summary judgment on Pinney's claims which predate the four-year statute of limitations under section 4B of the Clayton Act, *15 U.S.C. § 15b*. In denying the motions, Judge Thomas held that there was a genuine issue of fact whether the fraudulent concealment exception under *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975)*, tolled the statute of limitations. *Pinney Dock & Transport Co. v. Penn Central Corp.*, 1983-2 Trade Cas. (CCH) para. 65,608 (N.D. Ohio 1983). Defendants thereafter moved for reconsideration, or certification of these issues for interlocutory appeal. On March 29, 1984, Judge Thomas again fully analyzed defendants' arguments and reaffirmed the June 21, 1983, decision on exclusive jurisdiction, express immunity and standing. The court also directed Pinney **[**21]** to respond to its inquiries concerning the possible application of the *Keogh* doctrine and primary jurisdiction.

On May 10, 1984, the court reaffirmed its June 21, 1983, decision on *Keogh* and primary jurisdiction, and certified both of its *Pinney* decisions for interlocutory appeal pursuant to *28 U.S.C. § 1292(b)*. This court granted defendants' petition to appeal on August 8, 1984.

On October 4, 1984, Judge Thomas issued an exhaustive written Memorandum and Order in *Litton* denying defendants' motions for summary judgment on statute of limitations grounds. The court held that the legal principles relied upon in the *Pinney* statute of limitations opinion were equally applicable in *Litton* and further found that the facts of *Litton* raised a genuine issue of fact of fraudulent concealment by the defendants. In addition, after finding the jurisdictional issues in *Litton* virtually the same as in *Pinney*, the court, on October 5, 1984, adopted its holding in *Pinney* on all issues except standing, which defendants had not challenged. Judge Thomas also certified the *Litton* rulings pursuant to *section 1292(b)* for interlocutory **[**22]** appeal. On October 25, 1984, a panel of this court granted defendants' petition for leave to appeal the interlocutory orders and consolidated the *Pinney* and *Litton* appeals for briefing and oral argument.

On February 2, 1982, Judge Thomas had also denied defendants' motions for summary judgment to dismiss Pinney's pendent state claims under Ohio's Valentine Act. Although the court sustained pendent jurisdiction, the court noted that an issue was raised as to whether the four-year statute of limitations governing federal antitrust actions, *15 U.S.C. § 15b*, preempts *Ohio Rev. Code § 1331.12*, which provides that no statute of limitations shall bar claims under the Valentine Act. At the court's invitation, the parties submitted briefs on this issue. On October 1, 1982, Judge Thomas issued a written Memorandum and Order, **[*1454]** finding that the statute of limitations provision under the Valentine Act was preempted by federal law. The court therefore held that Pinney's pendent antitrust claims under the Valentine Act were subject to the Clayton Act's four-year statute of limitations. *See Pinney Dock & Transport Co. v. Penn Central Corp.*, 1982-83 Trade Cas. (CCH) para. 65,053 (N.D. Ohio 1982). **[**23]** On May 10, 1984, Judge Thomas again considered the preemption issue and reaffirmed his original decision. The court also certified this issue for interlocutory appeal pursuant to *section 1292(b)*. On August 8, 1984, this court granted Pinney's petition for interlocutory appeal.

On October 4, 1984, Judge Thomas issued a written Memorandum and Order in the *Litton* case adopting his October 1, 1982, preemption ruling in the *Pinney* litigation. Judge Thomas also certified this order for interlocutory appeal pursuant to *section 1292(b)*, and, on October 25, 1984, this court granted Litton's petition to appeal and consolidated *Pinney* and *Litton* for briefing and oral argument.

Judge Thomas' meticulous care and scholarship have been immensely helpful to the parties and to us.

On appeal, defendants have challenged virtually every ruling of the district court. Defendants argue that the district court erred in finding that they are not expressly immune from antitrust liability under the Interstate Commerce Act; that the court erred in finding that the *Keogh* doctrine does not bar plaintiffs' antitrust damage claims; and that the court erred in finding that the matters at **[**24]** issue are not within the exclusive jurisdiction of the ICC. The defendants also contend that the district court's refusal to refer certain issues to the ICC under the doctrine of primary jurisdiction was erroneous. The defendants further argue that both Pinney and Litton lack standing to seek antitrust relief for certain claims. Finally, the defendants contend that the district court erred when it applied the doctrine of fraudulent concealment to toll the Clayton Act's four-year statute of limitations. Pinney and Litton, joined by the State of Ohio as amicus, also challenge the district court's ruling that the four-year statute of limitations governing federal antitrust actions preempts the statute of limitations provision under Ohio's Valentine Act. [11]

[25] II**.

Initially, we address plaintiffs' contention that defendants are attempting to raise issues in this appeal which were not properly certified pursuant to *section 1292(b)* and which could not have been within the contemplation of the district court when it certified its orders for interlocutory appeal. Specifically, plaintiffs contend that defendants should not be able to raise the issue of primary jurisdiction, nor should defendants be able to challenge Litton's standing. Plaintiffs further contend that issues involving the fraudulent concealment exception to the statute of limitations should not be addressed to the extent that they do not involve "controlling questions of law."

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[11] Following oral argument, C.D. Ambrosia Trucking Company, Inc., and David W. Reaney and Reaney Dock Company sought leave to file a post-argument amicus brief pursuant to ***Rule 29 of the Federal Rules of Appellate Procedure***. Because of the complexity of this case, and the possibility that the interest of amicus could be affected by the outcome of this case, we granted this motion on January 3, 1986. In disposing of the issues raised in this appeal, we have considered the arguments raised by amicus. Although amicus has raised some arguments which have not been raised by the principal parties to this action, it is sufficient to note that the position of amicus is similar to that of Pinney and Litton.

Upon a review of the district court's order of certification in the *Pinney* case, dated May 10, 1984, and the court's order of certification in the *Litton* case, dated October 5, 1984, we find it difficult to determine precisely whether certain issues were certified for interlocutory appeal. The district court concluded that its jurisdictional orders in the *Pinney* and *Litton* cases, its statute of limitations orders in those cases, and its orders relating to the preemption of the **[**26]** Ohio Valentine Act's statute of limitations, involve "controlling question[s] of law for which there is a **[*1455]** substantial ground for difference of opinion and that immediate appeal may materially advance the ultimate termination of this litigation," and the court did not elaborate further. In any event we recognize that even those issues not properly certified are subject to our discretionary power of review if otherwise necessary to the disposition of the case. *See* *Alexander v. Aero Lodge No. 735, Intern'l. Ass'n, 565 F.2d 1364, 1370 (6th Cir. 1977)*; 9 Moore's *Federal Practice* para. 110.25[1] at 270 (2d ed. 1987). Accordingly, we address only those issues necessary to the disposition of this case and to the extent this opinion is construed not to address an issue, that issue is, for the purposes of this appeal, decertified.

III. *KEOGH*

Defendants argue that *Keogh v. Chicago & N.W. Railway Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*, bars the claims that unreasonable freight and handling charges caused plaintiffs to lose business.

The plaintiff in *Keogh*, a shipper of commodities, sued for antitrust damages **[**27]** on the ground that the defendant railroads restrained competition by conspiring to fix rates for shipment by rail. The ICC had approved the rates as reasonable and nondiscriminatory. The plaintiff claimed damages for the difference between these rates and earlier, lower rates that he alleged would have remained in effect if not for the conspiracy. The Supreme Court held that the plaintiff did not have a cause of action.

The Court listed four reasons for its holding. First, the Court observed that when the ICC finds a rate to be illegal because it is unreasonably high or discriminatory, the shipper can recover damages under the Interstate Commerce Act. The Court asked rhetorically whether Congress intended for the antitrust laws to provide an additional remedy, suggesting that the Court would not easily infer one. Second, the Court explained that "the paramount purpose" of the Interstate Commerce Act is "prevention of unjust discrimination." *Id. at 163*. This required that ICC-approved rates be the sole source of a shippers' rights against a carrier. If a shipper could recover under the antitrust laws for ICC-approved rates, Congress' purpose might be defeated, because **[**28]** the amount recovered would give that shipper an advantage over his competitors. Third, the Court reasoned that an antitrust plaintiff would have to show that the rate that would have prevailed but for the conspiracy would have been approved by the ICC. There was no proceeding in which the ICC could issue an opinion on a hypothetical rate. Finally, the Court said that the plaintiffs' damages were speculative because all shippers paid the same rate and the benefit of a lower rate might have gone to the plaintiffs' customers or to the ultimate consumer. *Id. at 162-65*.

Plaintiffs argue, and the district court held, that *Keogh* does not apply because they are defendants' competitors, not customers seeking damages that would give them an advantage over defendants' other customers. Also, the plaintiffs distinguish *Keogh* on the basis that there the plaintiff asked for a rebate from the rates he had paid, whereas here plaintiffs claim damages for loss of business.

The Second and Third Circuits have held that *Keogh* does not apply when the plaintiff is in competition with the defendant. In *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981),* **[**29]** the plaintiffs were municipal power companies who bought electricity at wholesale rates from a larger power company, the defendant. The plaintiffs competed with the defendant in selling power to industrial companies in the different municipalities, and the plaintiffs alleged that the defendant tried to squeeze them out of this competition by selling them power at a wholesale price that was higher than the retail price that the defendant charged its industrial customers. The plaintiffs claimed damages resulting from the industrial enterprises' decision to operate outside of the plaintiffs' territories. *Id. at 927, 934-35*. The court held that the discrimination problem of *Keogh* was absent because in *Keogh* the plaintiff's competitors were not represented in the lawsuit, whereas in *City of* ***[*1456]*** *Groton* the plaintiffs had no competitors other than the defendant. *See* *id. at 929-31*.

In *Essential Communications Systems, Inc. v. American Telephone & Telegraph Co., 610 F.2d 1114 (3d Cir. 1979)*, plaintiff Essential was in the business of distributing a telephone answering device called Code-a-Phone. The defendants provided **[**30]** telephone service and also competed with Essential in the distribution of Code-a-Phone. Defendants filed a tariff that required customers who installed an Essential Code-a-Phone to install an additional device as well, which Essential alleged was unnecessary. The tariff did not require customers who bought a Code-a-Phone from defendants to install the additional device. Essential alleged it was the victim of an antitrust conspiracy and claimed damages for loss of business.

The court allowed the claim. The court reasoned that in both *Keogh* and *Essential* the intended beneficiaries of regulation were customers, not competitors of the regulated utility. Thus, the court stated that the *Keogh* rule "has little or nothing to do with [the utility's] duties under the antitrust laws toward its competitors." *Id. at 1121*. Also, the court noted that the plaintiffs did not ask for a rebate from rates paid, as the plaintiff had in *Keogh. Id.* at 1122.

Plaintiffs' argument against extending *Keogh* to competitor suits finds some support in *Square D Co. v. Niagara Frontier Tariff Bureau Inc., 760 F.2d 1347 (2d Cir. 1985)* (Friendly, **[**31]** J.), *aff'd*, *476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)*, where the *Keogh* situation was repeated in a suit by the purchasers of truck transportation services. The Second Circuit argued that post-Keogh developments undercut all four reasons for the *Keogh* rule. First, the Supreme Court has allowed an antitrust remedy even when a regulatory remedy is available. Second, the existence of class actions can alleviate the danger of a rebate to a single plaintiff. Third, judicial proceedings can be stayed pending a regulatory proceeding to determine whether a hypothetical rate would have been reasonable. Fourth, the Supreme Court has held that a direct purchaser can recover antitrust damages for the full amount of an overcharge, regardless whether he passed part or all of it on to customers. *Id. at 1352-53*. *See* *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*.

The Second Circuit followed *Keogh* but urged the Supreme Court to overrule it. The Supreme Court praised Judge Friendly's opinion as "characteristically thoughtful and incisive" and did not take issue **[**32]** with his description of the developments since *Keogh*, but reaffirmed the *Keogh* rule for the sake of stability in the law.

> The developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute. . . . We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.

Square D, 476 U.S. 409, 106 S. Ct. 1922 at 1930-31, 90 L. Ed. 2d 413.

We do not read this deferential language as an adoption of Judge Friendly's rationale, for on its face it is a polite refusal of an invitation. Since the Supreme Court did in fact uphold the ruling in *Keogh* we construe its cited language to be that the *Keogh* rationale, whatever else might be said of it, still commands, in the Supreme Court's view, the support of Congress. Justice Stevens emphasized "Keogh's role as an essential element of the settled legal context in which Congress has repeatedly **[**33]** acted in this area." *Square D, 106 S. Ct. at 1930*.

Furthermore, we do not believe that either *Keogh* or *Square D* was intended to be limited solely to antitrust damage claims brought by shippers. It is true that in both *Keogh* and *Square D* the plaintiffs were shippers, i.e., customers of the defendants, **[*1457]** rather than direct competitors. [12] We may also assume that plaintiffs will not gain a

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[12] However, in *Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*, the Supreme Court did see fit to apply *Keogh* in a case where Georgia was both a customer and a competitor. The Court noted that "Georgia sues as a proprietor to redress wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions." *Id. at 447*. The Court then stated "we think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist." *Id. at 453*. While *Georgia* presents a special case because it was

preference over their trade competitors if permitted to recover antitrust damages resulting from the defendants' alleged conspiracy. In our view, however, it does not follow that plaintiffs' action for damages is therefore outside the scope of *Keogh*.

[34]** When the ICC approves a rate, including a rate purportedly arrived at under the type of joint rate agreement permitted under Reed-Bulwinkle, it necessarily takes an anticompetitive action. This action is justified by the ICA because the statute assumes that the pro-competition policies of the antitrust laws have been taken into account but also assumes that the ICC possesses and ought to have the power to override those policies in order to further national transportation policy as expressed in the Act. Rates must not only protect against overcharging captive customers but must also keep in mind the economic costs of delivery of the service. Regulation of one aspect inevitably begets regulation of the other. Thus, the ICC is the sole source of the rights not only of shippers, but of the entire public, including competitors. Plaintiffs here had a right under the ICC to complain to the Commission. We should not easily infer that the Reed-Bulwinkle amendments were not intended to extend to competitor's suits. While such actions may be aimed at achieving some of the objectives of the antitrust laws, they nonetheless can be inconsistent with the statutory delegation of power to the Interstate **[**35]** Commerce Commission and with the allowance of joint ratemaking activities as expressly authorized by Reed-Bulwinkle.

We recognize that the anti-discrimination arguments behind the *Keogh* doctrine lose their force in competitor lawsuits such as this. For those who believe that the original reasons expressed in *Keogh* still have some substantive persuasive force, in the face of Square D's expressed reservations, the other reasons in *Keogh*, we observe, still have considerable applicability here.

In sum, we conclude that the *Keogh* doctrine bars the plaintiffs' antitrust damage claims insofar as these claims are based either on the defendants' own handling charges or on the line-haul rate that was applied from Pinney Dock. To the extent that these rates and charges are otherwise unlawful, we believe that plaintiffs must seek whatever remedies are available under the provisions of the Interstate Commerce Act. At the same time, however, at least some of the plaintiffs' claims for antitrust damages appear to be outside the scope of the *Keogh* doctrine. Litton contends that the defendants refused to permit Litton to purchase, lease or use dock facilities which could have **[**36]** accommodated the technologically advanced self-unloading vessels being designed and constructed by Litton. These allegations are plainly not related to the defendants' handling charges or to the commodity line-haul rate applied from Pinney Dock and, to that extent, *Keogh* would not bar antitrust damage claims based on such allegations. Plaintiffs allege that defendants used harassing tactics and spurious challenges to try to forestall legitimate business activities of competitors. To the extent that these alleged acts are unrelated to defendants' rates, any damages suffered therefrom would not be barred by *Keogh*.

Plaintiffs have raised other claims as well, but it is less clear from the face of these claims that they are not rate-related and therefore within the scope of *Keogh*. Plaintiffs contend that defendants refused to handle self-unloading vessels at docks **[*1458]** owned or operated by defendants and that defendants boycotted Pinney Dock. However, if this boycott or refusal to deal took the form of assessing higher rates and charges, it would again appear that these claims are within the scope of *Keogh*. Plaintiffs also allege that defendants divided markets, **[**37]** but if the effect of such division is the lack of rate competition, *Keogh* again would bar recovery. Rather than requiring outright dismissal of these claims, however, we believe that plaintiffs should be afforded an opportunity on remand to amend their complaint in order to clarify these allegations to state a claim for damages consistent with *Keogh*. We note that this is the approach taken by Judge Friendly in *Square D, 760 F.2d at 1365*, and this ruling was specifically mentioned by the Supreme Court and left undisturbed when it affirmed the Second Circuit decision in *Square D. 106 S. Ct. at 1930 n.28*. [13]

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decided prior to the passage of the Reed-Bulwinkle Act in 1948, we find the Supreme Court's application of *Keogh* to a competitor to be relevant even under these circumstances. *Georgia* is discussed in greater depth in section IV of this opinion.

[13] An additional argument which may be equally applicable to competitors and is addressed in *Keogh* and in *Square D* is the speculative nature of any damages. As we have pointed out, their existence necessarily presupposes alternate activity which might have been undertaken by the plaintiffs but for the allegedly violative conduct of the defendants.

[38] IV. ANTITRUST IMMUNITY UNDER THE ICA**

Defendants argue that they are immune from antitrust liability for their ratemaking activities because they are parties to the ICC-approved 1950 Eastern Railroad Agreement. *HN5*[] The Reed-Bulwinkle Act, which was enacted in 1948 [14] as an amendment to the Interstate Commerce Act, gives the parties to an ICC-approved ratemaking agreement immunity from the antitrust laws:

> *HN6*[] If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the Sherman Act (*15 U.S.C. 1, et seq.*), the Clayton Act (*15 U.S.C. 12, et seq.*), the Federal Trade Commission Act (*15 U.S.C. 41, et seq.*), sections 73 and 74 of the Wilson Tariff Act (*15 U.S.C. 8* and *9*), and the Act of June 19, 1936, as amended (*15 U.S.C. 13*, *13a*, *13b*, *21a*) do not apply to parties and other persons with respect to making or **[**39]** carrying out the agreement.

49 U.S.C. § 10706(a)(2)(A).

The district court held that the immunity in this provision does not cover a conspiracy to eliminate a competitor. *Pinney Dock, 600 F. Supp. at 878*. On appeal the defendants attack the district court's reasoning, while the plaintiffs endorse it and ask this court to uphold it.

The district court held that the language of Reed-Bulwinkle excludes anti-competitive conspiracies from the grant of immunity. The court found support in the legislative history for this reading of the statute. First the court considered the meaning of the statutory language:

> The issue confronting this court is whether the ICC's approval of the defendants' [ratemaking] agreement operates as either an express or implied approval of a later "agreement" to eliminate a competitor and monopolize a market.

[40]**

600 F. Supp. at 866-67.

This definition of the issue is correct insofar as it refers to the statutory provision that the parties to a rate agreement are exempt from the antitrust laws "with respect to making" the agreement. This definition protects the defendants from liability for their conduct in making the 1950 Eastern Railroads agreements, however, it does not necessarily protect them from liability for any other agreement, including the alleged anticompetitive conspiracy.

But *HN7*[] Reed-Bulwinkle also exempts the parties to a rate agreement from antitrust liability "with respect to . . . carrying out the agreement." Thus, if the parties to a rate agreement conform with the agreement when setting rates, they are exempt from antitrust liability.

So long as defendants stay within the framework of the rate agreement and conform their rates to those approved by the **[*1459]** Commission, it cannot make a difference that their underlying intent may be anti-competitive. The difficulty with the district court's conclusion is that while it takes into account the exemption **[**41]** for *making* a rate agreement, it is irreconcilable with the exemption for *carrying out* a rate agreement:

> Nothing in the present record indicates that the ICC ever "approved" or even was aware of defendants' alleged predatory conspiracy to boycott and eliminate plaintiff as a competitor. The 1950 Eastern Railroads Agreement, which merely establishes the procedures for discussing rate matters and reaching rate agreements, cannot be read as impliedly or expressly "approving" such a predatory conspiracy.

600 F. Supp. at 867. Assuming that this reasoning is adequate as far as it goes, it still ignores the reality that the Agreement was only the first, not the last word, in the Acts of the defendants which it contemplated. It was the establishing of rates which was the purpose of the Agreement, and it is the rates and the incorporated provisions

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[14] Pub. L. No. 80-662, 62 Stat. 472 (1948) (current version at *49 U.S.C. § 10706*).

concerning their application which lie at the heart of plaintiff's complaint. It is difficult if not impossible to contemplate how the railroads could establish rates under the Agreement without communication with one another and even more difficult to hypothesize how such communication, in an area which **[**42]** is undeniably anti-competitive even in its effect, could not always be construed as capable of anti-competitive motivation.

Therefore, the challenged activities must be measured against the fact that concerted activity was contemplated by the Commission in its original recognition of the 1950 Agreement. The real issue is whether in such circumstances the task is one of determining if the defendants' conduct was within the framework of permissible activity condoned by the Commission's approval of the Agreement. It is asserted that much of the evidence in this case will concern private communications among the alleged conspirators and allegations of the withholding of certain exchanges from the plaintiffs. Such contentions, however, seem to us to be inextricably intertwined with the question of whether the 1950 Agreement itself was violated, a question which should be addressed, at least first, to the wisdom and expertise of the ICC.

The district court also held that the legislative history of Reed-Bulwinkle shows that Congress intended to exclude anticompetitive conspiracies from the antitrust exemption. The court inferred this from legislative history indicating that Reed-Bulwinkle **[**43]** left intact the Supreme Court's decision in *Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*. *600 F. Supp. at 871, 873-74*. We are unable to agree.

In *Georgia*, the State of Georgia sued several northern and southern railroads under the antitrust laws. Georgia alleged that the railroads conspired to fix rates in a manner that prevented her shippers and sellers from gaining access to national markets. Georgia also alleged that the northern railroads forced the southern railroads to take part in the conspiracy. The rates were approved by the ICC. However, the defendants acted through rate bureaus that were not approved by the ICC; at the time the law did not provide for ICC approval of rate bureaus. Georgia alleged that the setting of rates through rate bureaus violated the antitrust laws. The complaint asked for damages and an injunction to end the conspiracy. *324 U.S. at 443-44, 455*.

The Court held that *Keogh* barred the claim for damages because the rates were approved by the *ICC. 324 U.S. at 453*. But because *Keogh* only addresses damage claims, the Court allowed the injunctive **[**44]** claim to proceed. *Id.* In this regard the Court made a statement that the plaintiffs in the present case rely on to argue that there is no immunity for a anticompetitive conspiracy:

> We find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of **[*1460]** rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier.

Id. at 458.

The legislative history that led the district court to conclude that Reed-Bulwinkle left *Georgia* intact included several statements to that effect by the law's sponsors. For example, after the law passed Representative Bulwinkle said:

> The charge made against the railroads in the Georgia case is that they combined and conspired to fix rates by coercion and to discriminate against Georgia. A combination or conspiracy of that kind would not be protected or immunized [under the new law].

600 F. Supp. at 871 (quoting 94 Cong. Rec. App. 4033-34 (1948)). The **[**45]** district court also cited the final House and Senate Reports:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, *except as to such agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body* upon a finding that, by reason of furtherance of the

> national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.

600 F. Supp. at 871 (quoting H.R. Rep. No. 1100, 80th Cong., 2d Sess., reprinted in 1948 U.S. Code Cong. & Admin. News 1848 (1948)) (emphasis added).

We do not read the statement from the House and Senate Reports that "The bill leaves the antitrust laws to apply with full force and effect" as preserving the *Georgia* rule that injunctive relief is available against anticompetitive conspiracies. This statement was qualified, as emphasized above, by a statement that the antitrust laws will not apply to agreements that have been approved by the ICC. Thus, if the *Georgia* case had arisen after the enactment of Reed-Bulwinkle, and if the rate **[**46]** agreement had been approved by the ICC, the Supreme Court would have dismissed the injunctive claim.

Our view of the legislative history finds support in two Supreme Court cases. In *Pan American World Airways v. United States, 371 U.S. 296, 9 L. Ed. 2d 325, 83 S. Ct. 476 (1963)*, the Court stated that the result in *Georgia* "might today be different as a result of the Act of June 17, 1948, 62 Stat. 472, which gives the Interstate Commerce Commission authority to approve combinations of the character involved in that case and give them immunity from the antitrust laws." *Id. at 306 n.11*. Similarly, in *Square D* the Court stated:

> The legislative history of Reed-Bulwinkle explains that it was enacted, at least in part, in response to this Court's decision in *Georgia* . . . . In that case, after restating the holding in *Keogh*, the Court held that, although Georgia could not maintain a suit under the antitrust laws to obtain damages, it could obtain injunctive relief against the collective ratemaking procedures employed by the railroads. The Reed-Bulwinkle Act thus created an absolute immunity from the antitrust laws for approved **[**47]** collective ratemaking activities.

106 S. Ct. at 1927-28 (footnotes omitted).

In light of plaintiffs' waiver of claims that defendants failed to comply with the rate agreement, there is no need to remand the compliance issue to the district court. Indeed, if such claims were to go forward, the question would arise whether they should be referred to the ICC. Such a referral is what plaintiffs wanted to avoid by waiving claims of noncompliance with the rate agreement. In sum, the effect of Reed-Bulwinkle together with the waiver is that all rate-related claims should be dismissed. [15]

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[15] In *United States v. Bessemer and Lake Erie R. Co., 230 U.S. App. D.C. 316, 717 F.2d 593 (D.C. Cir. 1983)*, the D.C. Circuit upheld the criminal conviction of appellant railroad for Sherman antitrust violations arising out of a 1956 agreement to eliminate or inhibit competition from private docks in handling iron ore on Lake Erie. Speaking of intent, the court observed:

> The activities described in the indictment do not fit within the narrow *[§ 10706*] privilege. First, the indictment does not attack the rate bureau itself. It alleges, instead, that some members of the rate bureau entered into a separate agreement. This agreement only incidentally touched upon the setting of rates; its real purpose was to ward off the outside competition heralded by the advent of the self-unloaders.
>
> More than mere purpose or "intent" distinguished this separate conspiracy from the rate bureau. Several of the actions taken by this separate conspiracy were not "in conformity with" the rate bureau's [10706] rate agreement.
>
> Some of the actions were procedurally inconsistent with *section [10706*]. Paragraph 23(d) of the indictment alleges that defendants "quot[ed] the same charges for handling iron ore from self-unloaders as from bulkers even though services identified in the applicable tariffs were not to be performed." The crux of this charge is that handling the self-unloaders represented a significantly different type of service. Rather than promulgating a new rate for this new service in accordance with ICC requirements, the conspirators shielded the new joint rate from ICC scrutiny.

[48]** *** f838k147 M417 m004 415 m414

[*1461] V. ANTITRUST STANDING

Defendants argue that Pinney does not have standing to bring claims concerning the assessment of handling charges on self-unloaders, the refusal to let self-unloaders operate at docks owned by the railroads, and the refusal to sell or lease dock space to Litton. Defendants also argue that Litton lacks standing to recover for the refusal to grant Pinney a competitive rail rate, the assessment of handling charges on self-unloaders, and the monopolization of land transportation.

In the district court, defendants challenged Pinney's standing on certain claims, including apparently the ones on which defendants argue lack of standing now. But defendants did not challenge Litton's standing below. Plaintiffs argue that because of this the court should not address the arguments about Litton's standing.

HN8[] "It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff, 428 U.S. 106, 120, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976)*. [16] This rule **[**49]** is not jurisdictional; the Supreme Court has referred to it as a "practice" and a "rule of procedure." *Hormel v. Helvering, 312 U.S. 552, 557, 85 L. Ed. 1037, 61 S. Ct. 719 (1941)*. Deviations are permitted in "exceptional cases or particular circumstances," *id.*, or when the rule would produce "a plain miscarriage of justice." *Id. at 558*. The Supreme Court has declined to list comprehensively the circumstances that should prompt an appellate court to reach an issue not raised below. *See* *Singleton v. Wulff, 428 U.S. at 121*. Furthermore, the Court has stated that this matter is "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* We have carefully considered the case law of our circuit and elsewhere involving the exercise of this limited area of discretion and conclude that to the extent the issue is presented with sufficient clarity and completeness and its resolution will materially advance the progress of this already protracted litigation, we should address it. *Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1370-71 (6th Cir. 1977)*. We realize **[**50]** that the importance of our discussion of this issue has been largely subsumed by our rulings on the *Keogh* and Reed-Bulwinkle issues.

[*1462] *A. General Principles of Antitrust Standing*

In *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (hereinafter *AGC*), the Supreme Court took a fresh look ***HN9***[] at antitrust standing. *See* *Southaven Land Co., Inc. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983)* (*AGC* was "an obvious attempt **[**51]** to implement uniformity among the circuits"). *AGC* did not repudiate the Supreme Court's previous antitrust standing cases, but rather tried to synthesize them.

Our court has summarized the *AGC* factors:

Id. at 600-01 (citations and footnotes omitted). The D.C. Circuit also correctly confined itself to the special role of the United States in enforcing the criminal aspects of the Sherman Act, noting that:

> The offense charged in this case is not subject to ICC remedial jurisdiction. The government does not seek to amend the [10706] rate agreement or to alter prospectively the rates set by the [10706] rate bureau; it seeks to punish an illegal antitrust combination which happened to employ a rate bureau. The ICC is not equipped to "remedy" criminal violations of the antitrust laws.

Id. at 600. The court rejected the concept of an immunity argument under Bulwinkle as untimely and declined to address a primary jurisdiction argument. *Id. at 599-600*. We do not find our holdings here necessarily at odds with those in *U.S. v. Bessemer* involving entirely different considerations of the role of the United States in the criminal enforcement of the Sherman Act.

[16] This rule applies to a party seeking reversal. *Cf.* *Dandridge v. Williams, 397 U.S. 471, 475 n.6, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970)* ("The 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.")

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and whether that harm was intended to be caused;
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
> (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;
> (4) the potential for duplicative recovery or complex apportionment of damages; and
> (5) the existence of more direct victims of the alleged antitrust violation.

Province v. Cleveland Press Publishing Co., 787 F.2d 1047, 1050-51 (6th Cir. 1986) (quoting *Southaven Land Co., 715 F.2d at 1085*). *Southaven* said this list of factors is not exhaustive. *See* *Southaven Land Co., 715 F.2d at 1085 n.6*. This reading of *AGC* seems correct. *See* *459 U.S. at 538*.

AGC's attempt to synthesize precedents reflected **[**52]** the Court's view that the antitrust standing doctrine is rooted in the common law. The Court argued that when Congress enacted the first antitrust laws in 1890, it assumed they "would be subject to constraints comparable to well-accepted common-law rules." *Id. at 533*. These include "foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract." *Id. at 532-33*. ***HN10***[] Like common-law adjudication, antitrust standing analysis must be done case-by-case:

> There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make [sic] it virtually impossible to announce a black-letter rule that will dictate **[**53]** the result in every case.

Id. at 535-36. Therefore, while the *AGC* checklist is the starting point of antitrust standing analysis, a consideration of earlier cases is relevant to the interpretation of the *AGC* factors.

B. Defendants' Standing Arguments

(1) The refusal to grant Pinney a commodity line-haul rate and the imposition of handling charges on self-unloaders

The steel companies, who in the course of shipping iron ore paid the rail and handling charges, were the immediate victims of the defendants' refusal to grant Pinney a commodity line-haul rate and imposition of handling charges on self-unloaders at defendants' docks. Defendants argue that plaintiffs' damages from the handling charges are too indirect. The same argument can be made about Litton's damages from the rail rate. We must apply the five *AGC* factors to determine whether defendants' contention has merit.

The first *AGC* factor focuses both on the directness of the injury and the intention of the defendant. The leading case on directness of injury is *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, where **[**54]** the Supreme Court held that an indirect purchaser cannot sue a manufacturer for overcharges imposed on a middleman and passed on to the indirect purchaser.

[*1463] In *Illinois Brick* the State of Illinois alleged that the defendant, a manufacturer of concrete block, engaged in a price-fixing conspiracy in violation of the antitrust laws. The defendant sold block to masonry contractors, who used the block in masonry structures that they sold to general contractors. The general contractors incorporated the masonry structures into larger structures that the state bought. The state sued the manufacturer for the amount of the overcharge that passed from the masonry contractors through the general contractors and then on to the state.

The Court held that the state did not have standing to sue the manufacturer for antitrust damages. The primary reason for this holding was that allowing indirect purchasers to sue "would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge -- from direct purchasers to middlemen to ultimate consumers." *431 U.S. at 737*. *See* *id. at 741-45.* **[**55]** Apportioning damages along the chain of distribution would "weigh[] down treble-damages actions with . . . 'massive evidence and complicated theories.'" *Id. at 741* (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 493, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968))*.

The Court also refused to make an exception for businesses in which the direct purchaser typically passes on the entire cost of a certain component, for example an item that is resold without alteration. The Court reasoned that proving that this is the practice would also entail "massive evidence and complicated theories." *Illinois Brick, 431 U.S. at 745* (quoting *Hanover Shoe*).

The other reason for the Court's allowing only direct purchasers to recover was that such a rule would best serve antitrust enforcement. *Id. at 745-47* Because the injury to direct purchasers is usually greater than the injury to indirect purchasers, direct purchasers have a greater stake in the outcome of litigation and are more likely to sue. *Id. at 747* Direct purchasers will have even more incentive to sue if they are allowed **[**56]** to recover the full amount of the overcharge. Thus, the Court "elevat[ed] direct purchasers to a preferred position as private attorneys general. . . ." *Id. at 746*.

While directness of injury favors the defendants, the other consideration in the first *AGC* factor, intent, tends to favor the plaintiffs. They allege that the object of defendants' ratemaking decisions has been to drive plaintiffs out of business. The Court stated that "there no doubt are cases in which such an allegation [of defendants' intent] would adequately support a plaintiff's claim." *AGC, 459 U.S. at 537 n.35*. The Court also cited an article for the proposition that the "specific intent of [a] defendant to cause injury to a particular class of persons should 'ordinarily be dispositive' in creating standing to sue." *Id.* (citing Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 30 (1971)). The Court further cited an article that "suggest[ed] that standing in a group boycott situation should be based on the purpose of the boycott." *459 U.S. at 537 n.35* (citing Lytle & Purdue, **[**57]** *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 Am. U. L. Rev. 795, 814-16 (1976)). However, the Court stated that "an allegation of improper motive . . . is not a panacea that will enable any complaint to withstand a motion to dismiss." *AGC, 459 U.S. at 537*. Thus, intent must be balanced with the rest of the *AGC* factors.

The second *AGC* factor relates to the status of the plaintiff as consumer or competitor. As Pinney competes with defendants in the provision of dock services, and Litton also tried to enter that business, this factor also favors the plaintiffs.

The third *AGC* factor, the degree to which the damages involved are speculative, favors the defendants. To assess the effects of a hypothetical change in line-haul **[*1464]** rates or handling charges, the district court would need to undertake the difficult and uncertain task of ascertaining demand elasticities, the input of the challenged charge and other costs in the prices charged by the plaintiff and its competitors, and the role of non-profit considerations in pricing decisions. *See* **[**58]** *Illinois Brick, 431 U.S. at 742-43*. Further, for Pinney and Litton to prove the extent of their losses from the unavailability of the commodity rail rate and from the imposition of handling charges, they would have to produce evidence on the following questions: What non-price factors (such as relationships with railroads, docks, and water transport companies) influenced the steel mills' purchase of transport for iron ore? Assuming plaintiffs can prove how much more demand there would have been for shipment by self-unloader, how much of the increase could Pinney and Litton have absorbed? Assuming that Pinney and Litton could have absorbed all the extra demand for shipping iron ore by self-unloader, would competitors have taken business away from them? If there were no competitors during the time in question, would new competitors have appeared to take advantage of the increased opportunities? Under *Illinois Brick* and *AGC* courts cannot be saddled with the time-consuming and speculative task of sifting through massive evidence to decide such questions.

AGC's fourth factor, the potential for complex apportionment of damages between plaintiffs, also favors defendants. **[**59]** Pinney and Litton could themselves become adversaries: Pinney could argue that lower water transport charges would have caused increased demand for dock services, which would have led to higher charges for dock services; Litton could argue that cheaper dock services would have caused greater demand for shipment by self-unloaders, which in turn would have led to higher prices for Litton's services.

AGC's fifth and final factor is the existence of more direct victims. Plaintiffs argue that the direct purchasers here, the steel mills, cannot sue because of *Keogh*. Thus, if Pinney and Litton cannot sue there will be no "private attorney general" to enforce the antitrust laws in this case. [17] While the steel mills cannot sue for antitrust damages, the mills do, however, have a role that takes antitrust policy into account. As *Keogh* mentions, the shippers can challenge rates under the ICA. In adjudicating such a challenge, one factor that the ICC will consider is whether the benefits to transportation policy of uniform rates, which are anticompetitive by nature, outweigh the procompetitive policies of the antitrust laws. Thus, it appears that this factor favors the defendants. **[**60]**

On balance, the *AGC* factors clearly favor the defendants. It is true that plaintiffs are defendants' competitors and that these claims involve allegations of intentional harm. However, it is more significant that plaintiffs are not the direct victims of the defendants' acts. Further, it would be an extremely complex, if not impossible task for the district court to cope with the problems of computation and apportionment of damages. Given these factors, we conclude that we must dismiss the handling charge claim as to both defendants and the rate claim as to Litton.

(2) The refusal to handle self-unloaders at railroad docks or to sell or lease docks to Litton

Defendants argue that Pinney cannot claim damages for the refusal to handle self-unloaders at railroad docks, because this would have sent the self-unloaders to Pinney. This **[**61]** argument finds support in a recent decision, *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, where the Supreme Court stated that ***HN11***[] a conspiracy to charge higher than competitive prices is an antitrust violation but "actually *benefit(s)*" the conspirators' competitors. *Id. at 583* (emphasis in original).

As for the refusal to sell or lease docks to Litton, defendants apparently overlooked **[*1465]** the fact that this claim is not in Pinney's complaint.

(3) The monopolization of land transportation of iron ore

The district court dismissed Pinney's claim based on the monopolization of land transport, and defendants argue that Litton's claim is even more remote than Pinney's. Plaintiffs do not contest this argument.

Thus, for the reasons enumerated above, we reverse the holding of the district court and find plaintiffs Pinney and Litton lack standing to assert the claims addressed above.

VI. FEDERAL STATUTE OF LIMITATIONS

A. Fraudulent Concealment

In the district **[**62]** court, the defendants moved to dismiss the plaintiffs' claims insofar as they were based upon events or activities which occurred before the four-year limitations period of section 4B of the Clayton Act, *15 U.S.C. § 15b*. Treating these motions as motions for summary judgment under *Rule 56 of the Federal Rules of Civil Procedure*, the district court found that there was a genuine issue of material fact whether the defendants had fraudulently concealed plaintiffs' causes of action which may have accrued before the four-year limitations period. The district court therefore denied the motions. *Pinney Dock & Transport Co. v. Penn Central Corp.*, 1983-2 Trade Cas. (CCH) para. 65,608 (N.D. Ohio 1983).

HN12[] Under the doctrine of fraudulent concealment, if a defendant conceals from the plaintiff the existence of a cause of action, the statute of limitations is tolled. To toll the statute, the plaintiff must allege in the complaint that: (1) the defendant concealed the conduct that constitutes the cause of action; (2) defendant's concealment prevented plaintiff **[**63]** from discovering the cause of action within the limitations period; and (3) until discovery plaintiff exercised due diligence in trying to find out about the cause of action. *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)*. The burden of proving the elements of fraudulent concealment is

[17] It does appear, however, that the same area of activity challenged here has been made the subject of scrutiny by the Justice Department. *See* note 15, *supra*.

upon plaintiff. *Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 233, 234 n.5 (6th Cir. 1974)*; *In re Beef Industry Anti-Trust Litigation, 600 F.2d 1148, 1171 (5th Cir. 1979)*. *But see Hobson v. Wilson, 237 U.S. App. D.C. 219, 737 F.2d 1, 35 (D.C. Cir. 1984)*, holding that the burden of showing lack of due diligence shifts to defendant.

In denying the defendants' motions for summary judgment the district court ruled that a genuine issue of material fact existed as to each element of *Dayco*. Defendants attack this ruling and also argue that the district court applied the wrong theory to the first *Dayco* element.

HN13[] The equitable doctrine of fraudulent concealment represents a longstanding exception **[**64]** to the rule that the plaintiff must commence his action within the period provided by the relevant statute of limitations. "The authorities are without conflict in support of the doctrine that ***HN14***[] where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud." *Bailey v. Glover, 88 U.S. (21 Wall.) 342, 347-48, 22 L. Ed. 636 (1874)*. However, because "statutes of limitation are vital to the welfare of society and are favored in the law," the plaintiff who invokes the doctrine of fraudulent concealment will be "held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.'" *Wood v. Carpenter, 101 U.S. (11 Otto) 135, 139-40, 25 L. Ed. 807 (1879)* **[**65]** (citation omitted). [18]

[*1466] ***HN15***[] In the context of private anti-trust actions the doctrine of fraudulent concealment is well recognized by the federal courts, including our own court. *See* *Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230 (6th Cir. 1974)*; *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975)*. *See also* Annotation, *Application of Fraudulent Concealment Doctrine to Statute of Limitations in Antitrust Cases* (*15 U.S.C.S. § 15b*), 72 A.L.R. Fed. 431. As we held **[**66]** in *Dayco*: "We have recognized that ***HN16***[] the statute of limitations applicable to private anti-trust actions may be tolled where a plaintiff did not file its action in time because of ignorance resulting from a defendant's fraudulent concealment." *523 F.2d at 394*.

B. The element of wrongful concealment.

On appeal, the defendants initially contend that the district court below erred in holding that Dayco's first element, "wrongful concealment," does not require proof of affirmative acts of concealment. The district court, however, held:

> It does not make sense to rigidly apply a statute of limitations where the defendant has carried out its illegal activities in "a manner which precluded detection." As the Supreme Court stated in *Bailey v. Glover, 88 U.S. (21 Wall.) 342, 22 L. Ed. 636 (1874)*:
>
>> [Statutes of Limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which should show that such rights never existed, or had been satisfied, transferred, **[**67]** or extinguished, if they ever did exist. To hold that by concealing a fraud, *or by committing a fraud in a manner that it concealed itself* until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. [Emphasis added.]

Pinney Dock, 1983-2 Trade Cas. (CCH) para. 65,608 at 69,041 n.6. According to the defendants, the district court's reliance upon *Bailey v. Glover* for the proposition that "wrongful concealment" may also be established by conduct which causes a conspiracy to be carried out "in a manner which precludes detection" or "self-concealing

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[18] This rule of "particularity" has been codified in *Rule 9(b) of the Federal Rules of Civil Procedure*, which states in part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In the instant case, there is no dispute that plaintiffs failed to comply with this rule.

misconduct" is misplaced. We agree with defendants at least to the extent that the Sixth Circuit has apparently not conclusively decided the issue of whether the element of wrongful concealment requires proof of affirmative acts.

In *Campbell v. Upjohn Co., 676 F.2d 1122 (6th Cir. 1982)*, the Sixth Circuit, although not actually confronted with the issue of whether fraudulent concealment required proof of affirmative acts, did recognize **[**68]** that there was a distinction between non-active and active concealment. Plaintiff alleged that a corporation fraudulently induced him to sign a merger agreement and then took additional steps to fraudulently conceal from him the terms of that agreement. The district court held that because the plaintiff failed to satisfy the requirement of due diligence in discovering his cause of action, he was barred by the statute of limitations. On appeal, the plaintiff argued that the due diligence requirement should not apply to cases of "active" fraudulent concealment where the defendant has engaged in affirmative acts of concealment beyond the original fraud itself. Our court rejected this argument, holding "that alleged additional acts of concealment by the defendant beyond the original fraud did not exempt the plaintiff from the requirement of diligence in pleading the federal equitable tolling doctrine of fraudulent concealment." *Id. at 1128*. The court did state, however, that "active concealment by the defendant will be considered in determining the reasonableness of the behavior of the plaintiff under the circumstances" in discovering his cause of action. *Id.* In reaching **[**69]** this conclusion, the court emphasized that:

> [Plaintiff] would have the statute tolled indefinitely, while evidence stales, memories **[*1467]** fade and courts and adversaries wait, until the plaintiff at his leisure alleges actual discovery, despite the avalanche of evidence that would put all but the most indiligent plaintiffs on notice of a cause of action.
>
>> Statutes of limitations are vital to the welfare of society and are favored in the law. Stale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain. *Dayco Corp. v. Goodyear Tire & Rubber Co., supra, 523 F.2d 389 at 394* (citations omitted).
>
> A plaintiff who requests the avoidance of these important objectives owes the courts, the public and his adversaries a duty of diligence in discovering and filing his lawsuit.

Id. In holding that affirmative acts of concealment by the defendant beyond the original fraud do not relieve the plaintiff of the requirement of due diligence, the court therefore joined "those circuits which have declined to formulate a separate rule for cases involving active **[**70]** concealment by the defendant." *Id.*

The Supreme Court has apparently had only two occasions to discuss the doctrine of fraudulent concealment at any length, and both of these cases are quite old. In *Bailey v. Glover, 88 U.S. (21 Wall.) 342, 22 L. Ed. 636 (1874)*, which the district court placed heavy reliance upon in the instant case, the Supreme Court held upon the facts then before it that plaintiff's action was not barred by the statute of limitations because, "to hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." *Id. at 349*.

In *Wood v. Carpenter, 101 U.S. (11 Otto) 135, 25 L. Ed. 807 (1879)*, however, the Supreme Court held:

> Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.
>
> There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. **[**71]**
> The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.

Id. at 143.

Thus, while *Bailey v. Glover* indicates that the commission of a fraud which "is of such a character as to conceal itself," may be sufficient to toll the statute of limitations under the fraudulent concealment doctrine, *Wood v. Carpenter* holds that "concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."

Bailey v. Glover was subsequently followed by the Supreme Court in *Exploration Co. v. United States, 247 U.S. 435, 62 L. Ed. 1200, 38 S. Ct. 571 (1918)*. The government argued that the principles of *Bailey v. Glover* were applicable to the instant action, and argued further that "there were affirmative acts of concealment; but it is enough that the fraud was such as to conceal itself." *Id. at 445*.

The Supreme Court affirmed the court of appeals, holding:

> When Congress passed the Act in question the rule of *Bailey v. Glover* was the established **[**72]** doctrine of this court. It was presumably enacted with the ruling of that case in mind. We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the government. We are aware of no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the government as well as a private individual.

[*1468] *Id. at 449*. *See also* *United States v. Diamond Coal Co., 255 U.S. 323, 65 L. Ed. 660, 41 S. Ct. 335 (1921)*.

Bailey v. Glover was likewise followed in *Rosenthal v. Walker, 111 U.S. 185, 28 L. Ed. 395, 4 S. Ct. 382 (1884)*, which also distinguished *Wood v. Carpenter*. In *Walker*, plaintiff alleged that the bankrupt transferred certain property to the defendant in order to prevent the plaintiff from claiming an interest in that property in bankruptcy proceedings. Although the action was brought after the applicable statute of limitations **[**73]** had expired, plaintiff alleged that the bankrupt and the defendant kept concealed from him the fact of the sale, transfer, and conveyance of the goods.

On appeal to the Supreme Court, the defendant argued that plaintiff's action was barred by the statute of limitations. The Supreme Court rejected this argument stating:

> The case of *Bailey v. Glover* is a decision construing the statute which is relied on in this case, and unless subsequently overruled by this court is conclusive of the point under discussion. It has never been overruled. The plaintiff in error relies on the case of *Wood v. Carpenter, 101 U.S. 135, 25 L. Ed. 807*, and *National Bank v. Carpenter, Id. 101 U.S. (11 Otto) 567, 25 L. Ed. 815 (1879)*. The first was an action at law, the second a suit in equity. The court in both cases was called on to construe a statute of limitations of the State of Indiana, and it followed the adjudication of the Supreme Court of that State upon the same statute. Neither case refers to the opinion of the court in *Bailey v. Glover*, or can be held to overrule or modify it. The case of *Bailey v. Glover* has been often cited by this court, but **[**74]** has never been doubted or qualified. *Wood v. Bailey, 88 U.S. 640, 21 Wall. 640, 22 L. Ed. 689*; *Wiswall v. Campbell, 93 U.S. (3 Otto) 347, 23 L. Ed. 923*; *Gifford v. Helms, 98 U.S. (8 Otto) 248, 25 L. Ed. 57*; *Upton v. McLaughlin, 105 U.S. (15 Otto) 640, 26 L. Ed. 1197*. We are of opinion, therefore, that the assignment of error under consideration is not well founded.

Walker, 111 U.S. at 190-91. Thus, according to *Rosenthal v. Walker, Wood v. Carpenter* is limited to the particular case in which the Court was construing a state statute of limitations and following the adjudications of the Supreme Court of Indiana. *See also* *Traer v. Clews, 115 U.S. 528, 538, 29 L. Ed. 467, 6 S. Ct. 155 (1885)* ("The case of *Bailey v. Glover*, has never been overruled, doubted, or modified by this court. On the contrary, in *Rosenthal v. Walker*, it was reaffirmed, and was distinguished from the case of *Wood v. Carpenter* . . ."). See, however, *Felix v. Patrick, 145 U.S. 317, 12 S. Ct. 862, 36 L. Ed. 719 (1892)*, which neither cites to, nor makes any attempt **[**75]** to reconcile, *Bailey v. Glover* with *Wood v. Carpenter*.

The last reference made to *Wood v. Carpenter* by the Supreme Court occurred in *United States v. Kubrick, 444 U.S. 111, 117, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979)*, where the Supreme Court cited that case for the proposition that, "statutes of limitations, . . . 'are found and approved in all systems of enlightened jurisprudence,' *Wood v. Carpenter, 101 U.S. (11 Otto) 135, 139, 25 L. Ed. 807 (1879)*. . . ." Apart from one oblique reference in *Kubrick*, however, the Supreme Court has not recently had occasion to cite or otherwise discuss either *Wood v. Carpenter or Bailey v. Glover*. One distinguished commentator has explained the difference between active and passive fraudulent concealment as follows:

> "Where undiscovered "fraud" was the basis of liability, it was universally agreed that no new concealment was necessary and the wrongdoer might remain wholly passive, provided no avenues were open to the plaintiff for discovery of the fraud. But in cases that fell outside the elastic boundaries of the "fraud" exception new difficulties appeared. To permit suspension of **[**76]** the statute of limitations in all cases where the suitor was ignorant of his claim must have seemed hazardous. Behind the decisions there must have lain a conviction that for suspension of the statute outside the field of "fraud" there should be added to the suitor's ignorance some affirmative misconduct by the opposite party, preventing **[*1469]** discovery and excusing delay. And when the "fraudulent concealment" exception had once been formulated, the language of the formula itself gave a new direction to judicial inquiries. In examining the factual cases for suspension of the statute they were led beyond a scrutiny of the original cause of action and of the *plaintiff's* later opportunities for *discovery*, to an emphasis on the means by which the *defendant obstructed* discovery.
>
> There can be found in the cases innumerable statements that "fraudulent concealment" involves affirmative efforts by the defendant to prevent discovery. But qualifications are often attached. It is said that the defendant's concealment need not be subsequent to the original wrongdoing, but may proceed or accompany it, provided all his conduct taken together is calculated to mislead or allay **[**77]** suspicion. It is sometimes added that all requirements are satisfied if the original misconduct was of such a kind as to "conceal itself." And finally, in some cases the further requirement is added that defendant's efforts must include some element of "fraud" or moral turpitude, though numerous decisions reject such a test. From such a welter of conflicting generalities one can only draw the conclusion that generalities are being overworked, that in each case too wide a variety of fact situations is being included in a single formula."

Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875, 880-82 (1933) (footnotes omitted).

Most of the appellate cases which have addressed the issue in the context of antitrust actions have required allegations or proof of affirmative concealment under the first element of the doctrine of fraudulent concealment. *See, e.g., Hennegan v. Pacifico Creative Service Inc., 787 F.2d 1299 (9th Cir. 1986)*; *Berkson v. Del Monte Corp. 743 F.2d 53 (1st Cir. 1984)*; *Rutledge v. Boston Woven Hose and Rubber Co., 576 F.2d 248 (9th Cir. 1978)*; *City of Detroit v. Grinnell Corp., 495 F.2d 448, 461 (2d Cir. 1974)*; **[**78]** *Laundry Equipment Sales Corp. v. Borg-Warner Corp., 334 F.2d 788, 792 (7th Cir. 1964)*.

The defendants rely on these and other cases to argue that "proof of affirmative acts of concealment such as those involved in the cases cited . . . is essential to protect the important policies underlying the statute of limitations." As defendants point out:

> In *Dayco*, after noting that the statute of limitations in private antitrust cases may be tolled by fraudulent concealment, this court cautioned nonetheless that, "as the Supreme Court observed in *Wood v. Carpenter*, 101 U.S. [at 139]: 'Statutes of limitations are vital to the welfare of society and are favored in the law.' Stale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain." *523 F.2d at 394*. The policies of protecting defendants and courts from stale claims counsel against a broad interpretation of tolling doctrines, and the reasons for that approach "are particularly persuasive when viewed against the strong congressional policy in favor of repose in antitrust suits." (citations omitted).

Although **[**79]** the district court below acknowledged the Ninth Circuit's opinion in *Rutledge, Pinney Dock & Transport v. Penn Central Corp.*, 1983-2 Trade Cas. para. 65,608 at 69,040, the court nevertheless concluded that the first *Dayco* element did not necessarily require proof of affirmative acts of concealment. According to the district court:

> Thus, under *Dayco*'s first element, the type of actions of defendants which might wrongfully conceal a conspiracy to violate the antitrust laws can embrace, but are not limited to, fraudulent misrepresentations as articulated in the *Rutledge* reference, *supra*. The actions of defendants can also be those which cause a conspiracy to be carried out in "a manner which precludes detection," *e.g.*, "self-concealing misconduct." *See Gaetzi v. Carling Brewing company*, *205 F. Supp. 615, 620-621 (E.D. Mich. 1962)*. *Cf.* *King & King Enterprises v. Champlin* ***[*1470]*** *Petroleum Co., 657 F.2d 1147, 1154 (10th Cir. 1981)*, *cert. denied*, *454 U.S. 1164, 71 L. Ed. 2d 320, 102 S. Ct. 1038 (1982)*. Hence, the Court finds impermissible the implication of the defendants that "in order **[**80]** to make out the first element of fraudulent concealment Pinney must show affirmative acts of concealment by the defendants" which constitute fraudulent misrepresentations.

Id. at 69,041.

While Judge Thomas appropriately cites *Gaetzi*, Judge McCree's analysis in that opinion leads us to a different result. In *Gaetzi*, a former distributor of Carling Beer brought an antitrust action in 1961 seeking damages for defendant's allegedly wrongful termination of his Carling distributorship. Defendant then filed a motion for summary judgment on the ground that the cause of action was barred by the four year statute of limitations applicable to private antitrust actions. Plaintiff in turn argued that the period of limitations was suspended by reason of the defendant's fraudulent concealment.

In addressing this issue, then District Judge Wade H. McCree, Jr., initially noted that, "the contours of this doctrine in relation to private antitrust actions unfortunately are by no means as precise as either of the parties insists." *205 F. Supp. at 619-20*. In this regard, plaintiff argued that fraudulent concealment did not require proof of affirmative acts, while **[**81]** the defendant argued that the doctrine did require such proof. Judge McCree initially observed:

> It does appear to be settled that where the gravamen of an action is fraud and "the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover, supra, 88 U.S. at 348*.
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> * * *
>
> The cause of action asserted in the present case, however, is predicated neither on fraud nor on breach of a fiduciary duty, but on violation of the antitrust laws. The first question to be considered then is whether plaintiff is correct in his assertion that in an antitrust action ignorance of the facts constituting the cause of action suspends the prescriptive period, absent affirmative acts of concealment by defendant.

Gaetzi, 205 F. Supp. at 620. After examining the cases cited by plaintiff, Judge McCree noted that "each of the cases upon which plaintiff relies involved **[**82]** something more than mere silence on the part of the defendant." *Id.* He further noted:

> The illegal conspiracies proceeded in a manner which precluded detention [sic]. The activities of the defendants can be characterized as 'self-concealing.' The fact that the defendant did not take further steps to impede discovery after the plaintiff had sustained injury is unimportant, for the conduct which is denominated 'concealment' may take place before the cause of action accrues as well as afterwards.

Id.

Next, Judge McCree examined the cases cited by defendant for the proposition that an affirmative act of concealment is required in order to toll the statute of limitations. After examining these cases, Judge McCree concluded:

> Although the cases cited by plaintiff have sometimes been regarded as supporting the argument that no affirmative act of concealment is required to toll the statute in restraint of trade conspiracy cases, on analysis they all involve self-concealing misconduct and are not incompatible with the rationale underlying the principle that affirmative acts of concealment must be shown except in cases founded on fraud or breach of fiduciary **[**83]** duty.

Id. at 621.

Applying the foregoing principles to the facts of *Gaetzi*, Judge McCree concluded that no genuine question of fact existed with respect to circumstances which would **[*1471]** toll the four year statute of limitations. At least two of Judge McCree's factual conclusions are instructive:

> 2. *Failure to respond to plaintiff's inquiries*. Plaintiff states that his repeated efforts to obtain from defendant an explanation as to the reason for his loss of the Carling distributorship were unsuccessful. He does not claim that defendant, by a false but plausible explanation, dissuaded him from seeking out the facts. All that defendant did was to remain silent. Clearly the silence of defendant could not have been calculated to deter plaintiff from other inquiry, but could only have compounded plaintiff's suspicions. With reason to suspect that the loss of his business was the result of illegal conduct by defendant, plaintiff was obliged to do more by way of investigation then simply to make fruitless inquiries of the suspected wrongdoer. We have previously indicated that concealment necessitates the commission of affirmative acts. **[**84]** Mere silence, where there is no duty to speak, does not toll the statute.

Id. at 622. Judge McCree also concluded:

> 4. *Self-concealment of the alleged conspiracy*. "Self-concealment" of a conspiracy sufficient to toll the statute of limitations refers to activities in furtherance of the conspiracy which by their nature defy detection. Plaintiff asserts that defendant concealed its unlawful activities by operating through its parent corporation. However, unlike the *American Tobacco Co. v. People's Tobacco Co., 204 F. 58 (5th Cir. 1913)* case, *supra*, the relationship existing between the two companies was well known or readily ascertainable. As the uncontroverted affidavit of the executive vice-president of Canadian Breweries Ltd. indicates, the parent-subsidiary relationship between Canadian Breweries and defendant has been a matter of record in Canadian's annual report to shareholders since 1945. Furthermore, there is quoted in defendant's brief an excerpt from the plaintiff's deposition in the United States District Court suit in Pennsylvania, in which plaintiff admitted that he had been informed in 1952 that the controlling **[**85]** interest in defendant had been purchased by someone in Canada.
>
> . . . .
>
> The report condemned the acquisition by Canadian Breweries as a monopolistic activity. Since this official document was printed and available to the public according to plaintiff's own allegation, even before plaintiff's distributorship had been terminated, it would appear that the alleged conspiracy was no longer concealed and could have been discovered by due diligence well within the statutory period for bringing suit.

Id. at 623. Based in part on the foregoing, Judge McCree therefore granted the defendant's motion for summary judgment dismissing the plaintiff's complaint as being time-barred by the Clayton Act's four year statute of limitations period. Apparently, this case was not appealed to the Sixth Circuit. [19]

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[19] The other case cited by the district judge here to support his conclusion is *King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147 (10th Cir. 1981)*, wherein the Tenth Circuit held "both of the tests which were set forth in *Ashland Oil Co., 567 F.2d 984 (1977)*, were met here. The evidence showed that the defendant actively sought to conceal its price fixing activities, and the defendant's conduct, by reason of its fraudulent nature, was inherently self concealing." *Id. at 1156*. *See also* *Baker v. F. & F. Investment, 420 F.2d 1191, 1199 (7th Cir. 1970)* ("where, as in the case of many conspiracies in violation of federal antitrust laws, the wrong is self-concealing, little need be added in order to justify tolling the statute.").

[86]** Thus, according to *Gaetzi*, ***HN17***[] although self-concealing misconduct may be sufficient for purposes of the first element of fraudulent concealment, the cases involving such conduct "are not incompatible with the rationale underlying the principle that affirmative acts of concealment must be shown except in cases founded on fraud or breach of fiduciary duty." *Gaetzi, 205 F. Supp. at 621*. Moreover, Judge McCree emphasized that "'self-concealment' of a conspiracy sufficient to toll the statute of limitations refers to activities in furtherance of the **[*1472]** conspiracy *which by their nature defy detection." Id. at 623*. Mere silence, or one's unwillingness to divulge one's allegedly wrongful activities, is not sufficient. As the underlying cause of action here is based upon alleged antitrust violations not fraud, we agree with Judge McCree's rationale in *Gaetzi* that a plaintiff should be required to prove affirmative acts of concealment, particularly in light of the strong policy in favor of statutes of limitations.

3. Scope of Review of Denial **[**87]** *of Summary Judgment*

HN18[] When an appellate court reviews a grant of summary judgment, the district court decision is reviewed de novo. *See, e.g. National Bank of Detroit v. Shelden, 730 F.2d 421, 423 (6th Cir. 1984)*; *Glenway Industries, Inc. v. Wheelabrator-Frye Inc., 686 F.2d 415, 417 (6th Cir. 1982)*.

However, ***HN19***[] in reviewing a district court's ruling denying a summary judgment motion on grounds that a material issue of fact exists appellate review is governed by an "abuse of discretion" standard. *See, e.g., United States v. Merchants National Bank of Mobile, 772 F.2d 1522, 1524 (11th Cir. 1985)*; *Marcus v. St. Paul Fire & Marine Ins. Co., 651 F.2d 379, 382 (5th Cir. 1981)*; *McLain v. Meier, 612 F.2d 349, 356 (8th Cir. 1979)*. The difference in the standards of review has been explained as follows:

> ***HN20***[] Discretion **[**88]** plays no real role in the grant of summary judgment: the grant of summary judgment must be proper under the above principles or the grant is subject to reversal. The trial court may, however, exercise a sound discretion in denying summary judgment where, although the movant may have technically shouldered his burden, the court is not reasonably certain there is no triable issue of fact; where a portion of an action may be ripe for summary judgment but is intertwined with another claim(s) that must be tried; and in certain other situations.

6 *Moore's Federal Practice* para. 56.15[8] (2d ed. 1985).

4. Review of Evidence on Whether there are Issues of Fact on Dayco Elements

a. Whether there is Sufficient Evidence of Affirmative Acts of Concealment in Pinney Dock

The defendants apparently do not dispute the district court's conclusion that their conduct was sufficient to satisfy the self-concealment standard. That is, if our court should conclude that a self-concealment standard is appropriate in this case, defendants apparently would concede that the district court's application of that standard to the facts of this case and his factfindings was not erroneous.

[89]** We have, however, concluded that defendants are correct in their argument that the doctrine of fraudulent concealment requires proof of affirmative acts under facts such as those presented here and in *Gaetzi*. The issue then becomes what kind of conduct is sufficient to satisfy that standard and whether that standard was satisfied here. According to the defendants "the weight of judicial authority holds that in order to demonstrate affirmative concealment, a plaintiff must present evidence of destruction of records, falsification of accounts, or the use of other covert devices. . . ." The defendants note that the district court in *Pinney* found evidence of two instances of acts of concealment: (1) that Penn Central had not been "open and honest with Pinney as to the reasons Pinney was denied a commodity rate," *Pinney Dock*, 1983-2 Trade Cas. (CCH) para. 65,608 at 69,046; and (2) that Penn Central had "affirmatively misled Pinney into believing that it was willing to 'take care' of Pinney Dock's iron ore requests." *Id.* They contend that this evidence, when analyzed, does not constitute affirmative acts of concealment sufficient to meet Dayco's requirements. **[**90]**

In *Ohio Valley Electric Corp. v. General Electric Co., 244 F. Supp. 914 (S.D.N.Y. 1965)*, a case involving an alleged antitrust conspiracy in the electric industry, Judge Feinberg held that the plaintiffs had presented:

> **[*1473]** abundant proof that defendants affirmatively and deliberately concealed the existence of the conspiracy. The conspirators concealed their activities from their customers, the government, and officers and employees of defendants who did not participate. To achieve and preserve secrecy, the conspirators falsified their expense accounts to hide the true nature and purpose of their meetings and trips, made telephone calls at night from pay telephones rather than from their offices, destroyed notes taken at conspiratorial meetings, and instructed newcomers to the conspiracy not to divulge its existence.

Id, at 931-32. Significantly, Judge Feinberg believed that his conclusion was consistent with both Judge McCree's analysis in *Gaetzi, 205 F. Supp. 615* and with the policies underlying the doctrine of fraudulent concealment discussed by the Supreme Court in *Bailey v. Glover, 88 U.S. 342, 22 L. Ed. 636.* **[**91]**

In *Ingram Corp. v. J. Ray McDermott & Co.*, 1980-1 Trade Cas. (CCH) para. 63,277 (E.D. La. 1980), *rev'd on other grounds*, *698 F.2d 1295 (5th Cir. 1983)*, another case cited by the defendants, the district court discussed what kind of acts are and are not sufficient for purposes of affirmative concealment. According to the district court:

> Subparagraph (a) speaks of "clandestine meetings in hotel rooms" at which the rigging of bids was discussed. This allegation amounts to very little, for there is no obligation on the part of antitrust conspirators to advertise their conduct. One cannot expect bid riggers to hold a public meeting for that purpose. However subparagraphs (b) and (c) are quite different. In each plaintiffs allege that the defendants performed certain acts in furtherance of the conspiracy which created the false impression that project bids were competitively made rather than rigged. This is something more than silence; if true, it constitutes an attempt to deceive both the competition and the public into the belief that all of their bids were made legitimately and as the result of competitive considerations. It is precisely the **[**92]** sort of affirmative act of deception required by the jurisprudence.

Id. at 78,414. The affirmative acts referred to in subparagraphs (b) and (c) included submitting prearranged losing bids by the company that had agreed not to receive the award, in order to give the illusion of competition among the corporate defendants, and maintaining agreed-upon ratios of major equipment spreads and positioning equipment in particular localities throughout the world, so as to give the false impression that excessive bids on particular projects were the result of equipment availability rather than of the unlawful conspiracy.

In the instant case, Judge Thomas discussed several instances in which he believed the defendants' actions constituted affirmative acts of concealment, notwithstanding his general conclusion that the defendants' alleged antitrust conspiracy was self-concealing conduct for purposes of the fraudulent concealment exception to the statute of limitations. The first instance of affirmative acts discussed by Judge Thomas involved certain memoranda and letters written in late 1969 and early 1970. In this regard plaintiff submitted evidence of a series of meetings in **[**93]** 1968 and 1969 and argued that they were deliberately kept concealed. For example, a July 17, 1968, letter from J. K. Thorney, B & O director of coal commercial planning, to the general coal traffic managers-rates of Penn Central and N & W, stated, *inter alia*:

> following our day long meeting held in New York on July 9, the matter of handling charges on ex-lake iron ore received from self-unloader vessels was very briefly discussed. . . .
>
> . . . Our records also indicate that there was a *verbal agreement* made by all lines to assess the same charges as bulk freights. [Emphasis added by district court.]

Pinney Dock, 1983-2 Trade Cas. (CCH) para. 65,608 at 69,043.

As additional evidence of the defendants' secrecy, the district court notes that on August 25, 1969, Thorney again wrote to **[*1474]** C. S. Baxter, Chairman, Coal, Coke & Iron Ore Committee (CCIOC) -- Eastern Railroads, and stated:

> I have just received information that some of the members of the Coal, Coke & Iron Ore Committee, are now in the process of reissuing their ex-lake iron ore tariffs, and there are indications that deviations may be made

> from the previous tariffs **[**94]** insofar as the manner of publication of such reissues. Under the circumstances, I believe this matter should be discussed by all members *at the conclusion of the next meeting, which is to be held on September 11*.
>
> *This subject, of course, should not be listed on the regular docket but handled informally after the regular meeting*. [Emphasis added by district court.]

Id. at 69,043-44.

In addition, the district court notes that on March 26, 1970, Thorney also sent a memo to G. A. Sandmann marked "Personal" detailing a discussion on March 24, 1970, about ex-lake iron ore handling charges. In that letter, Thorney stated:

> There was no committee record other than the subject had been reviewed. . . . The above for your personal information only, and not to be disclosed to anyone in any manner at this time.

Id. at 69,044.

Although defendants apparently did not controvert Pinney Dock's assertion that the above mentioned meetings and dealings were kept secret, they argued that they were not obligated to disclose their private business communications and proposals. Pinney Dock, in turn, argued that under the terms of the railroads' 5A Agreement, **[**95]** they had a duty to issue public notices of meetings, proposals, and rate decisions. [20]

[96]** In sum, Judge Thomas concluded that the memoranda and letters discussed above permit an inference that the defendants took steps to insure that their actions would not become public. According to Judge Thomas, "these affirmative acts may be found by the trier of fact to constitute both wrongful concealment of the alleged conspiracy in violation of the antitrust laws and acts in furtherance of the conspiracy." *Id.*

In their brief, the defendants apparently do not dispute these findings of "affirmative acts" by the district judge. Indeed, it would appear that these meetings and dealings, which were apparently done in secret and possibly not in compliance with the ICC requirements requiring open and public meetings, are analogous to the secret phone calls in *Ohio Valley Electric Corp.* On the other hand, such secret meetings may be more analogous to the "clandestine meetings in hotel rooms" which were not deemed sufficient for purposes of affirmative concealment in *Ingram Corp.*

Apart from this evidence, the district court also concluded that a genuine issue of fact existed as to whether a series of letters written in 1968 and 1969 by Penn Central in response to Pinney's **[**97]** request for a line-haul commodity rate demonstrated that the defendants concealed the antitrust conspiracy through affirmative misrepresentations to Pinney. Significantly, Judge Thomas found that this evidence was consistent with the *Rutledge* requirement that "one means of wrongful concealment of an ongoing antitrust conspiracy is a co-conspirator's fraudulent misrepresentations." *Pinney Dock*, 1983-2 Trade Cas. (CCH) para. 65,608 at 69,044. According to Pinney, this correspondence led Pinney to believe **[*1475]** that Penn Central was acting unilaterally in denying Pinney a line-haul rate and that it was also working to get a commodity iron ore rate established off Pinney's dock.

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[20] To the extent that plaintiffs are arguing that the defendants kept their meetings and dealings secret in violation of their statutory duty to issue public notices of meetings, proposals, and rate decisions, it would appear that plaintiffs' argument would involve an interpretation of ICC rules, regulations and statutes. This in turn would seem to implicate the issue of primary jurisdiction, an argument which the defendants also raised in support of their contention that this action should be dismissed, or at least deferred to until the ICC has an opportunity to address the issues. However, Judge Thomas seems to have anticipated this problem because he states: "The present issue is not whether defendants had a statutory duty to disclose to plaintiff the details of their informal discussions. For purposes of the present motion, the court need only decide whether a genuine issue of fact exists as to the alleged agreement and communications being carried out in a manner which eluded discovery by plaintiff." *Pinney Dock*, 1983-2 Trade Cas. (CCH) para. 65,608 at 69,044.

Sometime in 1968 George Weir, who was fifty percent owner of Pinney, requested from Penn Central a commodity line-haul rate off Pinney Dock equivalent to that which was applied to the railroad owned docks. Penn Central's Wilkins wrote to Weir on September 4, 1968, stating:

> I am informed by our rate people that the subject of publishing rates on pellets originating at private docks on Lake Erie has been considered at a recent meeting of the Coal, Coke & Iron Ore Committee at which **[**98]** time there was a recommendation against extending the application of ex-lake iron ore rates to apply from privately owned docks other than those equipped to handle iron ore from bulk carriers. Under the circumstances, Penn Central must be governed by this recommendation.

Id. at 69,045. On October 3, 1968, Weir responded to this letter by stating that he was "still le[ft] . . . in the dark because you have not given me the justification on which this recommendation was supposedly based." *Id.*

Funkhouser, who was also an executive of Penn Central, responded to this letter by explaining that the basic reason for Penn Central's refusal to publish ex-lake rates from the Pinney Dock was that it would be financially unsound to do so:

> The Coal, Coke, and Iron Ore Committee of the Eastern Railroads has recommended against extending the application of ex-lake iron ore rates from additional docks. Traditionally, rates have been confined to apply from a relatively few docks from which ore moves in large and steady volume. . . . This had been advantageous to the shipping public and to the railroads. It seems clear that to depart from this scheme . . . would be damaging **[**99]** both to the railroads and to the iron ore shippers. [21]

Id.

On March 28, 1969, Weir made a further request that Penn Central extend its ex-lake iron ore rates to Pinney Dock, to which Funkhouser again responded: "It seems clear that to depart from this scheme of transportation by making the ex-lake iron ore rates applicable on spasmodic shipments from what would unquestionably grow to **[**100]** be a sizeable number of small docks would be at variance with the concept underlying said rates and would be damaging both to the railroads and to the iron ore shippers." *Id.*

Pinney argued before the district court that this correspondence led Pinney to believe that the reason why Penn Central was unwilling to publish a rate was its unilateral concern about Pinney's ability to meet volume requirements. According to Pinney, as late as August 19, 1974, Penn Central continued informing Pinney "that the level of ex-lake ore rates was constructed on a volume basis and the extensions of these rate[s] to facilities which could load only relatively small amounts of ore would make the rates unrealistic." *Id.* Although the defendants attempted to argue before the district court that this correspondence, rather than misrepresenting its actions, actually disclosed both to Pinney and to the ICC that its refusal to extend a commodity rate to Pinney was related to efficiency considerations, Judge Thomas nevertheless concluded that a genuine issue of fact existed as to whether the defendants had misrepresented their reasons for denying the rate to Pinney. According to Judge Thomas: **[**101]**

> The inference drawn by defendants can properly be argued to the trier of fact. However, the evidence, read in a light most favorable to Pinney, does not **[*1476]** as a matter of law show that defendants were open and honest with Pinney as to the reasons Pinney was denied a commodity rate. A genuine issue of fact exists as to whether Penn Central misrepresented the reasons for its actions so as to conceal the alleged conspiracy.

Id. at 69,046.

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[21] Notwithstanding this apparently valid explanation for Penn Central's refusal to extend an ex-lake rate from Pinney Dock, the district court concluded that "the trier of fact could find from the documents in the record that the true justification for the 'recommendation against extending the application of ex-lake iron ore rates from privately-owned docks other than those equipped to handle iron ore from bulk carriers' was the continuing secret agreement of February 26, 1958, to deny an iron ore commodity rate from Pinney's dock." *Pinney Dock*, 1983-2 Trade Cas. (CCH) para. 65,608 at 69,045.

Thus, Pinney initially alleges that the reasons why the defendants denied it a line-haul commodity rate was in order to effect the conspiracy to drive self-unloaders off Lake Erie. The defendants then brought forth evidence in the form of memoranda and correspondence that the reason they denied Pinney such rates was due to a concern with Pinney's low volume.

The final instance of affirmative acts of concealment discussed by the district court involves certain memoranda and correspondence between Pinney Dock and Penn Central during the period of 1973 to 1975. Based on these documents Pinney Dock argued before the district court that "Penn Central periodically misled Pinney into believing that it was ready, willing and **[**102]** able to do business with it. The effect of such misrepresentations was to leave Pinney with the clear impression that Penn Central could, and might, change its mind on rates from Pinney at any moment." *Id.* at 69,046. As the district court noted, Pinney pointed to communications it had with George Wallace of Penn Central in 1970 about granting Pinney a rate. "Several Wallace letters to Pinney indicate that Penn Central was 'glad to discuss . . . the question of a modern rail loading facility to be built by [Pinney],' a facility which Penn Central might use in return for issuing an ex-lake iron ore rate from Pinney Dock. Yet, other exhibits show that during this same period, Mr. Wallace was actively participating in meetings and discussions with other railroads on how to limit the use of self-unloaders." *Id.*

As further evidence of misrepresentations by the defendants during the 1973-1975 period, the district court pointed to the deposition of Maynard Walker, president of Pinney Dock, who testified that:

> Jim Royston at one time said to me, "Don't worry," he said to me and Joe Del Priore, "Don't worry, boys, Uncle Jim will take care of you."

Id. The **[**103]** district court also noted that in an internal memorandum of October 1, 1975, which was prepared by Royston of Penn Central it was stated that:

> Pinney was reassured that our modification plans for Ashtabula included serious consideration of including Pinney Dock in, or as an adjunct to the consolidated A & B and Union Docks.

Id.

Finally, the district court noted that Pinney presented evidence to show that Royston may have been intentionally misleading Pinney. For example, a former Penn Central employee testified in a special proceeding that:

> I was told to meet with Mr. Royston up at Pinney Dock to discuss it. Pinney Dock had offered to pay the entire cost of this conveyor system that would traverse from Pinney Dock over the Union fence tracks. After the meeting we went back. I discussed it with Mr. Ward, and I discussed it with Mr. Royston. Mr. Royston said that it was a lesson in futility, that we were just trying to appease Pinney Dock and keep them quiet. He said Pinney Dock would never get into the Ashtabula switching district, and it would be over his dead body before it got there. Those were the exact words used.

Id. According to Judge **[**104]** Thomas, "these letters and statements of Penn Central in the 1970's would permit the trier of fact to find that Penn Central affirmatively misled Pinney into believing that it was willing to 'take care' of Pinney Dock's iron ore requests." *Id.*

The defendants argue in their brief that both of these conclusions by the district court should be rejected because the evidence in the record as a whole establishes as a matter of law that Pinney's purported reliance on Penn Central's representations was not "reasonable." *See* *Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d at 250.* **[*1477]** In support of this argument, the defendants claim:

> As early as August 31, 1971, Mr. Walker, Pinney's president, stated that he expected Penn Central to "say 'no' to our rate request or, at the least, attempt to stall us, as they had been doing in the past." On October 7, 1971, Mr. Walker again stated his belief that "Penn Central and the B & O/C & O do not want a private dock with lower handling rates in the picture during this time period, which could well be 5/10 years, due to the effect this new rate would have on existing handling rates of their lessees and possibly **[**105]** themselves." On February 4, 1972, Mr. Walker wrote to Pinney's legal counsel, Mr. Beery, that it "does appear that we will not obtain the

> iron ore rate from Penn Central on a friendly basis," to which Beery on February 10, 1972 responded that "the present combination will last for at least another decade."

As described above, in 1968 and 1969, when Pinney asked Penn Central for a line-haul rate, Penn Central refused. Penn Central explained that it was following a recommendation made at a CCIOC meeting and that the reason for the refusal was that the interest of the railroads and the iron ore shippers was to restrict line-haul rates to a few docks from which ore moved in large and steady volume. However, Pinney's Mr. Weir testified in a deposition that he did not believe that Penn Central was governed by the CCIOC recommendation, because he "knew that the Penn Central had the right" to act independently of the CCIOC. *Pinney Dock*, 1983-2 Trade Cas. (CCH) para. 65,608 at 69,049. Weir also testified that he believed the reason that Penn Central gave for the recommendation: "Being a traffic man, I could conceive of no other reason [for Penn Central denying **[**106]** a commodity rate] than that they had some reservations as to whether we could handle the minimum tonnage required on this iron ore rate." *Id.* at 69,049 n.16.

In denying summary judgment, the district court stated that it was unclear whether Weir should have known that Penn Central had submitted to the CCIOC recommendation. The judge stated that "the trier of fact may infer . . . that Weir was warranted" in doubting that Penn Central had surrendered its right of independent action. *Id.* Also, the court ruled that Penn Central's report of the CCIOC recommendation "did not as a matter of law inform Pinney of the existence of the alleged railroad conspiracy." *Id.* at 69,050.

We have, as did the district judge, reviewed the evidence concerning the relationship of the parties quite thoroughly. We conclude that it may contain the seeds of support for the finding of the district judge that a factual question of actual concealment was presented. However, we also conclude that the record leads us to the same conclusion reached by Judge McCree in *Gaetzi*, namely that the time eventually arrived when "the alleged conspiracy was no longer concealed and could have been discovered **[**107]** by due diligence well within the statutory period for bringing suit." *Gaetzi, 205 F. Supp. at 623*.

In August 1970 Beery wrote a file memo that was a record of his meeting with Weir and Pinney's president, Walker. The memo said: "It appears that we have an antitrust action. . . . I advised that I had no knowledge as to antitrust actions but that I would obtain and consult the services of someone who is knowledgeable." Walker's desk calendar contains a notation referring to the meeting: "Will sue [Penn Central] under antitrust laws. . . ." A memo by Weir also mentions the possibility "of filing an antitrust action."

In September 1971 Beery wrote to Walker:

> You should consider the formal complaint to the Interstate Commerce Commission possibly followed by an anti-trust action against Penn Central. It would appear that the first action taken must be to the Interstate Commerce Commission, as that agency has the jurisdiction of the dispute.
>
> * * *
>
> We are considering coupling any administrative action with some widely based investigation of the conditions now prevailing upon the Great Lakes in relation **[*1478]** to the unloading of iron ore and the monopolistic **[**108]** conditions there that may significantly affect the public.

In February 1972 Beery wrote Walker a letter strongly urging that Pinney fight Penn Central under the antitrust and interstate commerce laws. This four-page letter contained only one legal argument: "If you can show that the self-unloader vessel will only be built after the rates are established for this type of unloader, then you can show that you are being damaged by Penn Central's refusal to publish competitive rates." The rest of the letter emphasized the business advantages to Pinney Dock of fighting. The tone of the letter is captured in its final sentence: "We can provide the technical means with which to fight this combination, but you have to provide the spirit and the perseverance." In a postscript Beery offered to go to Pinney Dock's office the next month to discuss "possible solutions and alternatives."

In January 1973 Walker responded that he thought that legal action "would be a waste of time and money," that he preferred to wait until Pinney had more self-unloader capacity, and that it would not harm Pinney to "delay court action" until then.

In holding that there is an issue of fact as to whether **[**109]** Pinney knew of its cause of action, the district court relied on Walker's testimony that Beery "didn't know what he was saying" about monopolistic conditions and on Beery's testimony that he was not familiar enough with the federal antitrust laws to understand what "monopoly" means under them. *Pinney Dock*, 1983-2 Trade Cas. (CCH) at 69,051. Defendants argued in the district court that if Pinney had been diligent, Beery's advice would have at least prompted the filing of an antitrust action, which "would have provided broad-based discovery of the detailed facts now alleged by Pinney." The court rejected the notion that obtaining discovery would have been a proper motive for filing an antitrust action. *Id.* at 69,055. This observation may in itself have been correct, but it has little relevancy to the realistic question of concealment. The knowledge that the railroads were acting in concert through their joint rate-making activities and any plain understanding of their self-interest was, in our opinion, bound to dispel any uncertainty as to their motive in failing to publish competitive rates. **[**110]** ***HN21***[] To hold that a tolling or suspension of the limitation of actions must continue unless or until proof positive existed of a wrong (which might never be established in fact) would abort the policy of the law of repose in statutes of limitations of diligence in the equitable principles permitting suspension of them. The plaintiffs are therefore limited in their remaining causes of action to acts and damages occurring within the statutory four year period preceding the filing of their action.

b. Affirmative Acts of Concealment of Litton's Cause of Action

The district court ruled that there also existed an issue of fact whether the Chesapeake & Ohio and Baltimore & Ohio Railroad Companies (C&O/B&O) created a false impression that they were willing to lease dock facilities to Litton.

The district court based its ruling on evidence of a meeting on April 30, 1971 between Litton's president, Preisser, and C&O/B&O's vice president, Sandmann. Before the meeting, Sandmann said in an internal memo that he planned to tell Preisser that C&O/B&O was willing to negotiate for the rental of "the so-called Grove Storage area." Sandmann also stated in the memo:

> A lease to Litton would, **[**111]** in effect, create a private dock, and the ore could conceivably be trucked . . . to inland mills. The railroad would lose control of the property. Other efforts have been made over the years to establish such private docks along Lake Erie and have been successfully resisted by the railroads.

Defendants argue that the ruling below was wrong, because the district court did not cite evidence that the railroad's expressions of interest in leasing were false or purposely misleading. As for Sandmann's statements that the railroad feared that a lease would allow Litton to "create a private dock" and that the railroads had in the **[*1479]** past "successfully resisted" attempts to create such private docks, defendants argue that such statements "merely recognized one disadvantage of arranging a lease."

The district court also based its holding on a letter that Litton received from Penn Central on March 19, 1971. Penn Central had filed a proposal with the CCIOC to establish a charge of $ 1.41 a ton for handling ore from self-unloading vessels. Litton protested what it described as an increase over the current rate of $.41 a ton. Penn Central responded in the March 19 letter that **[**112]** that rate of $.41 had never applied to self-unloaders. Penn Central closed the letter with the statement that the district court read as evidence of misrepresentation:

> As I have indicated to your Company before, we are ready at any time to join with you in attempting to improve the facilities and resolve the cost problems involved in lake-rail movements of iron ore and pellets.

Defendants argue that this "conclusory expression of good will cannot, without more, constitute evidence of active concealment of the alleged railroad conspiracy." We are compelled to agree. No reasonable person could read this letter in its context as anything other than a stiff rebuff of Litton's protest.

Further, defendants argue that the record shows that Litton was not misled by Penn Central's expression of good will. We agree. It was error to conclude otherwise upon this record.

The district court ruled that there existed a question of fact as to whether Litton knew of the facts constituting its cause of action before the statute of limitations expired. Some of the evidence at issue concerns the railroads' setting handling charges together. In March 1970 one Andberg, the president **[**113]** of a Litton subsidiary, told Preisser that the "railroads are meeting next week to discuss rate and future position." In an undated letter, Andberg said that he was told that Litton "could have difficulties with the railroads banding against [it]." Also, Andberg testified in a deposition that "it was common knowledge to me before I ever went to work for Wilson [the Litton subsidiary] that the railroads didn't want self-unloaders delivering iron ore." *Id.* Preisser knew that Sandmann, before their meeting on April 30, 1971, was planning to meet with other railroads "to discuss their terminal strategy on the Great Lakes and the relationship of that strategy to the new jumbo self-unloaders." In the same file memorandum Preisser described another conversation in which he had said that "we would not like the idea of the railroads colluding and/or meeting to determine their strategy on lake transfer terminals."

Andberg gave the following testimony in a deposition. When he was told that the railroads were banding against Litton, he "didn't know really" what that meant. He was aware of the rate bureau meetings but he "was not aware that they had meetings after their rate meetings **[**114]** and collectively got together" to make decisions directed against Litton. Preisser testified similarly:

> There were . . . ratemaking bureaus and rate filings which were published; and I presumed if they were having a meeting and they were going to discuss rates, they would do so in, you know, the proper form, whether it was at rate bureau meetings or public filing of a rate change or decision.

The district court held that there was an issue of fact as to whether Litton knew that the railroads acted collectively apart from rate bureau meetings.

On April 30, 1971 Sandmann told Preisser that C & O/B & O would not give Litton a lower handling charge for self-unloaders. After the meeting Preisser said that Sandmann "was intimidated by the other railroads and capitulated. He will not offer us an advantageous rate over their existing docks." In June 1971 Andberg was told that if C & O/B & O reduced its charges, "Penn Central would equalize. This would start a rate war."

Preisser testified about what he meant by his comment that Sandmann was intimidated:

> **[*1480]** He may have been intimidated by the other railroads' financial power, their responsiveness, **[**115]** their engineering, their car fleet size, the rapidity with which they could move and update their docks, arrangements which they might proceed to enter into with American Ship Building or some other Lake transportation carrier.

Plaintiffs argued in the district court that when they heard that Penn Central would match any reduction in C & O/B & O's handling charges, plaintiffs thought this meant that the railroads were willing to compete with each other, not that they were conspiring against Litton.

The district court held that Litton indeed might have understood Penn Central's threat "as a sign of competition and not collusion." As for the meeting in which Sandmann succumbed to the other railroads' pressure, the court stated:

> Even if plaintiffs knew that defendants met *privately* on April 29, this is not as a matter of law the equivalent of plaintiffs having knowledge that defendants had previously entered into and were furthering their alleged conspiracy to restrain the use and development of self-unloaders. Further, it may be found, as Preisser testified, that when he stated Sandmann was "intimidated" by the April 29 meeting, Preisser was referring to natural **[**116]** economic pressures rather than pressure resulting from a conspiracy. . . .

When Preisser became aware of Sandmann's meeting with the other railroads on April 29, 1971, Preisser knew in defendants' words "that the defendants were acting jointly to Litton's detriment with respect to handling charges," and should have suspected and investigated a possible conspiracy. As we have described above, on April 30, 1971 Sandmann and Preisser discussed C & O/B & O's handling charges and the possibility of Litton's leasing C & O/B & O dock facilities. The district court held that this meeting and other negotiations continuing through mid-1972 may have reasonably deterred Litton from investigating any suspicion of a conspiracy.

Once again our review of the evidence satisfies us that even if the defendants might conceivably have misled Litton initially, no reasonable person in the position of Litton could have long relied on such impressions nor have been dissuaded from exercising due diligence in investigating possible antitrust liability within the statutory period.

In conclusion, while we could properly have declined to address the statute of limitations issue upon the basis that **[**117]** a lenient standard of abuse of discretion applies to the denial of motions for summary judgment, we have concluded that the principles of *Alexander v. Aero Lodge, 565 F.2d 1364*, strongly counselled us to reach and decide this issue. There was as much before the district court and before us as there is likely ever to be. And since we conclude that no genuine issue of fact exists to warrant the tolling of the federal four year statute of limitations, the task for the parties and the court will be substantially lessened by our so ruling at this juncture. In short, therefore, the plaintiffs are limited in their proof of federal antitrust violations to conduct occurring within four years of their commencement of action.

As we shall shortly illustrate, we realize that this ruling does not affect plaintiffs' cause of action under the Valentine Act. The impact of our ruling will be summarized in the "conclusion" section of this opinion.

VII. PREEMPTION OF OHIO'S NO-LIMITATION STATUTE

Ohio Revised Code § 1331.12 provides: ***HN22***[] "No statute of limitation shall prevent or be **[**118]** a bar to any suit or proceeding for any violation of" Ohio's ***antitrust law***, the Valentine Act, *Ohio Rev. Code §§ 1331.01-1331.14*. ***HN23***[] Federal antitrust actions are limited by the four-year period of section 4B of the Clayton Act, *15 U.S.C. § 15b*. Plaintiffs appeal the district court's ruling that section 4B preempts application of *section 1331.12* to pendent claims that are brought under the Valentine Act and could **[*1481]** be brought under federal ***antitrust law*** if not for the statute of limitations.

The standards for deciding a preemption question are well established. ***HN24***[] State law in a given field can be preempted either entirely or to the extent that it conflicts with federal law. A conflict between state and federal law arises when "'compliance with both federal and state regulations is a physical impossibility,' . . . or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985)* **[**119]** (citations omitted). *See also* *Jones v. Rath Packing Co., 430 U.S. 519, 525-26, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977)*.

In the present case there is no suggestion that Congress has preempted the entire field of antitrust regulation or that it is impossible to comply with both federal and Ohio law. The issue, then, is whether Ohio's no-limitation statute "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" in enacting a four-year statute of limitations.

Before the enactment of section 4B of the Clayton Act in 1955, there was no federal statute of limitations for antitrust claims, and courts borrowed analogous state limitation periods and applied them to federal claims. *See* *Chattanooga Foundry & Pipeworks v. Atlanta, 203 U.S. 390, 51 L. Ed. 241, 27 S. Ct. 65 (1906)*. When Congress was considering the proposed section 4B, twenty-two of the forty-eight states were applying limitations periods of over four years. *See* S. Rep. No. 619, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Cong. & Admin. News 2328, 2331-32. Some states had enacted their own antitrust laws by then, and Congress presumably knew that **[**120]** courts might continue to apply statutes of limitation longer than four years to state claims. Congress' silence in the face of this possibility can be seen as acquiescence.

Ohio's no-limitation provision was itself in effect when section 4B was enacted. *See* Act of May 18, 1910, 101 Ohio Laws 274, 276 (1910). We cannot apply the normal presumption that Congress knew of the existence of the provision, *see* *New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 414, 37 L. Ed. 2d 688, 93 S. Ct. 2507 (1973)*, because in fact Congress did not know of it. In 1952 a United States district judge in the Northern District of Ohio, ignoring the no-limitation provision, held that federal antitrust claims were governed by Ohio's six-year limitation on actions to enforce a liability created by statute. *See* *Reid v. Doubleday & Co., 109 F. Supp. 354*

(N.D. Ohio 1952). The Senate Report, *supra*, at 2331, cited this case as the source for the Ohio statute of limitations applicable to antitrust claims and did not cite the Valentine Act.

One apparent reason for enacting section 4B of the Clayton Act was that Congress at the same time enacted section **[**121]** 4A, *15 U.S.C. § 15a*, which provides for antitrust damages actions by the United States. *See* Act of July 7, 1955, Pub. L. 84-137, 69 Stat. 282 (1955). These actions are also subject to the limitation period in section 4B. *15 U.S.C. § 15b*. In allowing the federal government to sue for damages, Congress had good reasons to set a federal statute of limitations. If Congress had not set a federal statute of limitations, damage suits by the federal government would have been hampered in states having a limitation period of less than four years. Furthermore, it would look unfair for the federal government to sue one party and not another, when the conduct of both violated federal ***antitrust law*** but they operated in different states. Thus, enforcement of federal law would have justified enacting section 4B and leaving state limitation periods intact.

There are indications, however, that Congress might have intended to preempt state statutes of limitation. The Senate Report noted the following problems that inconsistent statutes cause:

(1) Plaintiffs in different states injured by the same interstate conduct do not have the same opportunities **[**122]** to recover.

(2) The plaintiff can shop for the forum with the longest statute of limitations, and "the defendant remains in constant jeopardy **[*1482]** until the longest period of limitations has transpired."

(3) When there is a choice between two states' statutes of limitation, the question of which state's law applies -- that of the forum or that of the situs of the injury -- creates confusion.

After setting out these problems, the Senate Report stated: "It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law. . . ." Senate Report, *supra*, at 2331.

The main reason for the district court's decision was that if state statutes of limitation are not preempted -- a question that has arisen only recently and only in regard to Ohio, *see Ohio ex rel. Brown v. Klosterman French Baking Co.*, 1977-1 Trade Cas. (CCH) para. 61,361 (S.D. Ohio 1976) -- the confusion in choice of law may return along with differences in defendants' exposure time and plaintiffs' ability to recover.

We have very carefully considered the trial court's conclusion that Ohio's ***antitrust law***, as provided under the Valentine **[**123]** Act, should be subject to the federal four-year limitation period notwithstanding Ohio's provision that no statute of limitation should be a bar to any proceeding for the violation of its ***antitrust law***. The trial judge's ruling is appealing in many respects. Although we recognize the disadvantages which must inherently exist in a statute which is subject to no limitation, we are not convinced that the correct result was reached below.

Congress primarily focused on limiting federal antitrust actions. It was concerned that private enforcement of federal rights would be subject to a wide variety of state borrowing statutes. Congress was even more intent upon limiting the enforcement powers of the federal government itself. The establishment of a federal statute of limitations eliminated the possibility that federal enforcement would vary with the law of the jurisdiction in which the cause of action arose. We believe this is what the Senate Report was primarily addressing. Since Congress was well aware that there were state antitrust laws in effect and chose not to preempt them, we believe that neither did it intend to preempt anything in them, including statutes of limitations or provisions **[**124]** excluding them. We make no comment, of course, on what other constitutional, statutory or common law inhibitions there may be under Ohio law which might act as a bar to keeping such actions open in perpetuity. In short, to the extent to which the district court has pendent jurisdiction to adjudicate the rights of the parties under the Valentine Act, we hold that ***HN25***[] the four-year federal statute of limitations does not preempt *Ohio Revised Code § 1331.12*.

CONCLUSION

We harbor no illusions that we have resolved all of the problems which face the parties and the court in this extended litigation. Given the nature of the many rulings and the vagueness of the certification procedure employed both by the district court and by our court, we are not even certain that we have addressed all of the issues which arguably may have been included in the certification. To the extent the trial court and the parties are unable to glean any resolution of those unresolved questions that may have been certified, those questions are decertified.

Summarizing what we have reached here and decided on interlocutory **[**125]** appeal, we hold as follows:

(1) With regard to immunity under *Keogh* and under the Interstate Commerce Act all rate-related claims made by the plaintiffs, whether state or federal, must be dismissed.

(2) Following *Square D* and its disposition by the Supreme Court on remand, certain non-rate-related claims must survive, at least at this stage, and are therefore remanded to the district court for further proceedings, as follows:

(a) the claim that the defendants refused to permit Litton to purchase, lease or use dock facilities that could take self-unloaders;

(b) the claim that defendants used harassing tactics to try to forestall legitimate **[*1483]** business activities of competitors [to the extent that this claim is not rate-related];

(c) the claim that defendants refused to handle self-unloading vessels at defendants' docks;

(d) plaintiffs' claim that defendants boycotted Pinney;

(e) the claim that defendants divided markets; and

(f) any other non-rate claim that plaintiffs might make by amendments, subject always of course to the exercise of its discretion in that regard by the trial court.

(3) With respect to standing, all rate-related claims except **[**126]** for Pinney's claim that defendants did not grant it a commodity line-haul rate, which were not raised on appeal, again are subject to dismissal on the alternate basis of standing. Further, claims (a) and (c), referring to the defendants' refusal to permit Litton to purchase, lease or use dock facilities and the defendants' refusal to handle self-unloading vessels at their own docks, are dismissed as to Pinney Dock in their entirety.

(4) The federal four-year statute bars all claims under federal law that occurred four years before the lawsuit was commenced. Plaintiffs' claim in that regard that accrual of the cause of action was tolled by fraudulent concealment is rejected because if in fact concealed, any such causes of action were nonetheless discovered or could with reasonable diligence have been discovered notwithstanding such a concealment and well within the appropriate time for commencing such actions. We do not hold that all claims are time-barred and the defendants' motion to dismiss on that has not sought such relief.

(5) The provision in Ohio's Valentine Act providing for no statute of limitations is not preempted by the federal four-year statute.

(6) All issues not **[**127]** otherwise addressed in this opinion are decertified and the case is remanded to the district court for further proceedings consistent herewith.

Chanute v. Williams Natural Gas Co.

United States District Court for the District of Kansas

February 5, 1988, Decided ; February 5, 1988, Filed

No. 87-1463-K

Reporter

678 F. Supp. 1517 *; 1988 U.S. Dist. LEXIS 957 **; 1988-1 Trade Cas. (CCH) P67,977

City of Chanute, Kansas; City of Auburn, Kansas; City of Cleveland, Oklahoma; City of Garnett, Kansas; City of Humboldt, Kansas; City of Iola, Kansas; City of Neodesha, Kansas; and City of Osage, Kansas, Plaintiffs, v. Williams Natural Gas Company, Defendant

Subsequent History: On Motion to Modify February 9, 1988.

Core Terms

pipeline, transportation, contracts, customers, long-term, natural gas, injunction, prices, producers, take-or-pay, open access, interstate, sales, third party, preliminary injunction, Sherman Act, terminated, purchaser, exposure, relevant market, facilities, regulation, suppliers, monopoly power, consumers, duplicate, irreparable, open-access, competitor, conditions

LexisNexis® Headnotes

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

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

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Oil & Petroleum Products > Processing & Refining > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

Energy & Utilities Law > Utility Companies > General Overview

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

HN1[] **Natural Gas Industry, Natural Gas Act**

The fundamental goal of the Natural Gas Act of 1938 (NGA) is still intact, that being to protect consumers from exploitation at the hands of natural gas companies. Under the NGA, the Federal Power Commission, the predecessor to Federal Energy Regulatory Commission, set price ceilings for sales from producers to pipelines and also regulated the prices pipelines could charge to their downstream customers.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Natural Gas Policy Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Policy Act > Wellhead Price Regulation

HN2[] **Natural Gas Industry, Distribution & Sale**

In the Natural Gas Policy Act, Congress substantially terminated the Federal Energy Regulatory Commission's wellhead price regulation by defining eight categories of natural gas production and setting ceiling prices for "first sales" in each category. *15 U.S.C.S. §§ 3311-33*.

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

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

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Hearings & Orders > Judicial Review

Energy & Utilities Law > Natural Gas Industry > Common Carriage Obligations

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Policy Act > General Overview

Energy & Utilities Law > ... > Purchase Contracts > Take-or-Pay Contracts > General Overview

Energy & Utilities Law > Pipelines & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Access

Energy & Utilities Law > Pipelines & Transportation > Certification & Licenses

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

HN3[] **Natural Gas Industry, Natural Gas Act**

Federal Energy Regulatory Commission Order No. 436 is a highly complex order. It basically imposes open access commitment on any pipeline that (1) secures a "blanket certificate" to provide gas transportation pursuant to § 7 of the Natural Gas Act of 1938, *15 U.S.C.S. § 717f*, or *(2)* actually provides transportation under § 311 of the Natural Gas Policy Act, *15 U.S.C.S. § 3371*. It further provides that if a pipeline holds itself out as a transporter of gas for others, the pipeline's local distribution company customers then have an opportunity to convert their existing contract demand from an obligation to purchase gas to an obligation to use or pay for transportation services.

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > General Overview

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

Energy & Utilities Law > Natural Gas Industry > Natural Gas Policy Act > General Overview

HN4[] **Oil, Gas & Mineral Interests, Purchase Contracts**

Federal Energy Regulatory Commission Order No. 451 established procedures for the renegotiation of low, old, pre-Natural Gas Policy Act (NGPA) gas prices and the release of gas covered by such pre-NGPA gas purchase contracts. *18 C.F.R. § 270.201 (1987)*.

Energy & Utilities Law > Natural Gas Industry > Common Carriage Obligations

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

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Financing > Grants & Reservations > General Overview

Energy & Utilities Law > Pipelines & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Access

Energy & Utilities Law > Pipelines & Transportation > Certification & Licenses

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

HN5[] **Natural Gas Industry, Common Carriage Obligations**

Under the good faith negotiation process, a producer is permitted to abandon a contract only if the producer first seeks a higher price for its old gas, is unable to agree with the purchaser on a suitable price, and finds another purchaser. *18 C.F.R. § 270.201(b)* and *(c) (1987)*. Further, if a tentative new purchaser is not a firm sales customer of the existing purchaser, and the existing purchaser is not an open-access transporter under Federal Energy Regulatory Commission Order No. 436, firm sales customers of the existing purchaser have a right of first refusal. *18 C.F.R. § 270.201(g) (1987)*. Finally, interstate pipelines that are not open access transporters under the provisions of Order No. 436 will be granted blanket transportation certificates and will be deemed to have agreed to deliver on behalf of any shipper any gas released under this rule to any of its existing customers or interconnected pipelines. *18 C.F.R. § 270.201(h) (1987)*. Thus, while pipelines will not become open-access transporters by virtue of such transportation, they may be obligated to transport gas to their own customers under certain conditions.

Energy & Utilities Law > ... > Purchase Contracts > Take-or-Pay Contracts > General Overview

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

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

Energy & Utilities Law > Pipelines & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

HN6[] **Purchase Contracts, Take-or-Pay Contracts**

Federal Energy Regulatory Commission Order No. 500 basically provides a crediting mechanism whereby pipelines which transport gas for producers under Order No. 436 may receive a credit against their obligations to take a similar volume of gas under take-or-pay contracts with those same producers.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN7[] **Injunctions, Preliminary & Temporary Injunctions**

Before a preliminary injunction may be granted, four prerequisites must be satisfied by the moving party. The movant must establish: (1) a showing that the movant will suffer irreparable injury unless the injunction issues; (2) proof that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) a showing that the injunction, if issued, would not be adverse to the public interest; and (4) a substantial likelihood that the movant will eventually prevail on the merits. Where the first three requirements for a preliminary injunction are satisfied, the United States Court of Appeals for the Tenth Circuit has lessened the moving party's burden of proof on the fourth requirement. If the other elements are present, it will ordinarily be enough that the plaintiff has 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. The function of a preliminary injunction is to preserve the status quo pending the outcome of the case. As a preliminary matter, the court must consider whether the grant of a preliminary injunction would preserve or upset the status quo.

Civil Procedure > Remedies > Damages > Monetary Damages

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN8[] **Damages, Monetary Damages**

The most important prerequisite for the issuance of a preliminary injunction is a showing that if the injunction is not granted, the movant will suffer "irreparable harm" before a decision on the merits can be rendered. A preliminary injunction will usually be denied if monetary damages are sufficient to compensate a plaintiff.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

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

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

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

HN9[] Natural Gas Industry, Distribution & Sale

Section 4(b) of the Natural Gas Act of 1938 provides that no natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Federal Energy Regulatory Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. *15 U.S.C.S. § 717c(b)*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

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

HN10[] Sherman Act, Claims

In order to prevail on the merits, plaintiffs must prove the defendant has violated *§ 2* of the Sherman Act. The offense of monopolization under *§ 2* of the Sherman Act has two elements: (1) The possession of monopoly power in the relevant market; and (2) The willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The United States Court of Appeals for the Tenth Circuit has defined monopoly as the ability to control prices and exclude competition. While the two elements are closely related, both must be demonstrated to establish the existence of monopoly power.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Antitrust & Trade Law > Regulated Industries > General Overview

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

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

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Antitrust Issues > Monopolization

Energy & Utilities Law > Natural Gas Industry > Common Carriage Obligations

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Access

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

HN11[] Natural Gas Industry, Distribution & Sale

Under the essential facilities or bottleneck doctrine, a business or group of businesses which control a scarce facility has an obligation to give competitors reasonable access to it. The bottleneck theory differs from traditional monopolization analysis in that the intent factor is de-emphasized and emphasis is placed instead on the surrounding market conditions. Further, the doctrine is particularly applicable to natural gas pipelines and their refusal to transport third party gas.

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

HN12[] Monopolies & Monopolization, Actual Monopolization

The four elements necessary to establish liability under the essential facilities doctrine are: (1) Control of the essential facility by a monopolist;(2) A competitor's inability to duplicate the facility; (3) Denial of the use of the facility to a competitor; and (4) The feasibility of providing the facility.

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

Energy & Utilities Law > Antitrust Issues > General Overview

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

HN13[] Regulated Practices, Market Definition

The relevant market must be proven regardless of the type of § 2 of the Sherman Act claim utilized by plaintiff.

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

HN14[] Regulated Practices, Market Definition

The existence or absence of monopoly power cannot be determined in a vacuum but rather must be measured within a defined market.

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

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

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

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

HN15[] Relevant Market, Geographic Market Definition

Determining the relevant market typically requires an inquiry into the nature of the product and the geographical area of effective competition. The relevant product market is generally defined to be that area of goods or services in which the product or products offered by the defendant effectively compete while the relevant geographic market is generally defined to be the geographic area of effective competition in which the product or services is traded.

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

HN16[] **Monopolies & Monopolization, Actual Monopolization**

The essential facility doctrine is applicable only where the firm which controls the essential facility refuses to allow access to the facility to a competitor.

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

HN17[] **Monopolies & Monopolization, Actual Monopolization**

The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. The same may properly be said of *§ 2* cases under the Sherman Act. That Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency.

Counsel: **[**1]** Wheatley & Wollesen, Stumbo, Stumbo, Hanson & Hendricks, for Plaintiff.

Hall, Estill, Hardwick, Gable, Golden & Nelson, Adams, Jones, Robinson & Malone, B. E. Potts, Gen. Counsel, Williams Natural Gas Co., for Defendant.

Judges: Patrick F. Kelly, Judge.

Opinion by: KELLY

Opinion

[*1519] MEMORANDUM AND ORDER

PATRICK F. KELLY, JUDGE

Plaintiffs, Cities of Chanute, Auburn, Garnett, Humboldt, Iola, Neodesha, and Osage City, Kansas, and Cleveland, Oklahoma ("Cities"), seek an injunction compelling defendant Williams Natural Gas Company ("Williams" or "WNG") to permanently open access to its interstate natural gas pipeline which is connected to each of the plaintiff Cities. The Cities allege Williams' failure to open access to its pipeline to alternate suppliers of natural gas constitutes an intentional monopoly in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*.

This action was filed on August 3, 1987, and on August 7, 1987 a hearing was held before the Honorable Frank G. Theis on plaintiffs' motion for a temporary restraining order. In a ruling from the bench, Judge Theis denied the plaintiffs' motion. The Cities subsequently filed the motion for preliminary injunction now pending before this court.

A hearing on the preliminary injunction motion was **[**2]** held on October 20-23, 27-28 and November 16-19, 1987 (hereafter referred to as "hearing"). After the hearing, the parties submitted extensive briefs detailing their proposed findings of fact and conclusions of law. Final oral argument on the motion was held January 25, 1988, at which time the court announced that it would grant the requested injunction. However, the court stated the injunction would not take effect until it issued a full written memorandum and order. Accordingly, the court is now prepared to make written findings and conclusions on the plaintiffs' motion for a preliminary injunction.

Factual Background

Plaintiff Cities are each municipalities with their own natural gas distribution systems. The Cities purchase natural gas at wholesale and then resell it to residential, commercial and industrial customers within the Cities and surrounding areas.

Defendant Williams Natural Gas is a Delaware corporation with its principal place of business in Tulsa, Oklahoma. Williams is engaged in the business of interstate sale and transportation of natural gas, and as such is regulated by the Federal Energy Regulatory Commission ("FERC" or "the Commission"). Williams obtains gas **[**3]** from producing fields in various states, transmits the gas to its service areas, and delivers it to customers in Kansas, Oklahoma, Missouri and Nebraska. Williams' customers are primarily of two types: (1) local distribution companies ("LDCs"), such as the plaintiff Cities, which purchase gas from WNG at a "margin" or "markup", and resell the gas to the ultimate consumers; and (2) industrial gas users which purchase gas directly from WNG.

Each of the plaintiff Cities in this action can be characterized as an "LDC" and has or has had a "full requirements" contract with WNG. Under such contracts, the Cities must purchase all of their gas requirements from WNG, and WNG must maintain sufficient gas reserves to meet those requirements. For purposes of this case, there are essentially two types of rates and services available to the Cities **[*1520]** under "full requirements" contracts: firm service (F-2 rates -- $ 3.16 and $ 3.26/mcf), which is primarily for residential customers; and large industrial service (I-2 rates -- $ 2.75/mcf). Under either service, the gas is purchased by the Cities for resale to residential and industrial users.

In addition to these full requirements contracts, all of the **[**4]** Cities, except Auburn and Cleveland, have direct sale contracts with WNG to purchase gas for delivery to and use by the Cities in their municipal electric power plants. These contracts are known as "interruptible service" contracts and differ substantially from "full requirements" contracts. Interruptible service is provided on a "when available" basis, and accordingly, may be interrupted during periods when demand for gas is greatest. Further, either party can terminate such contracts upon 30 days' notice.

With the exception of the cities of Cleveland and Garnett, all of the plaintiff Cities currently have "full requirements" contracts in place with WNG, and the parties continue to operate under those contracts. Cleveland and Garnett's contracts with WNG expired by their own terms in May of 1987. [1] However, those two cities continue to purchase natural gas from WNG under the full requirements resale service provided under WNG's FERC certificate and tariff.

[5]** WNG's pipeline is the only major interstate pipeline serving plaintiff Cities, and prior to December, 1986, other natural gas suppliers did not have access to Williams' pipeline. However, prompted by the FERC's issuance of Order No. 436 (see discussion at pp. 12-14), WNG opened its pipeline to transportation gas on an interim basis on December 22, 1986. Under this "open-access" system, the Cities had an opportunity to purchase natural gas from third parties (e.g., other producers and marketing companies) and have that gas transported over WNG's pipeline. In return for transporting the gas, Williams received a fee called a "transportation rate". In order that the Cities could purchase gas from other sources, FERC temporarily waived its certificate and tariff provisions and Williams temporarily waived its "full requirements" contract provisions with the Cities.

Thus, while the "full requirements" provisions were waived, WNG's customers (including the plaintiff Cities) were free to replace all or any part of the gas they normally purchased from WNG with third party gas.

By April of 1987, WNG's customers were purchasing from third parties large volumes of gas previously purchased from **[**6]** WNG. WNG's vice president of marketing and supply, Jack Finch, testified at the hearing that by July of 1987, 80 % of WNG's sales of system supply gas had been converted to transportation. Finch further testified that as a result of the reduced sales, WNG's "take-or-pay" exposure increased dramatically during the period of open access. (Note: "take-or-pay" contracts between pipelines and producers commonly require a pipeline to pay for a specified percentage of delivered gas whether or not it is in fact taken).

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[1] Williams' firm service contracts with Chanute, Humboldt and Neodesha will expire on April 22, 1988. The Osage City contract expires August 22, 1989, while Iola's contract expires December 22, 1989. Auburn's contract is the last to expire, on December 22, 1990.

Despite increasing take-or-pay exposure, WNG was able to keep the pipeline open until August 1, 1987, by negotiating with its producers (primarily Amoco Oil Company) for take-or-pay relief.

During the period of interim open access, each of the plaintiff Cities obtained gas from Vesta Energy Company ("Vesta"), a marketing company engaged in the sale at the wellhead of natural gas supplies. Some of the Cities contracted directly with Vesta while others contracted with a consultant, Leo Edison, who, in turn, contracted with Vesta. The contracts were of varying terms and duration but can be generally categorized as follows:

Cleveland

On December 9, 1986, the City of Cleveland, **[**7]** Oklahoma entered into a "natural gas sale agreement" with Leo Edison, whereby the City agreed to purchase gas from Edison **[*1521]** for a period of five years at a specified price of $ 2.71/mcf, and thereafter at $.50/mcf less than the price of WNG's gas. Pursuant to a written transportation agreement, WNG commenced transportation of that third party gas to the City of Cleveland in February, 1987.

Auburn, Humboldt, Iola and Osage City

The Cities of Auburn, Humboldt, Iola and Osage City also commenced the purchase of third party transport gas in June and July of 1987 under gas purchase agreements with Leo Edison. These agreements were of short-term duration ending in September or October of 1987, or were month-to-month arrangements which could be cancelled by either party on 30 days' notice. The gas purchased by these Cities was transported by WNG under written transportation agreements with each City.

The source of supply for Edison's contracts with the City of Cleveland, as well as with the Cities of Auburn, Humboldt, Iola and Osage City, was a five-year contract between Edison and Vesta. The contract provided for a base price of $ 1.50/mcf at the delivery point, to be adjusted every **[**8]** six months based on 70 % of the increase or decrease in WNG's average resale price to its customers.

Neodesha, Garnett and Chanute

The Cities of Neodesha, Garnett and Chanute also commenced transportation under WNG's interim open-access program in June, 1987, pursuant to written transportation agreements with WNG and direct sale agreements with Vesta. The City of Chanute purchased gas from Vesta under a month-to-month arrangement while the City of Neodesha purchased gas from Vesta under an agreement covering the months of June and July, 1987 (Pltfs' Ex. 5). The City of Garnett's agreement with Vesta covered only the month of June, 1987. While none of these three cities actually entered into a long-term contract with Vesta, the evidence at the hearing showed that negotiations for a long-term arrangement had been completed between these cities and Vesta when WNG announced the closing of its pipeline effective August 1, 1987. Vesta's vice president of gas sales, David Tudor, testified that except for the starting price, the terms of the long-term agreement contemplated by these three cities and Vesta were identical to the terms of the Vesta/Edison agreement. Tudor further testified **[**9]** that the contracts were not formalized because of uncertainty as to how long WNG would keep its pipeline open.

To summarize, at the time WNG closed its pipeline, the City of Cleveland, Oklahoma, and the Cities of Auburn, Humboldt, Iola and Osage City, Kansas, had available a long-term, low-cost supply of Vesta gas. While the Cities of Garnett, Neodesha and Chanute had no long-term contract in effect with either Vesta or Edison, the essential terms of such a contract had been agreed upon.

When WNG closed its pipeline on August 1, 1987, the Cities were again required to purchase gas from Williams at a price substantially higher than the price of gas available to them through Vesta. The Cities subsequently filed the instant action, alleging WNG's refusal to open the pipeline constitutes monopolization in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*, and seeking an injunction ordering WNG to open access to its pipeline to the plaintiff Cities.

Economic and Regulatory Environment

It is clear to the court that any analysis of this case must take into account the economic and regulatory environment in which the parties were operating. Accordingly, prior to discussing the elements **[**10]** required to issue a preliminary injunction, and whether plaintiffs have met those elements, the court first briefly summarizes relevant regulatory actions and their impact upon the natural gas industry, with particular emphasis on their effect upon the parties to this action.

Since the enactment of the Natural Gas Act of 1938, *15 U.S.C. § 717 et seq.*, the natural gas industry has undergone substantial and complicated changes. Yet ***HN1***[] the fundamental goal of the NGA is still intact -- that being to protect consumers from exploitation at the hands of natural gas **[*1522]** companies. *FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 88 L. Ed. 333, 64 S. Ct. 281 (1944)*; *Associated Gas Distributors v. F.E.R.C., 263 U.S. App. D.C. 1, 824 F.2d 981, 995 (D.C. Cir. 1987)*. Under the NGA, the Federal Power Commission (the predecessor to FERC) set price ceilings for sales from producers to pipelines and also regulated the prices pipelines could charge to their downstream customers. *Transcontinental Pipe Line v. Oil & Gas Bd., 474 U.S. 409, 420, 106 S. Ct. 709, 88 L. Ed. 2d 732 (1986)*. However, the price of interstate gas at the wellhead was fixed well below market and a discrepancy developed between the price for interstate **[**11]** gas and unregulated intrastate gas, and gas production was withheld from the interstate market. *Maryland People's Counsel v. F.E.R.C., 245 U.S. App. D.C. 365, 761 F.2d 768, 770 (D.C. Cir. 1985)*.

By the early 1970s, a serious gas shortage had developed, apparently caused in part by an imbalance between supply and demand brought on by the NGA's artificial pricing scheme. Thus, in 1978, Congress enacted "a new system of natural gas pricing" under the Natural Gas Policy Act ("NGPA"), *15 U.S.C. § 3301 et seq. Transcontinental Pipe Line v. Oil & Gas Bd., 474 U.S. at 421*.

HN2[] In the NGPA, Congress substantially terminated the Commission's wellhead price regulation by defining eight categories of natural gas production and setting ceiling prices for "first sales" in each category. *15 U.S.C. §§ 3311-33*. [2]

[12]** The effect of the NGPA on producers, as compared to interstate pipelines, has been summarized by FERC as follows:

> As a direct result of the NGPA, . . . a natural gas producer can now sell "new" gas to any purchaser -- an intrastate pipeline, an interstate pipeline, a local distribution company served by an intra- or interstate pipeline, an end user, a nonprofit consumer cooperative or what have you -- without federal restrictions as to market entry, market exit or price attaching to the sale. Similarly, an independent marketer can acquire a portfolio of gas purchase agreements and sell gas supply to any person, again without coming under any market entry, market exit or price regulation over the sale. In short, with respect to sales of the commodity by producers or marketers, Congress removed controls in recognition of the competitive nature of the commodity market for gas.
> An interstate pipeline, however, seeking to sell gas from its system supply (a commingled stream of gas that was at the wellhead both NGA-jurisdictional and NGA-nonjurisdictional) is subject to the full panoply of statutory regulation governing market entry, market exit and price. . . .
>
> The rationale for maintaining **[**13]** utility-type market entry, exit, and price regulation over the sales for resale of interstate pipelines while removing that regulation for similar sales by other market entities is only implicit in the NGPA but appears plain enough: While Congress concluded that gas production was sufficiently competitive to remove regulation, the control which interstate pipelines exercised over transportation still conferred on them the same kind of market power over their customers as had existed at the time of enactment of the NGA.

[2] The NGPA provided for the almost immediate deregulation of certain "high cost" gas, while for most "new gas" it established new ceilings and provided for gradual increases until scheduled deregulation on January 1, 1985 or July 1, 1987. The NGPA did not deregulate "old" interstate gas, but instead provided for adjustment of the price ceilings for inflation and authorized the Commission to raise former ceilings to higher "just and reasonable" levels. *Associated Gas Distributors v. F.E.R.C., 824 F.2d at 994*.

Order No. 436, *50 Fed. Reg. 42,408, 42,418 (1985)* (footnotes omitted).

Thus, interstate pipelines, like WNG, are still subject to pervasive regulation by FERC. For instance, pipelines must secure a certificate of convenience and necessity prior to performing any significant act -- e.g., construction of new facilities or initiation of new transportation service or new sales for resale. *15 U.S.C. § 717f(c)*. Pipelines also must obtain commission approval when they abandon any "certificated" facility, transportation or sale. *15 U.S.C.* **[*1523]** *§ 717f(b)*. Additionally, the commission limits to "just and reasonable" levels the prices at which the interstate pipelines sell gas for **[**14]** resale or provide transportation services. *15 U.S.C. § 717c(a)*.

During the natural gas shortage which occurred in the 1970s, pipelines were encouraged by the commission to develop supply reserves and enter into long-term contracts with producers. The long-term contracts commonly incorporated high prices (and provisions for escalation upward) as well as "take-or-pay" provisions, requiring pipelines to either take some specified percentage of the deliverable gas, or to make "prepayments" for that percentage anyway. *Associated Gas Distributors v. F.E.R.C., 824 F.2d at 995-96, 1021*.

It was during this period of time that Williams Natural Gas acquired extensive new gas reserves from Amoco Production Company in the Wamsutter and Moxa regions of Wyoming, most of which contained high NGPA incentive prices. WNG was able to add this high-priced gas to its system and still sell it at a competitive price by "rolling in" the cost of the high-priced Wyoming gas with the cost of inexpensive "old gas" (e.g., from the Hugoton field) to reach a relatively low weighted average cost of gas (WACOG).

However, by 1982 the combination of a number of factors (including energy conservation, mild winters **[**15]** and lower prices of competing fuels such as petroleum) resulted in falling gas prices and a natural gas surplus. Further, various economic factors raised the wellhead price of gas. Producers of gas, responding to high prices and high take-or-pay terms, continued to develop new supply sources of gas. But since gas demand had fallen off, and the market could not absorb supplies at prevailing prices, a surplus of gas deliverability resulted. Thus, producers sought open access to pipeline transportation as an alternative to pipeline sales for marketing their gas. Moreover, purchasers of natural gas sought to purchase gas directly from the producer and have it transported in competition with the system supplies the pipeline retained under uneconomic long-term contracts. Finally, interstate pipelines, seeking new markets and lower prices for both surplus gas supplies and surplus pipeline capacity, expressed reluctance to provide transportation services to other suppliers, particularly where transportation of gas would displace the pipeline's own sales volumes, subjecting the pipeline to substantial take-or-pay exposure.

Order No. 436

In response to these conditions, FERC promulgated **[**16]** Order No. 436, *50 Fed. Reg. 42,408 (1985)*, (codified at various sections of C.F.R.). This order was motivated by the Commission's determination that the pipelines' refusal to transport gas for third parties had caused serious market distortions.

The essence of Order No. 436 is "a tendency, in the industry metaphor, to 'unbundle' the pipelines' transportation and merchant roles." *Associated Gas Distributors v. F.E.R.C., 824 F.2d at 994*. While ***HN3***[] Order No. 436 is a highly complex order, it basically imposes open access commitment on any pipeline that (1) secures a "blanket certificate" to provide gas transportation pursuant to § 7 of the NGA, *15 U.S.C. § 717f*, or *(2)* actually provides transportation under § 311 of the NGPA, *15 U.S.C. § 3371*. It further provides that if a pipeline holds itself out as a transporter of gas for others, the pipeline's LDC customers then have an opportunity to convert their existing contract demand ("CD") from an obligation to purchase gas to an obligation to use (or pay for) transportation services.

In *Associated Gas Distributors v. F.E.R.C., 263 U.S. App. D.C. 1, 824 F.2d 981*, the District of Columbia Circuit Court of Appeals upheld the substance of Order No. 436, but recognized **[**17]** that FERC had failed to deal with the problem of uneconomic take-or-pay contracts between pipelines and producers. Accordingly, the court remanded Order No. 436 to the Commission with the directive to determine to what extent certain policy considerations may justify the Commission's inaction on the uneconomical producer-pipeline contracts. 824 F.2d at 1030.

[*1524] As has already been discussed, WNG commenced interim open access on December 23, 1986, in response to FERC's issuance of Order No. 436. By July, 1986, WNG had filed with FERC an Order 436 "Stipulation and Agreement" which detailed Williams' plans for a permanent open-access program. FERC approved Williams' stipulation and agreement on February 20, 1987, subject to substantial modifications and conditions. Williams found these conditions unacceptable, however, and began revising its stipulation and agreement. In October of 1987, a revised stipulation and agreement was distributed to WNG's customers and submitted for Commission approval. At this time, the Commission has still not approved WNG's permanent open-access proposals, and WNG is no longer operating under the interim open-access program.

Order No. 451

On June 6, 1986, **[**18]** FERC issued Order No. 451, 51 Fed. Reg. 22,168 (1986). ***HN4***[] Order No. 451 established procedures for the renegotiation of low, old, pre-NGPA gas prices and the release of gas covered by such pre-NGPA gas purchase contracts. 18 C.F.R. § 270.201 (1987). [3]

The commission issued Order No. 451 in an attempt to revise its methodology of regulating producer sales of "old gas" in response to changes in market conditions. The commission also recognized that the existing rate structure for old flowing gas had created at least three problems for natural gas consumers:

> First, the existing rates for most old gas are below the replacement cost of gas reserves. . . . Most producers of old gas are not receiving revenues equivalent to the marginal costs of replacing depleted old gas reserves, and gas reserves are being consumed faster than they are being replaced.. . .
>
> Second, the existing rates for old, flowing gas vary widely by vintage, based on the date of its dedication to interstate commerce. The overall prices consumers **[**19]** pay for gas depend directly on the access of their pipeline suppliers to these cheaper vintages of gas. Therefore, wide variations in pipeline access to old gas have created huge disparities in the prices consumers pay for gas at the burner-tip around the country. . . .
> Third, the pricing of old, flowing gas below replacement cost gives pipelines with large "cushions" of such gas the ability to "roll-in" their prices of new and deregulated gas with artificially low old gas prices. This allows the pipelines to effectively subsidize the prices of new and deregulated gas above what consumers would otherwise be willing to pay, and therefore frustrates the efficient working of competitive wellhead markets.

51 Fed. Reg. at 22,172.

Order No. 451 establishes a single alternative ceiling price for categories of "old gas" committed or dedicated to interstate commerce before enactment of the NGPA, and eliminates the various ceiling prices for different "vintages" of old gas previously set according to when the gas reserves were produced.

However, before a producer may collect a higher price for its old gas under an existing contract, it must first enter into what is known as a "good faith negotiation" **[**20]** ("GFN") process with the purchaser. ***HN5***[] Under the GFN process, a producer is permitted to abandon a contract only if the producer first seeks a higher price for its old gas, is unable to agree with the purchaser on a suitable price, and finds another purchaser. 18 C.F.R. § 270.201(b)&(c) (1987). Further, if a tentative new purchaser is not a firm sales customer of the existing purchaser, and the existing purchaser is not an open-access transporter under Order No. 436, firm sales customers of the existing purchaser have a right of first refusal. 18 C.F.R. § 270.201(g) (1987). Finally, interstate pipelines that are not open access transporters under the provisions of Order No. 436 will be granted blanket transportation certificates and will **[*1525]** be deemed to have agreed to deliver on behalf of any shipper any gas released under

[3] A case seeking review of Order No. 451 is currently pending before the Fifth Circuit Court of Appeals. *See Mobil Oil Exploration Co. v. F.E.R.C.*, Case No. 86-4940.

this rule to any of its existing customers or interconnected pipelines. *18 C.F.R. § 270.201(h) (1987)*. Thus, while pipelines will not become open-access transporters by virtue of such transportation, they may be obligated to transport gas to their own customers under certain conditions.

As for the instant case, testimony at hearing indicated that several producers have **[**21]** entered into or completed the GFN process with WNG, and "451 gas" released pursuant to those negotiations has been made available to the Cities in at least three instances. Specifically, since June of 1987, Cabot Petroleum Corporation, Dakar Operating Company, and Mesa Petroleum have offered 451 gas to the Cities.

The Cities declined to accept the Cabot offer because it was for interruptible gas with prices and quantities to be renegotiable each month. The Dakar offer required the buyer to construct and maintain pipelines and meters at the wells located approximately 800 to 1,000 miles from Chanute. The Mesa proposal, which called for a price of $ 2.85/mcf, plus a transportation charge of $.52/mcf, was not acceptable to the Cities because it was "not competitive with Vesta." Finally, both Tenneco Oil Exploration & Production Company and Mobil Oil Corporation have entered into the Order No. 451 GFN process with WNG, but the process is not yet complete. Accordingly, the terms at which that gas will be offered to the Cities are not yet known.

Order No. 500

In response to the remand of Order No. 436 by the Court of Appeals in *Associated Gas Distributors*, the Commission issued **[**22]** Order No. 500 on August 7, 1987. ***HN6***[] Order No. 500 basically provides a crediting mechanism whereby pipelines which transport gas for producers under Order No. 436 may receive a credit against their obligations to take a similar volume of gas under take-or-pay contracts with those same producers.

There are, however, some situations in which pipelines must transport gas without credits. The most obvious situation occurs when the pipeline does not have a take-or-pay contract with the producer who owned the gas being transported by the pipeline. In such a case, there could be no credits because there would be no qualifying take-or-pay contract against which to apply any credits.

A second situation in which a pipeline must transport a producer's gas without credits occurs when a pipeline transports gas which it previously purchased under a terminated take-or-pay contract, and which is not presently committed to the pipeline. For instance, if a producer-pipeline contract has been terminated under Order No. 451, no credits would be available to a pipeline which later transported the same producer's gas. However, for a contract to be considered terminated under Order No. 451, sales of all gas **[**23]** covered by that contract must have been abandoned or terminated under No. 451's GFN rule.

Conclusions of Law

HN7[] Before a preliminary injunction may be granted, four prerequisites must be satisfied by the moving party. The movant must establish: (1) a showing that the movant will suffer irreparable injury unless the injunction issues; (2) proof that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) a showing that the injunction, if issued, would not be adverse to the public interest; and (4) a substantial likelihood that the movant will eventually prevail on the merits. *Amoco Oil Co. v. Rainbow Snow, Inc., 809 F.2d 656, 661 (10th Cir. 1987)*; *City of Chanute v. Kansas Gas & Electric Co., 754 F.2d 310, 312 (10th Cir. 1985)*. Where the first three requirements for a preliminary injunction are satisfied, the Tenth Circuit has lessened the moving party's burden of proof on the fourth requirement. The court has held: "'If the other elements are present . . . it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground **[**24]** for litigation and thus for more deliberate investigation.'" **[*1526]** *Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980)*, (*quoting* *Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 781-86* [10th Cir. 1964]). The function of a preliminary injunction is to preserve the status quo pending the outcome of the case. *Tri-State Generation v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986)*.

Thus, as a preliminary matter, the court must consider whether the grant of a preliminary injunction would preserve or upset the status quo.

Williams argues a preliminary injunction could only alter the status quo because Williams' pipeline is currently closed to transportation of third party gas and the plaintiffs seek to open the pipeline. The Cities point out, however, that Williams' pipeline was open until August 1, 1987, and the Cities, by filing the instant action, were only attempting to preserve the status quo as it existed prior to August 1, 1987. The court finds the Cities' argument persuasive, particularly in light of the fact the Cities filed this action on August 3, 1987, only two days after WNG had ceased open access.

Irreparable Harm

Perhaps ***HN8***[] the most important **[**25]** prerequisite for the issuance of a preliminary injunction is a showing that if the injunction is not granted, the movant will suffer "irreparable harm" before a decision on the merits can be rendered. 11 Wright & Miller, *Federal Practice and Procedure: Civil* § 2948. A preliminary injunction will usually be denied if monetary damages are sufficient to compensate a plaintiff. *Tri-State Generation v. Shoshone River Power, Inc., 805 F.2d at 355*; *Holly Sugar v. Goshen County Co-op. Beet Growers, 725 F.2d 564, 570 (10th Cir. 1984)*.

The question of whether the Cities have suffered "irreparable injury" must focus on the Cities' long-term contracts with Vesta. The Cities' contentions with respect to this issue are simple and persuasive. When Williams closed its pipeline on August 1, 1987, each of the plaintiff cities had available a dependable, long-term source of gas at a substantially lower cost than the gas supplied by Williams. The Cities argue when Williams closed its pipeline, it effectively terminated the Cities' arrangements for such gas, and this loss constituted "irreparable injury" to the Cities.

Williams contends, however, the loss of the Vesta contracts cannot **[**26]** form the basis for the Cities' claims of "irreparable injury" because (1) three of the plaintiff cities had no long-term contracts in place at the time WNG closed its pipeline; and (2) the Cities' contracts with Vesta were "suspended" rather than "terminated" by WNG's closing of the pipeline.

WNG apparently concedes that the Edison/Vesta contract was for a long-term supply of gas, and that this gas was "earmarked" for the cities of Auburn, Humboldt, Iola and Osage City, Kansas and Cleveland, Oklahoma. WNG focuses instead on the cities of Chanute, Garnett and Neodesha, and argues these cities had no long-term contracts in place on August 1, 1987, and thus could not be irreparably harmed.

However, testimony at hearing showed that these three cities (Chanute, Garnett and Neodesha) were in the process of negotiating long-term contracts directly with Vesta when WNG closed its pipeline. For instance, Vesta's "letter agreements" with these three cities for the sale of "spot gas" in June and July of 1987 specifically noted that Vesta would flow the short-term gas to the Cities while the long-term agreements were being finalized. Moreover, Vesta's representative, David Tudor, testified that **[**27]** Vesta "fully intended to offer and enter into" a long-term gas sales contract with the cities of Chanute, Neodesha and Garnett and the essential terms of the agreement had been finalized (e.g., a five-year contract for the sale of gas at the rate of $ 1.45/mcf, adjusted according to 70 % of WNG's sales service charge). Tudor further stated that the agreement was not actually entered into because it was uncertain how long Williams would keep its pipeline open. Thus, it is clear that had Williams not closed its pipeline, each of the plaintiff Cities would now have a supply of long-term, low price gas available through Vesta.

[*1527] Williams asserts, however, that even if the court finds that each of the Cities had a long-term source of supply available through Vesta, the Cities cannot show that such contracts were lost as a result of Williams closing its pipeline. WNG notes that the Edison/Vesta contract (which was the source of supply for five of the Cities) contained a "force majeure" provision which arguably "suspended" rather than "terminated" the contract in the event the gas could not be transported over WNG's line. Thus, Williams reasons that should it decide at some indefinite point **[**28]** in the future to open access to its pipeline, the Vesta contract will, in effect, "pick up where it left off."

Accordingly, Williams argues the Cities have not suffered irreparable injury because the contracts have not been terminated, and any loss suffered by the Cities will be compensable in money damages.

This argument is not supported by the evidence. First, the contract provision in question provides:

> 14.1 The term "force majeure" as used in this Gas Purchase Contract shall mean Acts of God, strikes, lockouts or other industrial disturbances . . . and causes of like or similar kind, whether herein enumerated or not, and not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.
>
> 14.3 It specifically is recognized and agreed by the parties hereto that the gas to be made available for sale and delivery by Seller which is purchased by Buyer hereunder may be transported by third party pipelines for Seller's account in order to effect delivery to Buyer at the delivery point(s). Accordingly, in addition to such other events of *force majeure* also shall exist when any third party pipeline is unable or otherwise **[**29]** declines to transport any volume of gas subject hereto during any period of time.

(Pltfs' Ex. 13, pp. 11-12.)

While it is clear that a pipeline's refusal to transport gas is a "force majeure" event under the contract, it is not clear from the contract the effect such an event has upon the parties' obligations to perform. It is probable that a determination of this question would require an examination of the entire contract and the intent of the parties as well as a consideration of the indefinite duration of the "force majeure" event in this instance. In any event, that question is not before this court. What is properly before the court is the testimony of Vesta's vice president, David Tudor, who stated that when WNG closed its pipeline, the gas which would have been sold to the plaintiff cities was resold on the spot market and transported over an open-access pipeline. Moreover, Tudor testified that if Williams' pipeline were to open again six months to a year after this case is tried on the merits, Vesta might not be willing to enter into a long-term gas purchase agreement with the plaintiff cities.

Tudor's testimony supports two findings: (1) the Cities' contracts with Vesta **[**30]** were effectively terminated when WNG closed its pipeline; and (2) if an injunction is not granted in this case, the Cities may lose the opportunity to contract with Vesta for a long-term, dependable supply of low cost gas.

This determination raises a final question with respect to this issue, e.g., can the loss of the Vesta contracts constitute "irreparable injury"?

A similar situation was addressed by the Tenth Circuit Court of Appeals in *City of Chanute v. Kansas Gas & Electric Co., 754 F.2d 310*, and a brief discussion of that case is helpful here.

In *City of Chanute*, the plaintiffs were three cities which generated electric power through their own operation and distribution systems, and also purchased wholesale electric power from defendant Kansas Gas and Electric Company (KG&E). A dispute arose between the parties when the plaintiff cities attempted to contract with additional suppliers of electricity [4] and thus **[*1528]** approached KG&E (which maintained the only transmission lines into the plaintiff cities) to arrange for the "wheeling" (or transfer) of the power. While KG&E was willing to wheel power to the cities, it would do so only on the condition that the cities would enter **[**31]** into new, higher priced contracts with KG&E for the purchase of wholesale power. When the cities refused to accept these conditions, KG&E refused to wheel power to them. *754 F.2d at 311-12*. Plaintiffs subsequently filed an action against KG&E alleging violations of *§§ 1* and *2* of the Sherman Act and of § 3 of the Clayton Act.

The trial court granted plaintiffs' motion for a preliminary injunction requiring KG&E to wheel power to the cities pending the outcome of the suit, and in so doing found that all three cities would suffer irreparable harm if the injunction were not granted. *City of Chanute v. Kansas Gas and Elec. Co., 564 F. Supp. 1416 (D. Kan. 1983)*.

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[4] The Cities of Chanute and Iola contracted with the Southwestern Power Administration (SWPA) and were to begin receiving five-year allocations of federally generated hydro-electric power on January 1, 1984. The City of Fredonia contracted with the Kansas Municipal Energy Agency to begin receiving power from the Nearman Creek Generating Plant on June 1, 1983, and was liable for demand charges whether or not the energy was transmitted. 564 F. Supp. at 1418.

On appeal, the Tenth Circuit affirmed the district court's finding **[**32]** of irreparable harm as to the Cities of Chanute and Iola, but reversed that finding as to the City of Fredonia. The appeals court determined that because Chanute and Iola would lose their allotment of power without wheeling, they suffered irreparable damages. The court reasoned:

> The difference in energy cost incurred by Chanute and Iola with and without SWPA power may be ascertainable, at least for the immediate future. *The value of the availability of potential supplier, however, cannot always be measured in dollars, particularly when, as here, such availability changes the competitive structure of the market and the supplier may be necessary to meet the long-term electrical demands of the cities*.

754 F.2d at 313 (emphasis added).

However, the court in *City of Chanute* distinguished Fredonia's situation on the ground that Fredonia's right to power from the Nearman Creek Project was not contingent on the issuance of the injunction. Rather, the court held that absent the injunction, the city "would merely be forced to pay for power it did not receive. This injury can be measured and compensated in dollars." *754 F.2d at 313*.

The position of the plaintiff Cities in the instant **[**33]** case can be likened to that of Chanute and Iola in *City of Chanute*. For instance, unless an injunction is issued here, the Cities stand to lose a potential supplier of low-cost, long-term gas -- a supply which may be necessary to meet the Cities' long-term gas needs. Moreover, it is difficult to estimate the effect of the loss of such gas on the Cities' customers -- whether residential, commercial or industrial.

Williams contends that even if the Cities were to lose the Vesta supply of gas, the Cities would not be irreparably harmed because there are alternative supplies of gas available to the Cities at comparable or perhaps even better prices.

First, WNG cites the availability of 451 gas as an "alternative" source of gas to the Cities. WNG asserts that "enough gas will be available to the Cities through the Order 451 GFN process to satisfy the Cities' combined peak day requirements 10 times over." (Def.'s Brief, p. 42.) Defendant's argument is misplaced. Plaintiffs have never suggested that there is not enough gas available to satisfy their needs. Rather, the issue is whether the Cities have been irreparably harmed by their inability to purchase low-cost, long-term gas from a **[**34]** dependable third party supplier and to have that gas transported over Williams' pipeline.

While it is true that if the Cities were to purchase 451 gas WNG would be required to transport the gas over its line, it is also true that the Cities have not yet received any offers for 451 gas comparable to the supply they can obtain from Vesta. Further, **[*1529]** Order 451 provides that the producer need only offer the released gas to a pipeline's customers *after* the pipeline's offer has been rejected, and *after* an offer from a third party has been obtained. Therefore, it seems unlikely that the Cities will be able to obtain 451 gas comparable in price and term to that obtained through Vesta. In any event, as stated earlier, the 451 gas which has been offered to the Cities to date has been unacceptable either because of price or term or other conditions attached to the offer.

Defendant also suggests that in addition to the availability of 451 gas, the Cities have available substantial volumes of "local gas". [5] Defendant points out that the City of Chanute currently has a contract to purchase local gas from Chooch, Inc. and a pipeline from Chooch's wells to the City is nearly complete. Additionally, **[**35]** the City of Neodesha is currently connected to the local gas supply of Willis Gas Company and has purchased some gas from Willis in the past.

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[5] WNG's full requirements contracts with the Cities contain an exception which permits the Cities to purchase "local gas" from a third party without violating their full requirements contracts. While "local gas" may be defined in various ways, when used in this case it refers to gas reserves located in geographic proximity to the plaintiff Cities.

The evidence showed, however, that the Chooch contract covered only a small percentage of Chanute's total requirements and was not contemplated to save the City's long-term needs. Moreover, the City of Neodesha is no longer purchasing gas from Willis because of quality problems experienced with Willis' gas in the past.

The evidence simply does not show that local gas of sufficient quality, price and volume is available to satisfy the needs of the Cities on a long-term basis. Further, even if the local gas did meet all of the necessary criteria, since Williams' pipeline is closed, the Cities in most instances would be required to construct pipelines from the gas reserves to the Cities. This is **[**36]** neither a feasible nor reasonable alternative.

The court therefore holds that the Cities have sufficiently shown that they will suffer irreparable injury unless the injunction issues.

Balance of Harms

Plaintiffs must next show that the threatened injury to plaintiffs outweighs whatever damage the proposed injunction may cause defendant. This element presents a difficult question, as both the Cities and WNG argue they will suffer injury if the court were to impose an injunction. However, for the reasons detailed below, the court finds the balance of hardships must weigh in favor of the Cities in this case.

The Cities point to the loss of an inexpensive, long-term gas supply, higher prices to customers and the potential loss of businesses and sales as evidence that the injury to the Cities, if the injunction is not granted, would outweigh any injury to the defendant if the injunction is granted. WNG maintains, however, the balance of harms must lie in its favor because of the substantial take-or-pay exposure it would allegedly incur if the injunction is granted.

WNG, relying on § 4(b) of the NGA, reasons that if the court orders WNG to open access to its pipeline to the plaintiff cities, **[**37]** Williams would subsequently be forced to open access to its pipeline on a system-wide basis.

HN9[] Section 4(b) of the NGA provides:

> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any *undue* preference or advantage to any person or subject any person to any *undue* prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

15 U.S.C. § 717c(b) (emphasis added).

Based on this statute, Williams argues FERC would not permit WNG to provide transportation service to the Cities alone, but instead would require that any service offered to the Cities be offered to all WNG customers on a nondiscriminatory basis. **[*1530]** Further, Williams estimates that under system-wide open access, transportation service would substantially displace gas sales and the company would be subject to take-or-pay exposure in the amount of $ 90 million to $ 140 million. WNG reasons that the injury to WNG in the form of take-or-pay exposure would outweigh the "small benefit" of **[**38]** reduced gas rates to the Cities.

Noting that § 4(b) of the NGA prohibits only "undue" or "unreasonable" differences, the Cities argue that a difference in the treatment or services provided to WNG's customers would not by itself violate the NGA. *See Michigan Consol. Gas Co. v. Federal Power Commission, 203 F.2d 895, 901 (3d Cir. 1953)*. Further, the Cities correctly point out that this court has not been asked to open access to WNG's entire pipeline. Rather, the issue currently before this court is whether Williams maintains an intentional monopoly in the eight cities which are parties to this action, and whether the Cities are entitled to a preliminary injunction ordering WNG to open its pipeline to those cities.

Accordingly, the court concludes that an injunction ordering Williams to open its pipeline to the plaintiff Cities would result in only minimal take-or-pay exposure to the defendant, while a denial of the requested injunction may result in the loss to the Cities of a steady, assured supply of natural gas at a price far more reasonable than that presently assessed by Williams.

Public Interest

The issue of whether the injunction, if issued, would adversely affect the **[**39]** public interest requires an examination of the effect of an injunction on the customers of the Cities as well as the effect of an injunction on WNG's customers.

There can be no doubt that substantially lower wholesale gas prices would benefit, rather than adversely affect, the customers of the plaintiff Cities, as the Cities would pass the cost savings on to their retail customers.

WNG once again suggests that it will be exposed to substantial take-or-pay liability if the court grants the requested injunction, and it is likely that at least part of these costs will ultimately be passed on to all of WNG's customers, thereby adversely affecting the public interest.

As already discussed, such an argument improperly clouds the issue in this case. This court has not been asked to order open access to Williams' entire pipeline -- or to, in effect, force Williams' compliance with Order No. 436. Rather, this court is here concerned only with whether WNG has an intentional monopoly in the eight plaintiff cities in violation of *§ 2* of the Sherman Act. Moreover, as this court commented in its ruling from the bench on this motion, it cannot be in the public interest for anyone to be forced to **[**40]** accept WNG gas at its present rate, knowing full well that such rate is not competitive in a real world setting.

Accordingly, the court finds the grant of the requested injunction would not adversely affect the public interest.

The final element plaintiffs must show is that they can demonstrate a likelihood of success on the merits.

As earlier stated, where the first three requirements are met, the moving party's burden of proof on the fourth requirement is lessened. Accordingly, plaintiffs will satisfy the fourth requirement if they raise 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.

HN10[] In order to prevail on the merits, plaintiffs must prove the defendant has violated *§ 2* of the Sherman Act. The offense of monopolization under *§ 2* of the Sherman Act has two elements:

> (1) The possession of monopoly power in the relevant market; and
>
> (2) The willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71, ***[**41]*** *86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *see also* *Bright v. Moss Ambulance Service, 824 F.2d 819, 823* ***[*1531]*** *(10th Cir. 1987)*; *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519 (10th Cir. 1984)*, *aff'd*, *472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. The Tenth Circuit has defined monopoly power as the ability to control prices and exclude competition. While the two elements are closely related, both must be demonstrated to establish the existence of monopoly power. *Bright v. Moss Ambulance Service, Inc., 824 F.2d at 824* (*citing* *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc., 783 F.2d 159, 164* [10th Cir. 1986]).

Plaintiffs seek to prove liability under *§ 2* by utilizing the "essential facilities" or "bottleneck" doctrine. ***HN11***[] Under this doctrine, a business or group of businesses which control a scarce facility has an obligation to give competitors reasonable access to it. *Byars v. Bluff City News Co., Inc., 609 F.2d 843, 856 (6th Cir. 1979)*. The bottleneck theory differs from traditional monopolization analysis in that the intent factor is de-emphasized and emphasis is placed instead on the surrounding market conditions. Kintner, Federal ***Antitrust*** **[**42]** ***Law*** § 10.25 n. 484 (1980). Further, the doctrine is particularly applicable to natural gas pipelines and their refusal to transport third party gas. McNulty, *Freeing the Captives: Nondiscriminatory Access to Transportation in the Interstate Gas Market*, *47 U. Pitt. L. Rev. 843 (Spring 1986)*.

The Tenth Circuit Court of Appeals recently discussed and applied the doctrine in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509*. The court there defined ***HN12***[] the four elements necessary to establish liability under the essential facilities doctrine as follows:

(1) Control of the essential facility by a monopolist;
(2) A competitor's inability to duplicate the facility;
(3) Denial of the use of the facility to a competitor; and

(4) The feasibility of providing the facility.

738 F.2d at 1520 (*quoting MCI Communications v. AT&T, 708 F.2d 1081, 1132-33* (7th Cir.), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983))*.

Prior to discussing the application of each of the above elements, a preliminary issue must first be addressed. Specifically, plaintiffs contend that when the "essential facilities" doctrine is utilized, proof of its elements is proof of monopoly power, and plaintiffs need **[**43]** not show "the relevant market". Defendant, on the other hand, argues proof of the relevant market is always a threshold element in determining whether there has been a violation of *§ 2* of the Sherman Act.

In support of its contention, defendant cites *Consul Ltd. v. Transco Energy Co., 805 F.2d 490 (4th Cir. 1986)*. In *Consul*, as in the instant case, plaintiff urged the court to find that under the "essential facilities" doctrine, the court need not concern itself with market definition. The Fourth Circuit Court of Appeals, after reviewing a number of "essential facility" cases, ruled that ***HN13***[] the relevant market must be proven regardless of the type of *§ 2* claim utilized by plaintiff. *805 F.2d at 494*.

Conversely, plaintiffs contend market analysis is not an indispensable means of proving monopoly power. Plaintiffs cite *Woods Exploration & Producing Co. v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971)*, in support of their contention. In *Woods*, owners of wells in the Appling Field in Texas filed an antitrust action against other producers, contending the defendants possessed monopoly power over the extraction of gas from the Appling Field, and that the relevant **[**44]** area of competition was the field. The court held:

> "When one must look for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously an essential first step. But when, with an illegal practice such as is present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears no real need to go further."

[*1532] *438 F.2d at 1306* (*quoting Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289* [D. Colo. 1969]).

The *Woods* court, however, then went on to find that the Appling Field was the relevant market and to determine that the defendant possessed monopoly power in that field. Hence, the *Woods* case does not stand for the proposition advanced by plaintiffs here.

The court thus holds ***HN14***[] the existence or absence of monopoly power cannot be determined in a vacuum but rather must be measured within a defined market. 3 Von Kalinowski, Antitrust Laws and Trade Regulation § 8.02[2] (1986). While it is certainly true that under the "essential facilities" doctrine, analysis of the relevant market **[**45]** may not take on the same implications as it does in other cases, this court concurs with the *Consul* court's determination that the "relevant market" must be proven in every case.

HN15[] Determining the relevant market typically requires an inquiry into the nature of the product and the geographical area of effective competition. The relevant product market is generally defined to be that area of goods or services in which the product or products offered by the defendant effectively compete while the relevant geographic market is generally defined to be the geographic area of effective competition in which the product or services is traded. *United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 388, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

With that stated, the court finds the relevant product market in this case is natural gas. It has not been shown that there is an adequate substitute for natural gas that would be acceptable to the large majority of industrial, commercial, or residential consumers of the Cities. Nor has it been shown that sufficient interchangeability exists between gas and other sources of energy. As for the relevant geographic area, it is clear to the court that **[**46]** while Williams Natural Gas Company operates in a several state geographic area, the plaintiff Cities can practicably turn to supplies only through Williams. Thus, the court concludes the relevant geographic market in this case is the area encompassing the plaintiff Cities.

With this determination of the relevant market in mind, the court now moves on to a consideration of whether this case satisfies the elements of the "essential facilities" doctrine.

The first element, control of the essential facility by a monopolist, has been met here. WNG owns the only natural gas pipeline connected to the plaintiff Cities and also maintains complete control over that pipeline. If WNG refuses to transport third party gas to the Cities, the Cities simply cannot compete for or obtain such gas.

The second element requires a showing of the competitor's inability to duplicate the essential facility. This element must be broken down into two questions for purposes of the court's analysis: (1) do the Cities compete with WNG; and (2) can the Cities duplicate the essential facility?

HN16[] The essential facility doctrine is applicable only where the firm which controls the essential facility refuses to allow **[**47]** access to the facility to a competitor. *Olympia Equip. Leasing v. Western Union Telegraph, 797 F.2d 370, 376-77 (7th Cir. 1986)*; *MCI Communications v. AT&T, 708 F.2d at 1147 n. 100*. Thus, Williams reasons that the Cities in this case are "customers" rather than "competitors" of WNG and cannot utilize the essential facility doctrine.

The Cities do not attempt to argue that competition exists between Williams and the Cities for retail customers. Rather, the Cities point out that Williams directly serves a number of industrial customers within and around the Cities -- customers the Cities could potentially serve if the Cities could obtain lower priced gas.

WNG counters that direct sales to end users comprise only about 16 % of its total sales. Further, WNG's president and vice president testified at the hearing that WNG has always viewed the Cities as customers rather than competitors.

[*1533] Regardless of how small a percentage of WNG's business consists of direct sales, and regardless of how WNG views the plaintiff Cities, the court finds the Cities do compete to some degree with WNG for direct sale customers. Moreover, there is no question that by denying access to its pipeline **[**48]** to Vesta and other potential suppliers, WNG has foreclosed competition and prevented the plaintiff Cities from obtaining competitively priced gas. Thus, the court finds plaintiffs are entitled to utilize the essential facility doctrine.

Plaintiffs must next show that they are unable to "duplicate" the essential facility. This element does not require plaintiff to show that it would be impossible to duplicate the facility or that the facility is indispensable. Rather, it is sufficient if duplication of the facility would be economically infeasible, and if denial of its use would inflict a severe handicap on potential market entrants. *Fishman v. Estate of Wirtz, 807 F.2d 520, 539-40 (7th Cir. 1986)*; *Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992 (D.C. Cir. 1977)*, *cert. denied*, *436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978)*; *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida, 665 F. Supp. 1493, 1534 (S.D. Fla. 1987)*.

While conflicting evidence was presented at hearing regarding the cost to the Cities of constructing a four-inch pipeline (estimates range from $ 10,000/mile to $ 50,000/mile), the court finds that constructing such a pipeline is neither feasible nor required.

[49]** Defendant additionally suggests that the fact that two cities are currently connected to local gas supplies is evidence that the Cities are able to duplicate defendant's facility.

In MCI Communications v. AT&T, 708 F.2d at 1147, the court, faced with an analogous situation, held that the fact that MCI was building its own facilities in at least one area was not evidence that it could duplicate AT&T's local service facilities at every point. Similarly, in this case the evidence does not show that each of the plaintiff Cities is capable of constructing a pipeline to local gas supplies. More importantly, the evidence does not show that even if such pipelines were built that local gas supplies would be of the same quality, dependability or price as could be obtained through access to Williams' pipeline. The court therefore finds that plaintiffs are unable to duplicate the essential facility.

Thirdly, the Cities must show denial of use of the facility to a competitor.

WNG argues it has not denied use of the pipeline to the Cities because it continues to supply gas to them through its pipeline, and further, because WNG is required to transport 451 gas to the Cities if they should contract **[**50]** for such gas with the producer. As previously discussed, 451 gas has not been shown to be available to the Cities on a long-term, low-cost basis. Moreover, while WNG continues to provide the Cities with its own gas, it has denied the Cities the opportunity to use the facility to purchase third party gas. Accordingly, the court finds the third element has also been met.

Finally, the Cities must show it is feasible for WNG to provide its facility to the plaintiffs.

WNG has contended throughout these proceedings that it cannot feasibly open access to its pipeline because to do so would result in substantially reduced sales and increased take-or-pay exposure.

First, the court has already determined that if it were to order open access only to the eight plaintiff Cities, minimal or no take-or-pay exposure would be incurred by defendant. Further, WNG would continue to receive a transportation fee in exchange for transporting third party gas to the Cities.

Secondly, even if take-or-pay exposure was incurred by the defendant as a result of this court's order, the "justification of self-preservation" has not been successfully asserted as a defense to denial of access to an essential facility. **[**51]** Consolidated Gas Company of Florida v. City Gas Company of Florida, 665 F. Supp. at 1536. A similar argument to that made by the defendant **[*1534]** here was made in Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973). In *Otter Tail*, an electric power company was held to have violated § 2 of the Sherman Act by monopolizing and attempting to monopolize the retail distribution of electric power in its service area by attempting to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The power company argued that if it did not prevent the establishment of municipal electric systems, more and more municipalities would turn to public power and the company would go downhill. The Supreme Court held:

> The argument is a familiar one. It was made in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 18 L Ed 2d 1249, 87 S Ct 1856, a civil suit under § 1 of the Sherman Act dealing with a restrictive distribution program and practices of a bicycle manufacturer. We said: ***HN17***[] "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." **[**52]** Id., at 375, 18 L Ed 2d 1249.
>
> The same may properly be said of § 2 cases under the Sherman Act. That Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collides with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power.

410 U.S. at 380 (footnote omitted).

Accordingly, the court finds the defendant cannot rely on the threat of take-or-pay exposure as a defense to the Cities' antitrust claim. The Cities have shown it is feasible for WNG to provide its facility to plaintiffs.

Plaintiffs have thus established the likelihood they will prevail on their "essential facility" claim and have raised questions going to the merits "so serious, substantial, difficult and doubtful as to make them a fair ground for litigation." With this determination made, plaintiffs have satisfied each of the requirements necessary to obtain a preliminary injunction.

IT IS ACCORDINGLY ORDERED this 5th day of February, 1988, that plaintiffs' motion for preliminary injunction is granted. Defendant is ordered to open access to its pipeline to **[**53]** the eight plaintiff Cities for the transport of third party gas. The Cities are thus advised to formalize their respective contracts for the purchase of gas from Vesta. Once such contracts are in place, the Cities will have waived their present contracts with Williams and any rights or claims that may exist under those contracts.

A status conference is scheduled in chambers on February 26, 1988, at 1:00 P.M.

Federal Paper Bd. Co. v. Amata

United States District Court for the District of Connecticut

February 10, 1988, Decided

Civil No. H-86-1415(MJB)

Reporter

693 F. Supp. 1376 *; 1988 U.S. Dist. LEXIS 9818 **; 1988-1 Trade Cas. (CCH) P68,088

FEDERAL PAPER BOARD COMPANY, INC. v. GIACINTO (a/k/a JESSE) P. AMATA, HAROLD KIRSTEIN, UNITED PAPER AND METAL CO., INC., INTERNATIONAL RECLAMATION CORP., CONNECTICUT RECYCLING COMPANY, INC., JAMES D. HERSHMAN, I. HERSHMAN & CO., INC., DAVID GOODMAN, TRI-CITY RECYCLING, INC., HARRY GOODMAN, INC., CAPITAL FIBERS, HARVEY LURIE, WILMINGTON PAPER CORP., TESSA INDUSTRIES, INC., JAMES A. DERRICO, SR., TIFFANY FIBERS, INC., JAMES A. DERRICO, JR., AUTOMATED MATERIAL HANDLING, INC., KIMBERLY KIRKER AND JAMES KIRKER, TRUSTEE

Core Terms

suppliers, wastepaper, enterprise, amended complaint, allegations, antitrust, Robinson-Patman Act, anticompetitive, Sherman Act, defendants', predicate act, conspiracy, bribes, counts, violation of section, relevant market, pleaded, alleged violation, anti trust law, rule of reason, terminating, paperboard, purchaser, pattern of racketeering activity, treble damages, Clayton Act, purposes, recycled, damages, sales

LexisNexis® Headnotes

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] **Motions to Dismiss, Failure to State Claim**

The standards that apply to a motion to dismiss for failure to state a claim brought under *Fed. R. Civ. P. 12(b)(6)* are the same as the standards for deciding a motion for judgment on the pleadings for failure to state a claim brought under *Fed. R. Civ. P. 12(c)*, as authorized by *Fed. R. Civ. P. 12(h)(2)*. All well-pleaded allegations of plaintiff will be taken to be true, and plaintiff's claims will not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of its claims which would entitle it to relief.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Private Actions, Remedies**

Every antitrust suit should begin by identifying the ways in which a challenged restraint might possibly impair competition. This step occasionally reveals that competition is not implicated at all and thus that the parties' dispute is not an antitrust case. If a plaintiff fails to allege any anticompetitive impact, dismissal is proper. To avoid dismissal, a plaintiff must allege that competition in a specific market has been restrained. Such an examination of the anticompetitive impact that the defendants' alleged conduct might have had requires a definition of the relevant market. The relevant market is comprised of a geographic and a product market. The geographic market encompasses the area in which the defendant effectively competes with other individuals or businesses for the distribution of the relevant product. The relevant product market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Private Actions, Remedies**

In order to establish an anticompetitive effect adequate to avoid dismissal under the Sherman Act, it is not sufficient to allege an injury to a competitor. Rather, the inquiry under the rule of reason is directed at the challenged restraint's overall impact on competitive conditions, rather than whether a particular party has been restrained by the conduct at issue.

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

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN4[] **Standing, Clayton Act**

To have standing to bring an antitrust claim plaintiff must suffer an antitrust injury.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Sherman Act, Claims

Commercial bribery, standing alone, does not establish a violation of the Sherman Act.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

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

Antitrust & Trade Law > Clayton Act > Claims

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

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman 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

HN6[] Types of Price Discrimination, Brokerage, Commissions & Compensation

Section 2(c) of the Robinson-Patman Act (Act) provides that: It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. *15 U.S.C.S. § 13(c)*. Section 2(c) of the Act defines conduct that is per se illegal. As such, a plaintiff does not have to prove injury to competition.

Antitrust & Trade Law > Robinson-Patman 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 > Scope

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

HN7[] **Remedies, Damages**

In order for a plaintiff to maintain a Robinson-Patman Act claim, plaintiff must demonstrate that it has standing under § 4 of the Clayton Act, and that it satisfies the common law tests for standing that have been developed to limit the scope of § 4, codified as amended at *15 U.S.C.S. § 15(a)*. In addition to proving a violation of the substantive ***antitrust law***, plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The antitrust injury requirement means a plaintiff suing for treble damages for violations of § 2(c) of the Robinson-Patman Act, *15 U.S.C.S. § 13 (a)*, must show that the probable affect of the discrimination would be to allow the favored competitor to draw sales or profits from him, the unfavored competitor.

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

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

HN8[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) provides that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. *Fed. R. Civ. P. 9(b)*. Malice, intent, knowledge, and other condition of mind, however, may be averred generally. *Fed. R. Civ. P. 9(b)*.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN9[] **Contract Interpretation, Good Faith & Fair Dealing**

Under Connecticut law, a breach of good faith requires only a showing that a party was not "honest in fact." That is a much lighter burden than is required for establishing fraud.

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

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

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

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

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

HN10[] **Heightened Pleading Requirements, Fraud Claims**

Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act provides: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. *18 U.S.C.S. § 1962(c)*. Racketeering activity is defined to include specific predicate offenses, including mail fraud indictable under *18 U.S.C.S. § 1341* and wire fraud indictable under *18 U.S.C.S. § 1343*. The predicate acts of mail and wire fraud must be pleaded in conformity with the particularity requirements of *Fed. R. Civ. P. 9(b)*. The mail and wire fraud statutes prohibit "everything designed to defraud."

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

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

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

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

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview

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

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

HN11[] **Heightened Pleading Requirements, Fraud Claims**

The United States Supreme Court defines the elements of fraud to be (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation. Fraud is not limited to affirmative misrepresentations, but may also be proved through the defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation. *Fed. R. Civ. P. 9(b)* requires that each element of fraud listed above be pleaded with particularity, except for knowledge and intent which "may be averred generally." *Fed. R. Civ. P. 9(b)*. A complaint must specifically allege the facts that amount to fraud. If a claim is based on an alleged failure to inform the plaintiff of a material fact, the complaint should also allege the basis for the defendant's duty to disclose. Although allegations of knowledge of falsity and intent to defraud are not subject to the requirements of *Rule 9(b)*, plaintiffs are not relieved of their burden to plead a factual basis for those allegations. Plaintiffs must still specifically plead events from which one can infer intent and knowledge.

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

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

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

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

HN12[] Pleadings, Heightened Pleading Requirements

18 U.S.C.S. § 1962(d) of the Racketeer Influenced and Corrupt Organizations Act provides: It shall be unlawful for any person to conspire to violate any of the provisions of this section. 18 U.S.C.S. § 1962(d). To be liable under § 1962(d), the defendant must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate acts. Although Fed. R. Civ. P. 9(b) does not apply to claims of conspiracy because it is not one of the averments enumerated in the Rule, plaintiffs must nevertheless provide some factual basis for the legal conclusion that a conspiracy existed. As with a claim of fraud tested under Rule 9(b), conclusory allegations are insufficient.

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

HN13[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

Under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961(5) states: "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. In the Second Circuit a RICO plaintiff need not plead or prove the existence of multiple schemes of criminality in order to establish a pattern of racketeering activity. A pattern of racketeering is established whenever a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated.

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

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

HN14[] Racketeer Influenced & Corrupt Organizations Act, Elements

In the Second Circuit, the requirements of relatedness and continuity under the Racketeer Influenced and Corrupt Organizations Act (RICO) referred to by the United States Supreme Court are addressed in the concept of enterprise under 18 U.S.C.S. § 1962(c). "Enterprise" is defined by statute to include both legal entities such as corporations as well as individuals "associated in fact." 18 U.S.C.S. § 1961(4). The latter consists of a group of persons associated together for a common purpose of engaging in a course of conduct and is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. Relatedness and continuity are provided for through the requirement that a RICO enterprise be "a continuing operation" and the predicate acts be "related to the common purpose."

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

HN15[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

As a starting point for finding a Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise, there must be "a continuing operation" and the predicate acts must be "related to the common purpose." In addition, when an enterprise is purely criminal in nature, the Second Circuit Court of Appeals appears to have developed a transactional test for continuity. If the predicate acts are related to a single transaction that has an "obvious terminating goal or date," then the requirement of relatedness and continuity are not satisfied, and there is no RICO enterprise. If, however, the criminal enterprise is one that is intended to continue indefinitely over the course of several transactions and whose purpose is achieved through multiple transactions involving predicate acts, then the plaintiff has established the existence of a RICO enterprise. If the alleged enterprise dissolves or ends upon commission of the predicate acts, it cannot be a RICO enterprise.

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Judges: Blumenfeld, United States District Judge.

Opinion by: BLUMENFELD

Opinion

[*1379] RULING ON MOTIONS TO DISMISS

BLUMENFELD, UNITED STATES DISTRICT JUDGE.

This case arises out of alleged bribes and kickbacks paid to Federal Paper Board Company's former employee, Giacinto P. Amata. The amended complaint alleges violations of *section 1* of the Sherman Act (Count I), section 2 of the Sherman Act (Count II), section 2(c) of the Robinson-Patman Act (Count III), and RICO (Count IV), along with several violations of state law (Counts V to XII). This ruling responds to **[**2]** the motions of defendants James D. Hershman and I. Hershman & Co., Inc. ("Hershman") (as to Counts I to IV), Automated Material Handling, Inc. and James A. Derrico, Jr. ("Automated") (as to all counts), David Goodman, Tri-City Recycling Co., Inc., Harry Goodman, Inc., and Capital Fibers ("Goodman") (as to all counts), Harold Kirstein, United Paper and Metal Co., Inc., International Reclamation Corp., and Connecticut Recycling Co., Inc. ("Kirstein") (as to Counts I to IV), James A. Derrico, Sr. and Tiffany Fibers, Inc. ("Tiffany") (as to all counts), and Giacinto P. Amata ("Amata") (as to Counts I to IV) to dismiss Federal's amended complaint.

The motions have been brought both as motions to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* and as motions for judgment on the pleadings pursuant to *Rule 12(c)*. With respect to those defendants that have filed pleadings, the motions are properly treated as motions for judgment on the pleadings. [1] *See Falls*

[1] Answers have been filed by the Kirstein group and Amata.

Riverway Realty, Inc. v. City of Niagara Falls, 754 F.2d 49, 53 (2d Cir. 1985). **HN1**[] The standards that apply to a motion to dismiss for failure to state a claim brought under Rule 12(b)(6) are the same as the **[**3]** standards for deciding a motion for judgment on the pleadings for failure to state a claim brought under Rule 12(c), as authorized by Rule 12(h)(2). *See* Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, 660 F. Supp. 1362, 1365 (D. Conn. 1987) [hereinafter *Andreo II*]. For purposes of this ruling, therefore, all well-pleaded allegations of Federal will be taken to be true, *see* 2A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* para. 12.15 at 12-106 (2d ed. 1987), and Federal's claims will not be dismissed "unless it appears 'beyond doubt that [Federal] can prove no set of facts in support of [its] claim[s] which would entitle [it] to relief.'" Goldman v. Belden, 754 F.2d 1059, 1065 (2d Cir. 1985) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) (footnote omitted)).

Allegations

The amended complaint alleges the following facts. Federal Paper Board Company, Inc. ("Federal") is a New York corporation with executive offices in New Jersey. Federal manufactures and sells wood and paper products, including recycled paperboard and paperboard cartons. Federal's claims in this case **[**4]** relate to Federal's manufacture and sale of recycled paperboard at its mill in Sprague, Connecticut. Recycled paperboard is produced principally from wastepaper and is used to make folding paperboard cartons.

[*1380] From 1970 to 1985, Giacinto P. Amata was responsible for purchasing the wastepaper used as the raw material at the Sprague mill. Federal expected Amata "to purchase wastepaper for Federal at the most advantageous price and delivery terms, from the numerous competing suppliers of wastepaper." In 1985, Federal discovered that Amata had been accepting bribes and kickbacks from the wastepaper suppliers with whom he had been dealing (including defendants Hershman, Automated, Goodman, Kirstein, and Tiffany). Federal alleges that Amata would not permit wastepaper suppliers who refused to pay him bribes to sell in significant amounts to the Sprague mill and that Amata suggested to the uncooperative suppliers that they sell their wastepaper to Amata's favored suppliers who would then resell the wastepaper to Federal at a higher price. By 1985, Amata had concentrated the purchases of wastepaper so that the majority of the Sprague mill's wastepaper came from the suppliers making payments **[**5]** to Amata. The cost of the bribes was passed on to Federal through the price charged for wastepaper sold to the Sprague mill. Following Amata's discharge, Federal was able to purchase wastepaper at more favorable prices from a wider source of suppliers.

In connection with Federal's claim under section 1 of the Sherman Act, Federal alleges that Amata entered into conspiracies "between and among" the defendant wastepaper suppliers for the purposes of gaining commercial advantage, fixing prices of wastepaper supplied to the Sprague mill, and restraining competition. In connection with its Robinson-Patman Act claim, Federal alleges that the payments received by Amata were not for bona fide services rendered, but were commercial bribes. In connection with its RICO claim, Federal alleges that Amata "conspired, established, conducted, and participated" with the defendant wastepaper suppliers, both individually and as a group, in enterprises engaged in a pattern of racketeering activity. Federal also alleges that Amata participated in the affairs of Federal through a pattern of racketeering activity. The purposes of the alleged enterprises included fixing the price of wastepaper supplied to **[**6]** the Sprague mill, reducing competition among the suppliers of wastepaper to the Sprague mill, and defrauding Federal. As predicate acts for the RICO count, Federal alleges violations of the federal mail fraud and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343 (1982), and the Hobbs and Travel Acts, 18 U.S.C. §§ 1951 and 1952 (1982 & Supp. IV 1986).

Discussion

I. *Sherman Act Count*

Federal alleges a violation of section 1 of the Sherman Act, which 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.

15 U.S.C. § 1 (1982). [2] **[**7]** Defendants assert that Federal has failed to state a claim under section 1 of the Sherman Act. [3] In particular, they argue that Federal has failed to plead a *per se* violation of the act or an injury to competition, and that it has inadequately alleged a relevant market or a conspiracy.

Although section 1 of the Sherman Act on its face prohibits every restraint of trade, the Supreme Court has long held that section 1 prohibits only unreasonable restraints on trade. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). "[A] restraint may be adjudged unreasonable **[*1381]** either because it fits within a class of restraints that has been held to be '*per se*' unreasonable, or because it violates what has come to be known as the 'Rule of Reason' . . . ." Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 2017, 90 L. Ed. 2d 445 (1986). Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., 433 U.S. at 49. A particular restraint on trade is unreasonable if its anticompetitive effects **[**8]** outweigh its procompetitive effects. International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 793 (2d Cir.), *cert. denied*, *482 U.S. 915, 107 S. Ct. 3188, 96 L. Ed. 2d 676 (1987)*. Some forms of conduct, however, "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. The principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken." Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). [4] *Per se* rules of liability involve generalizations about the social utility of certain practices, but as with a claim under the rule of reason, the ultimate issue in a claim of *per se* liability is whether the challenged conduct is an unreasonable restraint of trade. *See* Arizona v. Maricopa County Medical **[**9]** Soc'y, 457 U.S. 332, 344 & n.16, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982).

A. Impact on Competition is Essential To a Sherman Act Claim

A determination of the reasonableness of defendants' **[**10]** conduct, whether through detailed analysis under the rule of reason or through classification of the conduct as a *per se* violation of section 1, is only significant if there has been a showing that the defendants' conduct had some negative impact on competition in a relevant market. The rule of reason and the *per se* rules are simply different approaches to the issue of reasonableness once a restraint on trade has been found, *see* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 103, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984), and both approaches presuppose the presence of an anticompetitive impact. It is not necessary to engage in a balancing of pro and anticompetitive effects under the rule of reason if there is "no anticompetitive effect at all." Columbia Broadcasting Sys. v. American Soc'y of Composers, Authors and Publishers, 620 F.2d 930, 934, 939 (2d Cir. 1980), *cert. denied*, *450 U.S. 970, 67 L. Ed. 2d 621, 101 S. Ct. 1491 (1981)*. "'*Proof*

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[2] Standing to sue for violations of the Sherman Act is provided by section 4 of the Clayton Act. Section 4 gives the right to bring a treble damages action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a) (1982). The standing doctrine is discussed in more detail *infra* at part II. B.

[3] Count II of the amended complaint, alleging a violation of section 2 of the Sherman Act, was dismissed without prejudice by stipulation at oral argument, April 9, 1987, and is therefore not considered in this ruling.

[4] At first glance, it might appear that the arrangements alleged by Federal should be treated as *per se* violations of the Sherman Act since Federal has alleged conspiracies among Amata and the wastepaper suppliers with the purpose "to fix prices and elements of prices for the supply of wastepaper to Federal's Sprague mill," and "[a] horizontal agreement to fix prices is the archetypal example of [a *per se* violation]." *catalano,* Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980) (per curiam). "The mere attachment of a *per se* label" by Federal, however, "does not automatically invoke the *per se* doctrine." Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1284 (7th Cir. 1983). "The defendants' conduct must be analyzed to determine whether it should receive *per se* treatment." *Id*. As the text makes clear, because Federal has not alleged facts from which this court can infer a restraint on competition, the defendants' conduct does not amount to a *per se* violation of section 1.

that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case.'" *Hayden Publishing Co. v. Cox Broadcasting Corp., 730 F.2d 64, 69-70 (2d Cir. 1984)* (quoting *Kaplan **[**11]** v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)*, *cert. denied*, *447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 (1980))* (emphasis added). Similarly, although the plaintiff's burden of **[*1382]** proof is reduced considerably if the defendants' conduct is placed in the *per se* category, *see* *Northern Pac. Ry., 356 U.S. at 5*, it is still essential to allege conduct which results in some restraint on trade in order to maintain a claim of *per se* liability. "In characterizing . . . conduct under the *per se* rule, our inquiry must focus on whether the effect and . . . 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 almost always tend to restrict competition . . . ." *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)* (citation and footnote omitted). *See also* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* ("As a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation."). [5] In sum, ***HN2***[] "every antitrust suit should begin by identifying the ways in which a challenged restraint might **[**12]** possibly impair competition. This step occasionally reveals that competition is not implicated at all and thus that the parties' dispute is not an antitrust case." 7 P. Areeda, ***Antitrust Law*** para. 1503a at 372 (1986) (footnote omitted). If a plaintiff fails to allege any anticompetitive impact, dismissal is proper. *See* *Bunker Ramo, 713 F.2d at 1285* (dismissing complaint where "plaintiff [had] not alleged any anticompetitive effect arising from the defendants' conduct," and the court could not "infer such an effect from the facts alleged"). To avoid dismissal, Federal "must allege that competition in a *specific market* has been restrained." 7 P. Areeda, ***Antitrust Law*** para. 1502 at 371 (1986) (emphasis added).

Such an examination of the anticompetitive impact that the defendants' alleged conduct might have had requires a definition of the relevant market. "An antitrust policy divorced **[**13]** from market considerations would lack any objective benchmarks," *Continental T.V., 433 U.S. at 53 n.21*, and "without market analysis, the competitive impact of the challenged restraint cannot be assessed," *Business Foods Serv., Inc. v. Food Concepts Corp., 533 F. Supp. 992, 996 (E.D.N.Y. 1982)*. In *Carlo C.* *Gelardi Corp. v. Miller Brewing Co., 421 F. Supp. 237 (D.N.J. 1976)*, the court provided a succinct definition of relevant market:

> The relevant market is comprised of a geographic and a product market. The geographic market encompasses the area in which the defendant effectively competes with other individuals or businesses for the distribution of the relevant product. The relevant product market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered.

Id. at 243 (citations omitted).

B. Federal's Allegations of Anticompetitive Impact

Federal's Sherman Act claim must fail because Federal has not alleged facts that establish an injury to competition in a relevant market. Amata's demand for and receipt of bribes and his redirection of the wastepaper supply through cooperative **[**14]** suppliers may have injured Federal, but it does not, standing alone, constitute an injury to competition. Assuming *arguendo* that the relevant market in this case is the market alleged by Federal, that is the supply of wastepaper to be used in making paperboard by Federal at its Sprague mill, [6] **[*1383]** competition in that market would arise in two ways. First, there would be competition among suppliers for sales to Federal. Second,

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[5] Because *per se* liability is predicated on the existence of a substantial threat to competition, the "*per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." *NCAA, 468 U.S. at 104 n.26*.

[6] Although the definition of relevant market is most often a question of fact, *see* *Hayden Publishing Co., 730 F.2d at 70* & n. 8, except in unusual circumstances a single purchaser cannot usually constitute a relevant geographical market, *see* *Jayco Sys., Inc. v. Savin Business Mach. Corp., 777 F.2d 306, 319 & n. 43 (5th Cir. 1985)*, *cert. denied*, ***479 U.S. 816, 107 S. Ct. 73, 93 L. Ed. 2d 30 (1986)***. Since the court finds that there has been no anticompetitive effect in the market alleged by Federal, however, it is not necessary to consider whether Federal's allegation of a single-purchaser market is insufficient as a matter of law.

there would be Federal's efforts to make purchases on competitive terms with the various suppliers. With respect to each of these aspects of market competition, the requisite impact on competition is lacking.

[15]** 1. *Anticompetitive Effect on Competition for Sales to Federal*

The amended complaint fails to allege an injury to competition with respect to the ability of wastepaper suppliers to compete against each other for sales to Federal. The payment of bribes by suppliers to a purchasing agent does not by itself establish an anticompetitive effect. Although the bribes may have been illegal and unfair methods of competition, their illegality and unfairness does not support an inference that the bribes restrained competition. On the contrary, bribery could have been consistent with intense competition among the suppliers -- some of which resorted to illegal measures to gain an advantage. Indeed, it is ironic that, in addition to its antitrust claims, Federal has brought a claim under the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. Ann. §§ 42-110a* to -110q (West 1987) (as amended by 1987 Conn. Acts 297 (Reg. Sess.)). The Sherman Act is intended to protect competition, "whereas 'unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition.'" *Mid-West Underground Storage, Inc. v. Porter, 717 F.2d 493,* ***[**16]*** *497 (10th Cir. 1983)* (quoting *Northwest Power Prods., Inc. v. Omark Indus., Inc., 576 F.2d 83, 88 (5th Cir. 1978)*, *cert. denied*, *439 U.S. 1116 59 L. Ed. 2d 75, 99 S. Ct. 1021 (1979))*. The fact that Amata dealt primarily with suppliers who paid him bribes does not mean that the uncooperative sellers could no longer compete. For example, they might have informed Federal about Amata's behavior. In any event, without allegations of additional facts that demonstrate how those suppliers were precluded from taking competitive actions in order to secure sales with Federal, the amended complaint does not sufficiently allege anticompetitive effect. [7]

HN3[]

[17]** In order to establish an anticompetitive effect adequate to avoid dismissal, it is not sufficient to allege an injury to a competitor. *See* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* (antitrust laws designed to protect competition not competitors). Rather, "the inquiry under the rule of reason is directed at the challenged restraint's overall impact on competitive conditions, rather than whether a particular party has been restrained by the conduct at issue." *Berman Enter., Inc. v. Local 333, United Marine Div., Int'l Longshoremen's Ass'n, 644 F.2d 930, 937* (2d Cir.), *cert. denied*, *454 U.S. 965, 70 L. Ed. 2d 381, 102 S. Ct. 506 (1981)*. *See also* *NCAA, 468 U.S. at 104* ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.").

2. *Antitrust Injury to Federal*

As regards Federal's ability to buy wastepaper on competitive terms, the court finds nothing in the amended complaint which indicates that the kickback arrangements between Amata and some of the wastepaper suppliers foreclosed Federal from negotiating purchases with individual suppliers. Put another way, Federal has not suffered any antitrust injury **[**18]** with respect to its Sherman Act claim. [8] **[**20]** Amata **[*1384]** did not control Federal,

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[7] This court also finds that Amata's refusal to purchase from the wastepaper suppliers that were unwilling to pay him bribes does not amount to a refusal to deal as in *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*, where a refusal to deal was held to be a monopoly forbidden by the antitrust laws. *Klor's* involved a concerted refusal by "manufacturers, distributors and a retailer" to deal with the petitioner. *Id. at 213*. Amata's actions, by contrast, amounted at most to "a single trader refusing to deal with another," a scenario that the Court in *Klor's* distinguished from the group boycott. *See* *id. at 212*.

[8] An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick, 429 U.S. at 489*. Analysis of a plaintiff's antitrust injury is also relevant for determining whether that plaintiff has standing to sue for treble damages under section 4 of the Clayton Act. *See* *Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 250 (2d Cir. 1985)* ***HN4***[] (to have standing to bring an antitrust claim plaintiff must suffer an antitrust injury). The concept of antitrust injury and its relation to standing is discussed *infra* at part II. B.

nor is there any allegation that Amata and the suppliers paying him bribes could have prevented any other supplier from dealing with Federal had Federal attempted to purchase from such other supplier. A fair reading of the amended complaint indicates that the potential existed for Federal to obtain competitive prices from a wide range of suppliers. Of course, Amata's disloyalty and Federal's ignorance thereof resulted in depriving Federal from actually obtaining the benefits of competition among wastepaper suppliers. Nevertheless, there is no allegation that Federal could not have obtained the benefits of competition had it tried to do so. Indeed, as mentioned above, when Federal terminated Amata it did gain the benefits of a competitive market. When the only source of its injury is a disloyal employee, a plaintiff cannot complain of an antitrust injury in order to elevate claims based on an employee's breach of fiduciary duty into Sherman Act claims. The absence of an antitrust injury is fatal to Federal's *section 1* claim because in this case, where the alleged misconduct involved several suppliers selling to **[**19]** one purchaser, the lack of an antitrust injury to the purchaser reveals that the defendant's activities did not have *any* anticompetitive effect at all in the relevant market. If a purchaser like Federal has the opportunity to buy from competing sellers at competitive prices, that purchaser cannot make the necessary showing that competition has been restrained. Since Federal cannot establish an "impact on competitive conditions," *Berman Enter., 644 F.2d at 937*, defendants' conduct does not amount to a Sherman Act violation under the rule of reason or the *per se* rules. [9]

[21]** **[*1385]** In sum, Federal has alleged nothing more than commercial bribery. The amended complaint lacks additional allegations that might support a Sherman Act claim. [10] **[**22]** Other courts have also reached the

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The analysis of "antitrust injury" that this court undertakes with respect to Federal's Sherman Act claim should be distinguished from the "antitrust injury" analysis with respect to Federal's Robinson-Patman Act claim. As explained in the text *infra*, under section 2(c) of the Robinson-Patman Act there is no requirement that a plaintiff allege or prove antitrust injury or anticompetitive effect in order to establish a prima facie violation of section 2(c). The antitrust injury requirement for Federal's Robinson-Patman Act claim is imposed solely by common law standing doctrine. Moreover, since an antitrust injury is an "injury of the type the antitrust laws were intended to prevent," *Brunswick, 429 U.S. at 489*, an antitrust injury for purposes of a claim arising under section 2(c) of the Robinson-Patman Act is different from an antitrust injury for purposes of a claim arising under *section 1* of the Sherman Act. *Section 1* of the Sherman Act is intended to protect free competition, *NCAA, 468 U.S. at 104* & n.27, so that a plaintiff's Sherman Act injury must reflect the anticompetitive consequences of the defendants' conduct, *see Brunswick, 429 U.S. at 489*. Section 2(c) of the Robinson-Patman Act, on the other hand, was enacted to close a loophole in the price discrimination laws. *See infra* part II. B. To establish antitrust injury for purposes of standing to sue for a violation of section 2(c), a plaintiff must show that the violation "adversely affected his ability to compete with favored competitors." *World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1480* (10th Cir.), *cert. denied*, ***474 U.S. 823, 88 L. Ed. 2d 63, 106 S. Ct. 77 (1985)***.

[9] There is no restraint in this case because the way was open to Federal to do business with individual suppliers. The fate of the blanket-license arrangement examined by the Supreme Court in *Broadcast Music* and on remand by the Second Circuit Court of Appeals in *Columbia Broadcasting System* provides a more sophisticated example of this concept. The blanket licenses at issue gave the licensees "the right to perform any and all of the compositions owned by the members or affiliates [of the American Society of Composers, Authors and Publishers and Broadcast Music, Inc.] as often as the licensees desired for a stated term." *Broadcast Music, 441 U.S. at 5*. In *Broadcast Music*, the Court refused to apply *per se* analysis to the blanket-license arrangement. *Id. at 24*. The Court observed that "the individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing." *Id. at 23-24*. As the Court later commented in *Maricopa County Medical Society, 457 U.S. at 355*, "although there was little competition among individual composers for their separate compositions, the blanket-license arrangement did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price." On remand, the court of appeals examined the blanket-license arrangement under the rule of reason. *Columbia Broadcasting Sys., 620 F.2d at 932*. After observing that the plaintiff CBS had never attempted to purchase songs from individual copyright owners, the court "agree[d] with the defendants that if that opportunity [to purchase from the individual owners] is fully available, and if the copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to deal with them, the blanket license is not a restraint of trade." *Id. at 936*. These cases demonstrate that anticompetitive effect is not to be blithely assumed.

[10] The fact that the wastepaper suppliers were able to pass the cost of bribing Amata on to Federal and charge an excessive price for raw wastepaper does not mean there has been a restraint of trade for purposes of the Sherman Act. Presumably, the suppliers were able to pass these costs on to Federal because of Amata's willingness to bind Federal to purchase contracts that were not in Federal's interest in return for bribes and kickbacks. While it is true that every purchase negotiated by Amata "restrained" trade in that it involved the "fixity" of a price, the same is true of any contract between a buyer and a seller, and the

conclusion that *HN5*[] commercial bribery, standing alone, does not establish a violation of the Sherman Act. *See* Bunker Ramo, 713 F.2d at 1275, 1284-85; [11] Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 687 (9th Cir.) (per curiam), *cert. denied*, *429 U.S. 940, 50 L. Ed. 2d 309, 97 S. Ct. 355 (1976)*. Count I of the amended complaint must therefore be dismissed.

II. *Robinson-Patman Act Count*

In Count III of the amended complaint, Federal alleges that defendants violated *HN6*[] **[**23]** section 2(c) of the Robinson-Patman Act, which provides that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c) (1982). Defendants claim that Count III should be dismissed on the grounds that Federal has failed to allege an anticompetitive injury. The main thrust of defendants' argument is that an anticompetitive injury is both a necessary element of a violation of section 2(c) of the Robinson-Patman Act and a prerequisite to standing under section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982). Federal responds that it does not have to allege anticompetitive **[**24]** injury to sue under section 2(c), but if anticompetitive injury is required, it has alleged such injury.

A. Establishing a Prima Facie Violation Of Section 2(c) of the Robinson-Patman Act

The language of section 2(c) of the Robinson-Patman Act is broad enough to encompass the alleged payments to Amata **[*1386]** from the wastepaper suppliers. *See* Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 372 (3d Cir. 1985) (citing cases that have applied section 2(c) to schemes of commercial bribery). Payments were made to Amata, an agent of the buyer Federal, that were not for services rendered. [12] To require Federal to make additional allegations of anticompetitive effect in order to establish a prima facie violation of section 2(c) would be to impose a common law limitation on the broad language enacted by Congress. At least a few courts appear to have held that in order for payments to constitute a violation of section 2(c) the payments must have an anticompetitive effect. *See e.g.,* Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 25 (1st Cir. 1981) (plaintiff must show that payments give a favored buyer a competitive advantage); Bunker Ramo Corp. v. Cywan, **[**25]** 511 F. Supp. 531, 533 (N.D. Ill. 1981) (plaintiff must allege "competitive injury of the type which the Robinson-Patman Act was designed to protect against"). This court finds, however, that long-standing Second Circuit precedent and Supreme Court dicta refute any claim that competitive injury is an element of a violation of section 2(c) of the Robinson-Patman Act.

Sherman Act has never been interpreted to impose a general prohibition on commercial contracts. *See* NCAA, 468 U.S. at 98; United States v. Topco Assocs., 405 U.S. 596, 606, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972).

[11] The facts of *Bunker Ramo* are similar to the facts in this case. In *Bunker Ramo*, the plaintiff alleged that one of its employees and a supplier had been engaged in a scheme in which the supplier submitted false invoices for goods never received by the plaintiff. The employee filled out false delivery receipts so that the plaintiff paid the supplier for the goods never received, and in return the employee received bribes from the supplier. 713 F.2d at 1275. The Seventh Circuit Court of Appeals reversed the district court's denial of the defendants' motion to dismiss the plaintiff's Sherman Act claim. The court found that bribing an agent as part of a scheme to defraud -- without allegations of additional behavior by the defendants that might give rise to an antitrust violation -- did not constitute a *per se* violation of the Sherman Act and was deficient under the rule of reason for lack of any anticompetitive effect. Id. at 1284-85. Although *Bunker Ramo* involved only one supplier, the logic of *Bunker Ramo* applies equally well to this case.

[12] The "services rendered" defense has been limited to services performed by the seller's own broker. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113, 1156 (1983).

In *Biddle Purchasing Co. v. Federal Trade Comm'n, 96 F.2d 687* (2d Cir.), *cert. denied*, *305 U.S. 634, 83 L. Ed. 407, 59 S. Ct. 101 (1938)*, the court of appeals was confronted with the argument that

> section 2(c) . . ., under which this proceeding is brought, is to be construed in the light of section 2(a), and that, so construed, the payment or receipt of the brokerage is illegal only when it has such effect upon competition as is provided in section 2(a). The argument is that the receipt of [payments] here would be illegal only if it restricts competition or restrains trade or injures a competitor.

Id. at 690. [13] **[**27]** The court rejected this argument **[**26]** on the grounds that "section 2(c) contains no classification provision nor is there anything in it which would justify the conclusion that it would not be uniformly applied." *Id*. The court also held that the lack of a competitive injury requirement did not render section 2(c) unconstitutional. *Id. at 690, 692*. As the court of appeals later commented in *Grand Union Co. v. Federal Trade Comm'n, 300 F.2d 92, 99 (2d Cir. 1962)*, section 2(c) defines conduct that is *per se* illegal. As such, a plaintiff does not have to prove injury to competition. *Id*. The conclusion reached in *Biddle* is also supported by dicta in *Federal Trade Comm'n v. Simplicity Pattern Co., 360 U.S. 55, 3 L. Ed. 2d 1079, 79 S. Ct. 1005 (1959)*. In *Simplicity Pattern*, the Court contrasted sections 2(c), (d), and (e) with section 2(a). *Id. at 65*. "Unlike § 2(a)," the Court wrote, "[neither § 2(c), (d), nor (e)] requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition." *Id*. [14]

B. Standing

Section 2(c) of the Robinson-Patman Act defines certain conduct as illegal. It does not, however, create a private right of action to sue for damages caused by violations of the act. Private plaintiff standing to sue for treble damages for violations of the Robinson-Patman Act is provided by section 4 of the Clayton Act. [15] *See Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 853 (2d Cir. 1987)*. ***HN7***[] In order for Federal to maintain a Robinson-Patman Act claim, **[*1387]** Federal must demonstrate that it has standing under section 4 of the Clayton Act and that it satisfies the common law tests for standing that have been developed to limit the scope of section 4.

If Federal does not have standing, its Robinson-Patman Act claim must be dismissed despite the fact that it has alleged conduct by the defendants that violates the act. Even though, as *Biddle* **[**28]** and *Simplicity Pattern* demonstrate, the defendants' conduct might support a Federal Trade Commission cease and desist order, [16] an additional inquiry into standing is necessary if Federal's claim for damages is to survive dismissal. For purposes of standing analysis, cases like *Biddle* and *Simplicity Pattern* are irrelevant. Those cases involved Federal Trade Commission enforcement actions in which the standing limitations on private plaintiff claims do not apply. *See Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 600 (8th Cir. 1987)* (for purposes of standing analysis under section 4 of the Clayton Act, "citations to Federal Trade Commission enforcement actions are clearly inapposite").

Although standing requirements impose several hurdles for plaintiffs, "the single most striking development in the law of private antitrust **[**29]** enforcement . . . is the 'antitrust injury' concept associated with the Supreme Court's

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[13] Section 2(a) of the Robinson-Patman Act prohibits price discrimination "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 the customers of either of them." *15 U.S.C. § 13(a) (1982)*.

[14] The Second Circuit is not alone in refusing to graft a competitive injury requirement onto section 2(c). *See, e.g., Seaboard Supply, 770 F.2d at 372*; *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 716 F.2d 245, 247 (4th Cir. 1983)*.

[15] Codified as amended at *15 U.S.C. § 15(a) (1982)*.

[16] *15 U.S.C. § 45 (1982)* empowers the Federal Trade Commission to order persons to cease and desist from using unfair methods of competition. Unfair methods "encompass[es] . . . practices that violate the Sherman Act and the other antitrust laws." *Indiana Fed'n of Dentists, 476 U.S. at 454, 106 S. Ct. at 2016*.

Brunswick decision . . . ." P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 335.1 at 224 (Supp. 1986). The reference is to *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, in which the Court examined a petitioner's attempt to sue for treble damages pursuant to section 4 of the Clayton Act for injury resulting from a merger in violation of section 7 of the Clayton Act. [17] To recover damages under section 4, the Court held that the petitioner had to do more than prove that the defendant violated section 7. *Id. at 486*. In addition to proving a violation of the substantive ***antitrust law***, "plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id. at 489* (emphasis in original).

The *Brunswick* analysis has been applied to violations **[**30]** of the Robinson-Patman Act, and it governs Federal's claim for treble damages. In *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*, the petitioner alleged a violation of section 2(a) of the Robinson-Patman Act. [18] In its analysis of the petitioner's claim, the Court noted that "our decision here is virtually governed by our reasoning in [*Brunswick*]." *Id. at 562*. The petitioner had to prove more than just a violation of section 2(a), "since such proof establishes only that injury may result." *Id*. (quoting *Brunswick, 429 U.S. at 486*). "To recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *Id*. The Court remanded the case to the court of appeals to determine whether the petitioner had produced sufficient evidence to support a finding of a violation of section 2(a). *Id. at 568*. If the court of appeals determined on remand that respondent violated section 2(a), it would then have to decide whether the petitioner had antitrust standing. *Id*. In the final paragraph of the opinion, the Court gave the court of appeals the following instruction: **[**31]** "we emphasize that even if there has been a violation of the Robinson-Patman Act, petitioner is not excused **[*1388]** from its burden of proving antitrust injury and damages." *Id*. Although *J. Truett Payne* involved section 2(a) of the Robinson-Patman Act, there is no reason why its analysis should not also apply to claims arising out of section 2(c) since in both instances the right to treble damages is granted by section 4 of the Clayton Act. *Cf. World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1480* (10th Cir.) (holding that *J. Truett Payne* is "equally applicable to a plaintiff seeking damages for a violation of section 2(e) [of the Robinson-Patman Act] because such damages are also governed by section 4 of the Clayton Act, the damages provision construed in *J. Truett Payne*"), *cert. denied*, *474 U.S. 823, 88 L. Ed. 2d 63, 106 S. Ct. 77 (1985)*.

J. Truett Payne makes it clear that Federal must allege an antitrust injury in order to have standing to sue for treble damages. Defining antitrust injury for purposes of claims arising out of section 2(c) of the Robinson-Patman Act is more difficult. Keeping in mind that an antitrust injury is an "injury of the **[**32]** type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," *Brunswick, 429 U.S. at 489*, however, it is possible to formulate a meaningful test for antitrust injury in section 2(c) cases. "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Comm'n v. Henry Broch & Co., 363 U.S. 166, 168, 4 L. Ed. 2d 1124, 80 S. Ct. 1158 (1960)*. Section 2(c) was added to supplement section 2(a)'s prohibition on price discrimination and was primarily intended to attack indirect price discrimination through the use of "brokerage" payments to the agents of large buyers. The agents would pass the payments on to the buyers, giving the buyers an effective price reduction without violating section 2(a). *See id. at 168-69, 171*. Even though there is evidence in the legislative history that Congress may have additionally intended for section 2(c) to prohibit commercial bribery, *see id. at 169 n.6*, it appears that the main purpose of section 2(c) was to close the "brokerage" loophole in the laws regulating price discrimination. **[**33]** *See id. at 171* (stating that section 2(c) of the Robinson-Patman Act "was enacted by Congress because § 2(a) was not considered adequate to deal with abuses of the brokerage function"). *See also Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 447 F. Supp. 867, 881-82 (S.D.N.Y. 1978)* (discussing the legislative history of section 2(c)), *rev'd on other grounds*, *602 F.2d 1025* (2d Cir.), *cert. denied*, *444 U.S. 917, 62 L. Ed. 2d 172, 100 S. Ct. 232 (1979)*. In light of the primary purpose of section

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[17] Codified as amended at *15 U.S.C. § 18 (1982 & Supp. IV 1986)*.

[18] *See supra* note 13.

2(c), this court believes that the antitrust injury requirement of *Brunswick* and *J. Truett Payne* requires a plaintiff suing for treble damages for violations of section 2(c) to show "that the probable affect of the discrimination would be to allow the 'favored competitor to draw sales or profits from him, the unfavored competitor.'" *Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578 at 585 (2d Cir. 1987)* (quoting *J. Truett Payne, 451 U.S. at 569-70* (Powell, J., dissenting in part)).

Professors Areeda and Hovenkamp reach a similar conclusion in their analysis of *J. Truett Payne*. The plaintiff in *J. Truett Payne*, a Chrysler automobile dealer, had challenged **[**34]** a Chrysler incentive program that paid bonuses to dealers who achieved certain sales quota. *See 451 U.S. at 559-60*. As part of its holding, the Court rejected the rule of "automatic damages" under which a plaintiff who proves a violation of section 2(a) is automatically entitled to damages in the amount of the price discrimination. Instead, as described above, the Court held that a plaintiff must make an additional showing of antitrust injury before he can recover damages for a violation of section 2(a). *Id. at 561-63*. According to Professors Areeda and Hovenkamp's "simplest reading of this decision," the automatic damage measure was defective because "[it] did not reflect any actual injury to the plaintiff, for the bonuses received by his rivals were not shown to have **[*1389]** been translated into any retail price cuts (or other activities) by his rivals that took business away from him." P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 335.2c at 233-34 (Supp. 1986).

Applying these standards to this case, Federal's Robinson-Patman claim must be dismissed for lack of standing. Although Federal contends that it has suffered an "anticompetitive **[**35]** injury," the facts alleged in the amended complaint do not support a finding of antitrust injury sufficient to confer standing to sue for damages for violations of section 2(c). With respect to injury, Federal alleges (1) that the wastepaper suppliers passed the cost of bribing Amata on to Federal so that Federal paid more than it would otherwise have paid in the absence of the payments to Amata and (2) that the cost of wastepaper supplied to Federal's Sprague mill dropped after Amata's termination. The most this court is willing to infer from those allegations is that Federal's profits might have been lowered as a result of the bribes paid to Amata -- and the court cannot even be certain about reduced profits since Federal may have been able to pass the additional cost of wastepaper through to its customers. This court is unwilling to infer from the allegations in the amended complaint that the payments to Amata and the increased cost of wastepaper resulted in a price discrimination that disadvantaged Federal with respect to its competitors. [19] **[**37]** There is no allegation that other manufacturers of recycled paperboard were purchasing wastepaper from the same suppliers at a lower cost **[**36]** or that the alleged arrangements resulted in a transfer of profits from Federal to one of Federal's competitors. Nor is there any allegation that the higher cost of wastepaper supplied to the Sprague mill caused Federal to lose sales of the recycled paperboard manufactured from raw wastepaper or that the payments to Amata and the resulting overcharge to Federal allowed Federal's rivals in the recycled paperboard business to undercut Federal's prices and thereby increase their sales volume at Federal's expense. [20] Once again, Federal

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[19] Federal cites *Grace v. E.J. Kozin Co., 538 F.2d 170, 174 (7th Cir. 1976)*, for the proposition that whenever bribery of a purchasing agent results in a higher price to the buyer there is injury "entitled to redress under Section 2(c)." Federal's reliance on that case is inapposite for two reasons. First, the case is easily distinguishable. *Grace* involved bribes paid by the defendant, a wholesaler of seafood, to a purchasing agent of another wholesaler, the plaintiff, in order to induce the plaintiff to purchase seafood from the defendant at unreasonably high prices. *Id. at 172*. Moreover, the two wholesalers shared some of the same customers. *Id*. Thus, the plaintiff and defendant were direct competitors in the same consumer market. Under those facts, it is possible to infer that the higher cost of seafood that the plaintiff paid as a result of the kickback scheme disadvantaged the plaintiff in its ability to compete with the defendant. In this case, however, Federal and the wastepaper suppliers do not compete, *see infra* note 20, and they do not share any of the same customers. Second, and more importantly, the court in *Grace*, which was decided before *Brunswick* and *J. Truett Payne*, appears to adopt the automatic measure of damages that the Supreme Court rejected in *J. Truett Payne.* See *Grace, 538 F.2d at 174* (upholding the district court's award of damages in the amount of "commissions" paid to the unfaithful purchasing agent). Indeed, *Grace* is cited by the Court in *J. Truett Payne* as a case approving the automatic damages theory. *See 451 U.S. at 561 n.2*. In light of the recent Supreme Court developments in the law of standing, it would be improper to rely on *Grace*.

[20] In its briefs, Federal argues that it competes with the defendant wastepaper suppliers because -- to the extent that the defendant suppliers went along with Amata and bought wastepaper from uncooperative suppliers and resold it to Federal -- they competed with Federal to make purchases of wastepaper. This argument does not withstand close analysis and cannot provide

has tried to cast commercial torts in the language of antitrust in order to have a chance at treble damages. As with its Sherman Act claim, however, the facts alleged in the amended **[*1390]** complaint simply do not amount to an antitrust violation.

III. *Rule 9(b)*

Defendants contend that the amended complaint fails to satisfy the pleading requirements of *Rule 9(b) of the Federal Rules of Civil Procedure*. ***HN8***[] *Rule 9(b)* provides that "in all averments **[**38]** of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Fed. R. Civ. P. 9(b)*. "Malice, intent, knowledge, and other condition of mind," however, "may be averred generally." *Id*. Defendants argue (1) that the requirements of 9(b) apply to the entire complaint since "the allegations of conduct comprising the purported 'fraudulent schemes' are incorporated into *all* counts" and (2) that the entire amended complaint should be dismissed for failure to plead with sufficient particularity. Federal, on the other hand, argues that application of 9(b) is limited to Count IV (RICO) and Count VII (fraud by agent) since those are the only counts "that allege fraud" and that *Rule 9(b)* is satisfied with respect to those two counts.

Rule 9(b) must be satisfied with respect to a particular count whenever fraud is a necessary element of that count. *See* *In re LILCO Sec. Litig., 625 F. Supp. 1500, 1503 (E.D.N.Y. 1986)*. If "fraud is not required for a [] claim, [that claim] need not be pleaded pursuant to *Rule 9(b)*." *Id*. Despite defendants' argument to the contrary, the mere fact that the transactions alleged in the amended complaint give **[**39]** rise to some claims grounded in fraud does not mean that all the claims rising out of the same transactions are subject to 9(b).

To the extent that the RICO count is based on predicate acts of mail and wire fraud, it must satisfy *Rule 9(b)*. *See Andreo II*, 660 F. Supp. at 136. The sufficiency of the RICO pleading is discussed below. Count VII, alleging fraud by an agent, is also clearly covered by *Rule 9(b)*. [21] The only other counts that might arguably trigger *Rule 9(b)* are Counts X and XI. Count X, based on the Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. Ann. §§ 42-110a to 110q* (West 1987) (as amended by 1987 Conn. Acts 297 (Reg. Sess.)), alleges that the wastepaper suppliers engaged in "unfair and *deceptive* acts" in violation of section 42-110b. Fraud, however, is not a necessary element for a claim under the CUTPA, which is broader in scope than traditional common law remedies for fraud. *See* *Bailey Employment Sys., Inc. v. Hahn, 545 F. Supp. 62, 66-67 (D. Conn. 1982)*, *aff'd*, *723 F.2d 895 (2d Cir. 1983)*; *Hinchliffe v. American Motors Corp., 184 Conn. 607, 616-17, 440 A.2d 810, 815-16 (1981)*. Since Federal does not need to prove fraud in order **[**40]** to recover under Count X, Federal does not need to plead Count X pursuant to *Rule 9(b)*. Count XI alleges that the wastepaper suppliers breached a contractual duty to deal in good faith. ***HN9***[] Under Connecticut law, a breach of good faith requires only a showing that a party was not "honest in fact." *Funding Consultants, Inc. v. Aetna Casualty & Sur. Co., 187 Conn. 637, 643, 447 A.2d 1163, 1165-66 (1982)*. That is a much lighter burden than is required for establishing fraud. *See* *Miller v. Appleby, 183 Conn. 51, 54-55, 438 A.2d 811, 813 (1981)* (listing the elements for an action in fraud). Again, since Federal need not prove fraud in order to recover under its breach of contract claim, Count XI need not be pleaded pursuant to *Rule 9(b)*.

IV. *RICO Count*

A. Sufficiency of Pleading of Predicate Acts

Defendants argue that the RICO count is inadequately pleaded under *Rule 9(b)*. Without specifying under which subsection it is proceeding, Federal alleges a violation of *section 1962* of RICO. There are two relevant subsections **[**41]** of *section 1962* which will be considered in turn.

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the basis for finding that Federal has standing. The defendant suppliers, when they bought wastepaper from uncooperative sellers, bought the wastepaper in order to resell it to Federal. They were acting as brokers. Federal, however, has not made any allegation that it has been injured in its ability to compete with the defendant suppliers in *the brokerage business*. All that Federal has alleged is that it purchases wastepaper to recycle it into paperboard. Since Federal has not alleged that it brokers wastepaper, it cannot argue that it has been injured in its ability to compete in the wastepaper brokerage business.

[21] Since Count VII is directed only at Amata, who has not moved to have that count dismissed, the sufficiency of Count VII is not at issue in this motion.

1. Section 1962(c)

HN10[] Section 1962(c) of RICO provides:

> **[*1391]** It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1982). Racketeering activity is defined to include specific predicate offenses, including mail fraud indictable under 18 U.S.C. § 1341 and wire fraud indictable under 18 U.S.C. § 1343. The predicate acts of mail and wire fraud must be pleaded in conformity with the particularity requirements of Rule 9(b). Andreo II, 660 F. Supp. at 1368. [22]

The mail and wire fraud statutes prohibit "everything designed to defraud." McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875, 2880, 97 L. Ed. 2d 292 (1987) (quoting Durland v. United States, 161 U.S. 306, 313, 40 L. Ed. 709, 16 S. Ct. 508 (1896)). [23] HN11[] The Supreme Court has defined **[**42]** the elements of fraud to be "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation." Pence v. United States, 316 U.S. 332, 338, 86 L. Ed. 1510, 62 S. Ct. 1080 (1942). Fraud is not limited to affirmative misrepresentations, but may also be proved "through the defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation." United States v. O'Malley, 707 F.2d 1240, 1247 (11th Cir. 1983).

Rule 9(b) requires that each element of fraud listed above be pleaded with particularity, except for knowledge and intent which "may be averred generally." Fed. R. Civ. P. 9(b). A complaint must specifically allege the facts that amount to fraud. Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir. 1979), *cert. denied*, *446 U.S. 946, 64 L. Ed. 2d 802, 100 S. Ct. 2175 (1980)*; Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972). **[**43]** It will not suffice to merely quote language taken from the mail and wire fraud statutes such as scheme to "defraud." *See* Ross, 607 F.2d at 557. If a claim is based on an alleged failure to inform the plaintiff of a material fact, the complaint should also allege the basis for the defendant's duty to disclose. Nordlicht v. New York Telephone Co., 617 F. Supp. 220, 228 (S.D.N.Y. 1985), *aff'd*, 799 F.2d 859 (2d Cir. 1986), *cert. denied*, *479 U.S. 1055, 107 S. Ct. 929, 93 L. Ed. 2d 981 (1987)*. Although allegations of knowledge of falsity and intent to defraud are not subject to the requirements of Rule 9(b), plaintiffs are not relieved of their burden to plead a factual basis for those allegations. Plaintiffs must still specifically plead events from which one can infer intent and knowledge. Connecticut Nat'l Bank v. Fluor Corp., 808 F.2d 957, 962 (2d Cir. 1987). [24]

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[22] Federal has also alleged other predicate acts which are not covered by 9(b) and which are sufficient to support a RICO claim. *See infra* note 25.

[23] Although *McNally* dealt with mail fraud, case law interpreting the mail fraud statute also applies to the wire fraud statute. United States v. Giovengo, 637 F.2d 941, 944 (3d Cir. 1980), *cert. denied*, ***450 U.S. 1032, 68 L. Ed. 2d 228, 101 S. Ct. 1743 (1981)***.

[24] The case law has elaborated on the specificity requirements of Rule 9(b). When factual allegations are based on information and belief, "the complaint must set forth the source of the information and the reasons for the belief." Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, 651 F. Supp. 877, 880 (D. Conn. 1986) [hereinafter *Andreo I*]. In addition, "fraud allegations ought to specify the time, place, speaker, and content of the alleged misrepresentation." DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987). At the same time, however, Rule 9(b) does not require a plaintiff to set forth a complete history of every transaction. *Accord* General Accident Ins. Co. of Amer. v. Fidelity and Deposit Co. of Ind., 598 F. Supp. 1223, 1232 (E.D. Pa. 1984) ("If the fraud allegedly involved a course of conduct over an extended period of time or series of transactions, it is not necessary to recite, in detail, the facts of each transaction of the fraudulent scheme."). Nonetheless, to survive a motion to dismiss and to satisfy Rule 9(b)'s purpose of providing fair notice to defendants, protecting defendants from unwarranted harm to reputation, and reducing the frequency of strike suits, *see* DiVittorio, 822 F.2d at 1247 (discussing the purpose of Rule 9(b)), a plaintiff must specify at least one occasion of fraud. Additional instances of fraud can be elicited with the tools of discovery.

[44]** **[*1392]** Applying the foregoing principles to the present case, the court believes that Federal's amended complaint should not be dismissed for failure to comply with *Rule 9(b)*. Although the facts alleged are not directed to the five elements of fraud, the arrangements described in the amended complaint support an inference of facts that would satisfy the elements of a fraud claim. At this stage of the proceedings, it would be putting form before substance if defendants' 9(b) motions were granted immediately. Rather, the court grants Federal 20 days in which to amend the amended complaint to add allegations of specificity that clearly describe each element of fraud. *Cf. Devaney v. Chester, 813 F.2d 566, 569 (2d Cir. 1987)* (when a complaint is dismissed for failure to comply with *Rule 9(b)*, leave to replead should be freely granted unless there is a legitimate reason for denial). [25]

[45]** 2. *Section 1962(d)*

Along with a violation of *section 1962(c)*, Federal appears to allege a conspiracy to violate RICO. ***HN12***[] *Section 1962(d)* provides:

> It shall be unlawful for any person to conspire to violate any of the provisions . . . of this section.

18 U.S.C. § 1962(d) (1982). To be liable under this section, the defendant "'must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate acts.'" *Andreo I, 651 F. Supp. at 883* (quoting *Laterza v. American Broadcasting Co., 581 F. Supp. 408, 413 (S.D.N.Y. 1984))*. *See also* *United States v. Ruggiero, 726 F.2d 913, 921* (2d Cir.) (conviction for RICO conspiracy requires that the "defendant himself at least agreed to commit two or more predicate crimes"), *cert. denied*, *469 U.S. 831, 83 L. Ed. 2d 60, 105 S. Ct. 118 (1984)*. "The agreement proscribed by *section 1962(d)*," however, "is conspiracy to participate in a charged enterprise's affairs, not conspiracy to commit predicate acts." *United States v. Persico, 832 F.2d 705, 713 (2d Cir. 1987)*.

As this court has previously noted, "although *Rule 9(b)* does not apply to claims of conspiracy because it **[**46]** is not one of the averments enumerated in the Rule, plaintiffs must nevertheless provide some factual basis for the legal conclusion that a conspiracy existed." *Andreo I, 651 F. Supp. at 883* (citations omitted). As with a claim of fraud tested under 9(b), conclusory allegations are insufficient. *Id*.

Under this standard, the amended complaint does not state a claim against any of the defendants for conspiracy to violate RICO. With respect to each defendant wastepaper supplier and the suppliers as a group, the amended complaint alleges that "Amata conspired, established, conducted, and participated, with [such defendant suppliers], in an enterprise engaged in a pattern of racketeering activity which affected interstate commerce." It then gives the goals and purposes of the conspiracies and states that such conspiracies were carried out through "repeated acts" in violation of **[*1393]** *18 U.S.C. §§ 1341*, *1343*, and *1951*. This claim must fail because the amended complaint does not allege "any objective manifestation of an agreement," and it does not "set forth the facts upon which the conspiracy claim is based." *See* *Andreo I, 651 F. Supp at 883*. The allegations of a RICO conspiracy are **[**47]** merely conclusory allegations.

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[25] To the extent that Federal's RICO claim is brought under *section 1962(c)* and relies on predicate acts other than mail and wire fraud, amendment is not necessary. In particular, Federal has alleged a violation of "the Hobbs Act, Title *18, United States Code, Section 1951 et seq.*" Presumably, Federal means *18 U.S.C. § 1952*, which prohibits interstate travel or the use of interstate facilities, including the mail, to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." *18 U.S.C. § 1952(a) (1982)*. Unlawful activity includes commercial bribery prohibited by state law, *Perrin v. United States, 444 U.S. 37, 50, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979)*, and in Connecticut commercial bribery is a crime, *see* *Conn. Gen. Stat. Ann. §§ 53a-160* and -161 (West 1985). The court notes that *section 53a-160* requires that the bribes be made with "intent to influence [the employee's] conduct in relation to his employer's or principal's affairs." *Id*. *§ 53a-160*. As noted in the text *supra*, the specificity requirements of *Rule 9(b)* do not apply to allegations of intent. Nonetheless, Federal must still plead facts which give rise to a strong inference of intent. *See* *Connecticut Nat'l Bank, 808 F.2d at 962*. The court believes that Federal's allegations that bribes were paid by the defendant wastepaper suppliers to a purchasing agent of Federal are sufficient to establish intent on the part of the suppliers to influence the affairs of Federal.

B. Sufficiency of Pattern of Racketeering and Enterprise Allegations

1. *The Pattern Requirement*

Defendants contend that Federal has failed to allege a "pattern of racketeering." [26] Defendants cite several cases for the proposition that a pattern of racketeering is limited to "a series of separate and discrete ongoing criminal episodes or schemes." *See e.g.,* *Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986)* (more required in order to establish a pattern of racketeering activity). Such cases have relied on the now famous footnote 14 in *Sedima, S.P.R.L. v. Imrex. Co., 473 U.S. 479, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1984)*, in which the Court quoted a Senate Report for the proposition that "pattern of racketeering activity" requires "*continuity plus relationship." Id. at 496 n.14* (emphasis in original) (quoting S. Rep. No. 91-617, p. 158 (1969)). *See also, e.g., Superior Oil, 785 F.2d at 257* (citing footnote 14).

[48]** Whatever may be the law in other circuits, however, it is now settled that in the Second Circuit a RICO plaintiff need not plead or prove the existence of multiple schemes of criminality in order to establish a pattern of racketeering activity. *See* *United States v. Ianniello, 808 F.2d 184, 192 (2d Cir. 1986)*, *cert. denied*, *483 U.S. 1006, 107 S. Ct. 3230, 97 L. Ed. 2d 736 (1987)*. *See also* *Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51 (2d Cir. 1987)* (stating that *Ianniello* "expressly rejected a multiple episodes requirement"), *cert. denied*, *484 U.S. 1005, 108 S. Ct. 698, 98 L. Ed. 2d 650 (1987)*. According to *Ianniello*, a pattern of racketeering is established whenever "a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated." *Ianniello, 808 F.2d at 192*. *See also* *Andreo II, 660 F. Supp. at 1369-70* (applying *Ianniello*). [27]

[49]** This court finds that Federal has alleged a pattern of racketeering under the standard set forth in *Ianniello*. Federal's amended complaint pleads at least two related acts of commercial bribery through the use of interstate facilities in violation of *18 U.S.C. § 1952* in furtherance of a single scheme to bribe Federal's employee in order to obtain commercial advantage and "defraud" Federal. That is sufficient to satisfy the pleading requirement for pattern of racketeering activity. *See* *Beck, 820 F.2d at 51*.

2. *The Enterprise Requirement*

HN14[] In the Second Circuit, the requirements of relatedness and continuity referred to by the Supreme Court in *Sedima* are addressed in the concept of enterprise under *section 1962(c)*. "Enterprise" is defined by statute to include both legal entities such **[*1394]** as corporations as well as individuals "associated in fact." *18 U.S.C. § 1961(4) (1982)*. The latter consists of "'a group of persons associated together for a common purpose of engaging in a course of conduct' and 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" *Ianniello, 808 F.2d at 191* **[**50]** (quoting *United States v. Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981))*. Relatedness and continuity are provided for through the requirement that a RICO enterprise be "a continuing operation" and the predicate acts be "related to the common purpose." *Id*.

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[26] ***HN13***[] *18 U.S.C. § 1961(5) (1982)* states:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

[27] *Ianniello* involved a "continuing criminal enterprise" to skim profits from bars and restaurants owned by the defendants and to evade taxes. *808 F.2d at 189*. Some district courts in this circuit have apparently tried to limit *Ianniello* by requiring that a plaintiff allege separate criminal episodes when the enterprise is a lawful entity, rather than a "continuing criminal enterprise." *See e.g., Mastercraft Indus., Inc. v. Breining, 664 F. Supp. 859, 860-61 (S.D.N.Y. 1987)*. This court believes, however, that *Beck* eliminates the multiple episode requirement in all cases. Although *Beck* also involved a criminal enterprise, *see* 802 F.2d at 48-49, the court in *Beck* clearly stated that "*Ianniello* confirms that two related predicate acts will suffice to establish a pattern under *18 U.S.C. sec. 1961(5)*." *Id. at 51*. In any event, since this court has determined that Federal has alleged *criminal enterprises* made up of Amata and the wastepaper suppliers, *Ianniello* clearly applies.

The facts of four recent cases decided by the court of appeals give substance to this definition of enterprise. In *Ianniello*, the court examined an open-ended scheme to skim profits and evade taxes on restaurants and bars owned by the defendants. [808 F.2d at 186-89](). The court decided that there was a "common purpose" with "no obvious terminating goal or date," and that the scheme "clearly establish[ed] the enterprise requirement." *Id. at 191-92*. In *Beck*, the court applied *Ianniello* to the defendants' "allegedly improper treatment of bonds held by Mexico and the sale and disposition of the proceeds of the U.S. collateral." *820 F.2d at 49*. Because of the fact that "the enterprise alleged by [the] plaintiffs had but one straightforward, short-lived goal -- the sale of the U.S. collateral at a reduced price," [28] and the fact that after the sale "the alleged **[**51]** enterprise ceased functioning," the court concluded that the association was "not sufficiently continuing to constitute an 'enterprise' under [RICO]." *Id. at 51*. Similarly, in *Albany Insurance Co. v. Esses, 831 F.2d 41 (2d Cir. 1987)*, the court relied on *Ianniello* and *Beck* to find that the defendants' efforts to induce an insurance company to pay a single false insurance claim did not constitute an enterprise. Although the scheme involved several incidents of fraudulent representations by the defendants, all of the fraud related to one insurance claim arising out of a fire at one of the defendants' warehouses. *Id. at 43*. As such, "the purpose of the enterprise . . . had an 'obvious terminating goal or date' -- inducing the insurer of its goods to pay a false insurance claim. There [was] nothing in [the] amended complaint that indicate[d] a threat of continuing criminal activity beyond this terminating goal." *Id. at 44*. Finally, in *Furman v. Cirrito, 828 F.2d 898, 903 (2d Cir. 1987)*, the court held that a partnership could not be a RICO enterprise when the partnership was terminated by the alleged acts of racketeering.

[52]** *Ianniello, Beck, Esses*, and *Furman* establish the following guidelines. ***HN15***[] As a starting point for finding a RICO enterprise, there must be "a continuing operation" and the predicate acts must be "related to the common purpose." *Ianniello, 808 F.2d at 191*. In addition, when an enterprise is purely criminal in nature, the court of appeals appears to have developed a transactional test for continuity. If the predicate acts are related to a *single transaction* that has an "obvious terminating goal or date," *Ianniello, 808 F.2d at 192*, then *Sedima*'s requirement of relatedness and continuity are not satisfied, and there is no RICO enterprise. *See Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc., 662 F. Supp. 1499, 1505 (S.D.N.Y. 1987)* ("At the very least, *Beck* mandates that an alleged scheme whose goal is 'straightforward [and] short-lived,' and which has an obvious termination date, should be dismissed."). Thus, enterprise was absent in *Beck* and *Esses* because the defendants' ultimate goal involved only one transaction. If, however, the criminal enterprise is one that is intended to continue indefinitely over the course of several **[**53]** transactions and whose purpose is achieved through multiple transactions involving predicate acts, then the plaintiff has established the existence of a RICO enterprise. Finally, *Furman* teaches that if the alleged enterprise dissolves or ends upon commission **[*1395]** of the predicate acts, it cannot be a RICO enterprise. [29]

Applying these guidelines to the present case, Federal has adequately alleged RICO enterprises composed of Amata and individual suppliers as well as an enterprise composed of Amata and all the suppliers. [30] A fair reading of the amended complaint reveals that Federal has alleged that each enterprise had a common purpose to obtain commercial advantage and "defraud" Federal through the predicate acts of illegal bribery. Although not all suppliers were making sales to Federal for the entire period, the schemes lasted over a period of several years and involved multiple transactions between Federal and the various defendants. The enterprises had no "obvious terminating

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[28] Part of the plaintiffs' amended complaint in *Beck* was dismissed on other grounds, so that the only remaining claims related to the sale of the U.S. collateral. *See 820 F.2d at 49-50*.

[29] Although *Furman* involved a legitimate partnershp regulated by New York law, *see 828 F.2d at 900*, this court sees no reason why its logic would not apply to criminal enterprises as well.

[30] The fact that the defendants who are alleged to have engaged in a pattern of racketeering activity are also the members of the alleged enterprises is not fatal to a RICO complaint. Although an enterprise is "an entity separate and apart from the pattern of activity in which it engages," *United States v. Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*, there is "no reason why a single entity could not be both the RICO 'person' and one of a number of members of the RICO 'enterprise.'" *Cullen v. Margiotta, 811 F.2d 698, 729-30* (2d Cir.), *cert. denied*, ***483 U.S. 1021, 107 S. Ct. 3266, 97 L. Ed. 2d 764 (1987)***.

[54]** goal or date," *[Ianniello, 808 F.2d at 192](#)*, and the enterprises continued after commission of the predicate acts. [31] These facts are sufficient to satisfy the test for enterprise.

[55]** V. *Liability of Individual Defendants*

Defendant Automated seeks dismissal of all counts against the individual officers of the corporate defendants on the grounds that the amended complaint does not contain allegations sufficient to render the individual officers liable for the torts of the corporate defendants. It is not necessary to consider this argument in detail, however, for it is clearly alleged in the amended complaint that the individual defendants themselves committed the wrongful acts. They are not named as defendants merely by virtue of their positions as officers in the defendant corporations.

VI. *Conclusion*

Count I of the amended complaint, alleging a violation of *section 1* of the Sherman Act, must be dismissed for failure to allege an impact on competition in a relevant market. Count III of the amended complaint, alleging a violation of section 2(c) of the Robinson-Patman Act, must be dismissed for lack of standing. To the extent that Count IV alleges a violation of *section 1962(d)* of RICO, it must be dismissed for failure to adequately allege conspiracy. To the extent that Count IV alleges a violation of *section 1962(c)* of RICO based **[**56]** on the predicate acts of mail and wire fraud, it is **[*1396]** not dismissed, provided, however, that Federal amend the amended complaint within 20 days of this ruling to add allegations of specificity that describe each element of fraud. To the extent that Federal's *section 1962(c)* claim is based on predicate acts of commercial bribery, it is not dismissed and no amendment is necessary.

SO ORDERED.

Dated at Hartford, Connecticut, this 10th day of February, 1988.

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[31] Although Federal's amended complaint is not specific in its allegations of the several criminal enterprises, and indeed the RICO count merely states that Amata "conspired, established, conducted, and participated" with the various defendants "in an enterprise engaged in a pattern of racketeering activity," the necessary elements of a RICO enterprise can be inferred from the amended complaint as a whole. In particular, the amended complaint describes the conduct and the goals of the members of the enterprises. To "plead the RICO enterprise in terms of the conduct and goals of those allegedly a part of the enterprise is not a bar to the RICO cause of action." *In re Gas Reclamation, Inc. Sec. Litig., 659 F. Supp. 493, 516 (S.D.N.Y. 1987)*. The allegations in the amended complaint are sufficient to put the defendants on notice of the claims against them and are satisfactory under the Federal Rules of Civil Procedures. *See* *Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 790 (3d Cir. 1984)* (notice pleading sufficient for the enterprise element of a RICO claim), *cert. denied*, *469 U.S. 1211, 84 L. Ed. 2d 327, 105 S. Ct. 1179 (1985)*. This court disagrees with the conclusion reached in *Plount v. American Home Assurance Co., 668 F. Supp. 204, 206-07 (S.D.N.Y. 1987)*, that *Ianniello* and its progeny presuppose and therefore require a specifically pleaded complaint. *Rule 9(b)* limits specificity in pleading to averments of fraud. With respect to allegations of enterprise, Federal need only provide some factual basis for the legal conclusion that an enterprise existed. *Cf.* *Andreo I, 651 F. Supp. at 883* (addressing the pleading requirements for allegations of conspiracy). To require more would conflict with RICO's remedial purpose, *see* *Sedima, 473 U.S. at 498*, and the Supreme Court's directive that "RICO is to be read broadly," *id. at 497*.

Anheuser-Busch, Inc. v. Abrams

Court of Appeals of New York

January 6, 1988, Argued ; February 11, 1988, Decided

No Number in Original

Reporter

71 N.Y.2d 327 *; 520 N.E.2d 535 **; 525 N.Y.S.2d 816 ***; 1988 N.Y. LEXIS 85 ****; 1988-1 Trade Cas. (CCH) P67,890

Anheuser-Busch, Inc., Respondent, v. Robert Abrams, as Attorney-General of the State of New York, Appellant; In the Matter of Subpoenas Duces Tecum Served by the Attorney-General of the State of New York, Upon the New York State Beer Wholesalers Association, Inc., et al., Respondents; Attorney-General of the State of New York, Appellant; In the Matter of G. Heileman Brewing Company, Inc., Respondent, v. Robert Abrams, as Attorney-General of the State of New York, Appellant; In the Matter of Miller Brewing Company, Respondent, v. Robert Abrams, as Attorney-General of the State of New York, Appellant; In the Matter of Stroh Brewery Company, Respondent, v. Robert Abrams, as Attorney-General of the State of New York, Appellant; In the Matter of Forbee Bros. Corporation et al., Respondents, v. Robert Abrams, as Attorney-General of the State of New York, Appellant

Subsequent History: **[****1]** As Amended November 8, 1988.

Prior History: Appeal, in the six above-entitled proceedings, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered March 5, 1987, which (1) reversed, on the law, six judgments (denominated orders) of the Supreme Court at Special Term (Hortense W. Gabel, J.), entered in New York County, denying applications by petitioners to quash subpoenas duces tecum and interrogatories served upon them by the Attorney-General, dismissing the petitions and directing petitioners to comply with the subpoenas and to answer the interrogatories, and (2) granted the applications by petitioners to quash the subpoenas duces tecum and interrogatories. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the six judgments (denominated orders) of the Supreme Court, properly made?"

Anheuser-Busch, Inc. v Abrams, 126 AD2d 197, reversed.

Matter of New York State Beer Wholesalers Assn. (Attorney-General of State of N. Y.), 126 AD2d 197, reversed.

Matter of Heileman Brewing Co. v Abrams, 126 AD2d 197.

[**2]** *Matter of Miller Brewing Co. v Abrams, 126 AD2d 197*.

Matter of Stroh Brewery Co. v Abrams, 126 AD2d 197.

Matter of Forbee Bros. Corp. v Abrams, 126 AD2d 197.

Disposition: Order reversed, with costs, and the judgments of Supreme Court, New York County, reinstated. Certified question not answered as unnecessary.

Core Terms

vertical, territorial, Donnelly Act, legality, courts, subpoenas, wholesaler, decisions, brewers, beer, distributorships, investigate, restraint of trade, anti trust law, rule of reason, interrogatories, interpreting, petitioners', powers

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Public Enforcement, State Civil Actions**

N.Y. Gen. Bus. Law § 343 authorizes the Attorney-General to investigate marketing practices which may violate state's antitrust laws.

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

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

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

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

A vertical" restraint is one imposed by an agreement between noncompetitors who occupy different levels in the distribution chain -- as opposed to a horizontal restraint, which results from an agreement among competitors at the same level of distribution.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Evidence > Inferences & Presumptions > General Overview

HN3[] **Methods of Investigation, Subpoenas**

An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry. In defending his inquiry, the Attorney-General enjoys a presumption that he is acting in good faith and must show only that the materials sought bear a reasonable relation to the subject matter under investigation and to the public purpose to be achieved.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The Donnelly Act declares, among other things, that 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 against public policy, illegal and void. *N.Y. Gen. Bus. Law § 340(1)*.

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 > Public Enforcement > State Civil Actions

HN5[] **Antitrust & Trade Law, Sherman Act**

As construed by State and Federal courts, the Donnelly Act and Sherman Act antitrust laws prohibit only "unreasonable" restraints on trade.

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 > Public Enforcement > State Civil Actions

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

The Donnelly Act -- often called a "Little Sherman Act -- should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN7[] **Methods of Investigation, Subpoenas**

The Attorney-General's subpoena power does not abate by reason of any action or proceeding brought by him. *N.Y. Gen. Bus. Law § 343*.

Headnotes/Summary

Headnotes

Monopolies -- Donnelly Act -- Use in Beer Industry of Exclusive Territorial Distributorships -- "Vertical" Restraint of Trade -- No Rule of Per Se Legality -- Power of Attorney-General to Investigate

1. *General Business Law § 343* authorizes the Attorney-General to investigate the pervasive use in the beer industry of exclusive territorial distributorships, which result in a "vertical" restraint of trade with respect to intrabrand competition in the beer industry and which the Attorney-General alleges may violate the State's antitrust laws (Donnelly Act; *General Business Law § 340 et seq.*); therefore it was error to quash the subpoenas duces tecum and interrogatories served upon petitioners -- four brewers, several beer wholesalers and a beer wholesalers' trade association -- by **[****3]** the Attorney-General pursuant to that investigation. Case law does not conclusively establish a rule of per se legality for vertical territorial arrangements. Nor does the language of the Donnelly Act foreclose the Attorney-General's position that such arrangements, if shown to result in an unreasonable restraint of

trade under the circumstances, are prohibited. In the absence of such a rule of per se legality, the Attorney-General is authorized to conduct an investigation to test the legality of petitioners' practices.

Attorney-General -- Subpoena Power of Attorney-General -- Monopolies -- Donnelly Act -- Effect of Commencement of Civil Action in Federal Court by Attorney-General

2. Subpoenas duces tecum served upon petitioners by the Attorney-General pursuant to an investigation into marketing practices in the beer industry which the Attorney-General alleges may violate the State's antitrust laws (Donnelly Act; *General Business Law § 340 et seq.)* need not be quashed because the Attorney-General has commenced a civil action in Federal court, charging petitioners with violations of the Sherman and Donnelly Acts. *General Business Law § 343* specifically provides that the **[****4]** Attorney-General's subpoena power does not abate by reason of any action or proceeding brought by him.

Counsel: *Robert Abrams, Attorney-General (Alan Pfeffer, O. Peter Sherwood, Lloyd Constantine, Katherine L. Frank, Elizabeth M. O'Neill, Richard M. Weinberg* and *Alice McInerney* of counsel), for appellant. I. Exclusive territorial vertical restraints are covered by the Donnelly Act. *(Columbia Gas v New York State Elec. & Gas. Corp., 28 NY2d 117*; *State of New York v Glen & Mohawk Milk Assn., 61 NY2d 705*; *Matter of Aimcee Wholesale Corp. [Tomar Prods.], 21 NY2d 621*; *Continental T. V. v GTE Sylvania, 433 U.S. 36*; *State of New York v Mobil Oil Corp., 38 NY2d 460*; *People v Roth, 52 NY2d 440*; *LaRossa, Axenfeld & Mitchell v Abrams, 62 NY2d 583*; *Lafayette v Louisiana Power & Light Co., 435 U.S. 389*; *Big Top Stores v Ardsley Toy Shoppe, 64 Misc 2d 894, 36 AD2d 582*; *Alexander's Dept. Stores v Ohrbach's, Inc., 266 App Div 535, 291 NY 707*.) II. The Attorney-General is authorized **[****5]** to investigate all restraints of competition. *(Sanders v Winship, 57 NY2d 391*; *Matter of Smathers, 309 NY 487*; *Eiberger v Sony Corp. of Am., 622 F2d 1068*; *State of New York v Mobil Oil Corp., 38 NY2d 460*; *Matter of Freeman, 34 NY2d 1*; *People v Hobson, 39 NY2d 479*; *Big Top Stores v Ardsley Toy Shoppe, 64 Misc 2d 894, 36 AD2d 582*; *Columbia Gas v New York State Elec. & Gas Corp., 28 NY2d 117*; *Matter of American Tel. & Tel. Co. v State Tax Commn., 61 NY2d 393*; *Matter of Hamptons Hosp. & Med. Center v Moore, 52 NY2d 88*.)

Thomas H. Milch, Jerome I. Chapman, Wayne C. Holcombe, David Rees Davies, Adeeb Fadil, Terrence Sheehy, Peter Moll, Roxann Henry, William Pelster, David Elkind, David Beckwith, Michael Fischer, Gary Hoppe, Eugene D'Ablemont, Robert Getman, Robert Crotty, Ernest Gellhorn, Adrian Wager-Zito, Hugh Latimer, Robert Skitol, Richard Nash, Henry B. Gutman, Douglas Richards, Richard C. Stein and *Matthew Feigenbaum* for respondents. I. The Attorney-General lacks **[****6]** authority to investigate vertical territorial arrangements because such restraints are legal under New York law. *(Matter of Kates v Lefkowitz, 28 Misc 2d 210*; *Stemmerman v Kelly, 150 App Div 735, 220 NY 756*; *Dawn to Dusk v Brunckhorst Co., 23 AD2d 780*; *Revlon Prods. Corp. v Bernstein, 204 Misc 80, 285 App Div 1139*; *People v Roth, 52 NY2d 440*; *Marsich v Eastman Kodak Co., 244 App Div 295, 269 NY 621*; *Port Chester Wine & Liq. Shop v Miller Bros. Fruiterers, 253 App Div 188, 281 NY 101*; *Matter of Jackson, 57 Misc 1*; *Bradford v New York Times Co., 501 F2d 51*; *Matter of Davies, 168 NY 89*.) II. The per se legality of vertical exclusive territories requires that the subpoenas be quashed. *(Matter of Kates v Lefkowitz, 28 Misc 2d 210*.) III. The Attorney-General's Federal lawsuit vitiates any legitimate purpose the subpoenas might have had. *(People v Anaconda Wire & Cable Co., 45 Misc 2d 151, 23 AD2d 823, 16 NY2d 871*; **[****7]** *Dellwood Foods v Abrams, 109 Misc 2d 263*.)

Judges: Judges Simons, Alexander, Titone and Hancock, Jr., concur with Chief Judge Wachtler; Judge Bellacosa dissents and votes to affirm in a separate opinion; Judge Kaye taking no part.

Opinion by: WACHTLER

Opinion

[*330] [536] [***817] OPINION OF THE COURT**

The petitioners -- four brewers, several beer wholesalers and a beer wholesalers' trade association -- brought these proceedings to quash subpoenas duces tecum and interrogatories served upon them by the Attorney-General pursuant to an investigation into marketing practices in the beer industry which the Attorney-General alleges may violate the State's antitrust laws. The central issue posed by this appeal, here by leave of the Appellate Division, [1] is whether that court properly granted the applications on the ground that the focus of the investigation is an activity which is per se legal under State law and therefore beyond the scope of the Attorney-General's investigatory powers.

[**8] [***818]** We hold that *General Business Law § 343* ***HN1***[] authorizes the Attorney-General to investigate the practice in question and that it was error, therefore, to quash the subpoenas and interrogatories.

[*331] I.

The subpoenas and interrogatories now challenged were issued to the petitioners beginning in May 1985 as part of an investigation by the Attorney-General into the pervasive use in the beer industry of exclusive territorial distributorships. The Attorney-General alleges -- and petitioners do not dispute for purposes of these proceedings -- that since 1982 brewers and wholesaler distributors have entered into agreements establishing exclusive territorial rights to sell each brewer's products to retail outlets. According to the Attorney-General, under this scheme, the brewer agrees to sell its products to only one designated wholesaler in a given territory and that wholesaler, in turn, agrees not to sell the brewer's products outside that territory or to anyone inside the territory who would resell the products elsewhere. The aim of these agreements, allegedly, is to eliminate intrabrand competition by "transshippers", independent wholesalers who, prior to the advent of these agreements, **[****9]** could buy beer from a franchised wholesaler in one territory and sell it in another territory, in competition with another franchised wholesaler.

The parties agree that, to the extent that this arrangement results in a restraint of trade, it is ***HN2***[] a "vertical" restraint -- that is, one imposed by an agreement between noncompetitors who occupy different levels in the distribution chain -- as opposed to a "horizontal" restraint, which results from an agreement among competitors at the same level of distribution. The Attorney-General contends that, although such vertical restraints are not per se illegal under New York's ***antitrust law*** (the Donnelly Act; *General Business Law § 340 et seq.)*, they may be found to be illegal if, under all the circumstances, they impose an unreasonable restraint on competition. Petitioners concede that the "rule of reason" analysis urged by the Attorney-General would **[**537]** be employed to determine if the practice violates Federal ***antitrust law*** *(see, e.g., Continental T. V. v GTE Sylvania, 433 U.S. 36*), but they argue that the courts of this State have ruled that such vertical restraints are per se legal under the Donnelly Act. Accordingly, **[****10]** they conclude, the Attorney-General lacks authority to conduct an investigation designed to facilitate a rule of reason analysis of the brewing industry practice.

II.

HN3[] An application to quash a subpoena should be granted "[only] where the futility of the process to uncover anything **[*332]** legitimate is inevitable or obvious" *(Matter of Edge Ho Holding Corp., 256 NY 374, 382)* or where the information sought is "'utterly irrelevant to any proper inquiry'" *(Matter of La Belle Creole Intl., S. A. v Attorney-General of State of N. Y., 10 NY2d 192, 196*, quoting *Matter of Dairymen's League Coop. Assn. v Murtagh, 274 App Div 591, 595*, *affd* *299 NY 634*). In defending his inquiry, the Attorney-General enjoys a presumption that he is acting in good faith *(Matter of Ryan v Lefkowitz, 26 AD2d 604*, *affd* *18 NY2d 977*) and must show only that the materials sought bear "a reasonable relation to the subject matter under investigation and to the public purpose to be achieved" *(Carlisle v Bennett, 268 NY 212, 217*; *see also, Virag v Hynes, 54 NY2d 437, 442*; **[****11]** *Matter of*

[1] The Appellate Division also certified the following question: "Was the order of this Court, which reversed the six judgments (denominated orders) of the Supreme Court, properly made?" Because the order appealed from finally determines these special proceedings *(see, Matter of Abrams [Anonymous], 62 NY2d 183, 192)*, the certified question was unnecessary and need not be answered.

Goldin v Greenberg, 49 NY2d 566, 572; Matter of La Belle Creole Intl., S. A. v Attorney-General of State of N. Y., supra, at 196).

Thus, the precise question presented by these proceedings is brought into focus. The question is not whether all vertical restraints of this type should, in the context of these proceedings, be declared legal per se or, on the other hand, subject to a rule of reason analysis. Instead, the question **[***819]** is whether the Attorney-General has authority under the Donnelly Act to issue the subpoenas and interrogatories challenged here, a question which must be answered in the affirmative unless the legality of the brewers' marketing practice is so well established, either by the plain language of the statute or by existing judicial interpretation, as to be free from doubt. If the legality of the brewing industry's vertical restraints is arguable, then the subpoenas issued pursuant to the Attorney-General's broad powers to investigate possible violations of the Donnelly Act *(see,* General Business Law § 343) [2] must be sustained *(see, Matter of Nicholson v State Commn. on Judicial Conduct, 50 NY2d 597, 610-611)*. **[****12]**

Petitioners effectively concede as much, because the focus of their argument is not that we should announce a rule of per **[*333]** se legality, but rather that such a rule has already been established by "seven **[****13]** decades of unanimous precedent" and that the Legislature has acquiesced in such an interpretation of the Donnelly Act by failing to amend the statute to overrule those decisions. We conclude, however, that the cases cited by petitioners do not conclusively establish, either singly or in combination, a rule of per se legality for vertical territorial arrangements. Nor does the statutory language foreclose the Attorney-General's position that such arrangements, if shown to result in an unreasonable restraint of trade under the circumstances, are prohibited.

[538]** III.

HN4[] The Donnelly Act declares, among other things, that "[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] against public policy, illegal and void" (*General Business Law § 340 [1]*). This language is clearly broad enough, on its face, to encompass the vertical restraints in issue. There is no dispute for present purposes that the target of the Attorney-General's investigation -- exclusive territorial distributorships -- **[****14]** restricts intrabrand competition in the beer industry.

We recognize that neither the Donnelly Act nor the Sherman Act, after which it was modeled, has been interpreted as prohibiting every agreement that has the effect of restraining trade, no matter how minimal. Instead, ***HN5***[] as construed by State and Federal courts, the antitrust laws prohibit only "unreasonable" restraints on trade *(see,* *Northern Pac. Ry. Co. v United States, 356 U.S. 1, 5*; *Atkin v Union Processing Corp., 90 AD2d 332*, *affd* 59 NY2d 919, *cert denied 465 U.S. 1038*). Even in light of this general judicial gloss, however, the statutory language easily accommodates the Attorney-General's position that petitioners' practice may be prohibited if it can be shown to be unreasonable. [3]

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[2] Pertinent language from *General Business Law § 343*, the provision which confers investigatory powers on the Attorney-General, illustrates the broad scope of that authority. The statute authorizes an investigation "[whenever] it shall appear to the attorney general * * * that any person or persons, partnership, corporation, company, trust or association shall have engaged in or engages in or is about to engage in any act or practice by this article [the Donnelly Act] prohibited or declared to be illegal, or * * * has assisted or participated in any plan, scheme, agreement or combination of the nature described herein, or whenever he believes it to be in the public interest that an investigation be made". That such an investigation may include the use of subpoenas and interrogatories is not disputed here.

[3] Thus, the dissent's major premise -- that the Donnelly Act does not expressly declare the brewers' practice to be illegal -- is flawed. The Act, by its very broad terms, declares all restraints on trade to be illegal; it is only by judicial interpretation that some practices have been held to be outside the act's scope. And, as noted above *(supra, at 332, n 2*), the Attorney-General's investigatory powers are equally broad. Thus, our decision to allow this investigation to proceed does not, as the dissent suggests, depend on the kind of extrapolation of legislative intent that we resisted in *CPC Intl. v McKesson Corp. (70 NY2d 268*).

[**15]** **[*334]** **[***820]** Petitioners' efforts to extract a rule of per se legality from the case law dealing with vertical territorial arrangements are unavailing for several reasons. First, the issue of per se legality of all vertical territorial arrangements was not presented in the cases cited by petitioners. In *Dawn to Dusk v Brunckhorst Co. (23 AD2d 780* [2d Dept]), *Stemmerman v Kelly (150 App Div 735* [1st Dept], *judgment after remand affd no opn 163 App Div 892*, *affd no opn 220 NY 756*), and *Revlon Prods. Corp. v Bernstein (204 Misc 80*, *affd no opn 285 App Div 1139* [1st Dept]), the issue before the courts was the legality, under specific circumstances, of specific arrangements. The courts decided no more than that those arrangements did not constitute unreasonable restraints of trade.

For example, in *Stemmerman (supra)*, the Appellate Division held that the trial court had erred in declaring the contract void without allowing the plaintiff to introduce proof tending to show the limited impact **[****16]** of the territorial restriction on the asphalt market -- evidence relevant to a rule of reason analysis. Thus, the decision did not establish a rule of per se legality; it simply rejected the trial court's rule of per se illegality. The *Revlon Prods. (supra)* decision is open to a similar interpretation *(see*, Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 Cornell LQ 254, 261, n 32; 263, n 40) and, in any event, was colored by the defendant's concession that the restriction in question did not restrain trade *(see*, *204 Misc, at 81*, *supra)*.

In addition, this court, the final arbiter of questions of State law, did not issue or pass directly upon any of the decisions cited for the proposition advanced by petitioners. Nor do these isolated decisions from two judicial departments represent the kind of unanimous judgment of the intermediate appellate courts deserving of similar weight *(cf., Matter of Knight-Ridder Broadcasting v Greenberg, 70 NY2d 151*). Thus, even if the cited decisions unequivocally supported petitioners' contention, we **[**539]** would not **[****17]** be persuaded that legislative inaction should be interpreted as acquiescence *(see, Matter of Hellerstein v Assessor of Town of Islip, 37 NY2d 1, 9-10)*.

Finally, such a tenuous inference is even less compelling in this case, because it would result in an interpretation of the Donnelly Act at odds with the settled interpretation of its **[*335]** Federal counterpart. Although we do not move in lockstep with the Federal courts in our interpretation of ***antitrust law*** *(see, People v Roth, 52 NY2d 440*), ***HN6***[] the Donnelly Act -- often called a "Little Sherman Act" -- should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result *(see, State of New York v Mobil Oil Corp., 38 NY2d 460, 463*; *Matter of Aimcee Wholesale Corp. [Tomar Prods.], 21 NY2d 621, 626*; Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, *General Business Law § 340*, 1988 Cum Ann Pocket Part, at 182). Thus, we should not be eager to find that a contrary State rule has been established by a **[****18]** combination of equivocal pronouncements from the lower courts and legislative inaction in response to such decisions.

IV.

We conclude, therefore, that no rule of per se legality must inexorably be gleaned from the case law or the statutory language. In the absence of such a rule, we hold that the Attorney-General is authorized to conduct an investigation to test the legality of petitioners' practices. In addition, we find no merit to petitioners' alternative argument that the subpoenas must be quashed because the Attorney-General has commenced a civil action in Federal court, charging them with violations of the Sherman and Donnelly Acts. *Section 343* specifically provides that ***HN7***[] the Attorney-General's **[***821]** subpoena power does not abate by reason of any action or proceeding brought by him *(see, Matter of Grandview Dairy v Lefkowitz, 76 AD2d 776, 777*; *State of New York v Mobil Oil Corp., 40 AD2d 369*, *affd 33 NY2d 627*).

Accordingly, the order of the Appellate Division should be reversed and the judgments of Supreme Court reinstated.

Dissent by: BELLACOSA

Dissent

Bellacosa, J. (dissenting). I vote to affirm. The investigatory and enforcement powers **[****19]** of the Attorney-General under the Donnelly Act should not be expanded by judicial construction to include vertical restraints, as that is a policy choice and authorization uniquely reserved to the legislative branch *(compare, Boreali v Axelrod, 71 NY2d 1*).

The Donnelly Act (*General Business Law § 340 et seq.)* does not expressly declare illegal or prohibit vertical restraint agreements establishing exclusive territorial distributorships between noncompetitors in different positions in the distribution **[*336]** chain, nor does it vest authority in the Attorney-General to investigate and prosecute such commercial arrangements. The courts of this State have never, up to now, found such a prohibition or power even by implication in the provisions of the act. Indeed, the opposite has prevailed over many years. Moreover, the Legislature has evidenced its acquiescence in these decisions by repeatedly refusing to adopt legislation sought by the Attorney-General restricting vertical restraints and granting that office such enforcement powers. Most pertinently, the Legislature has even specifically refused to adopt legislation prohibiting vertical distribution agreements **[****20]** between brewers and beer wholesalers.

The determination of the issue as to whether the Attorney-General has the authority to issue the subpoenas and interrogatories which respondents seek to quash necessarily hinges upon whether vertical restraint agreements creating exclusive territorial distributorships are prohibited or illegal under the Donnelly Act, not whether the legality of such arrangements is "arguable", **[**540]** as suggested by the majority. Such a tenuous predicate for the issuance of formal, duplicative and burdensome investigatory process by the chief law enforcement officer of the State should not be countenanced by this court.

General Business Law § 340, "[the] determinative provision of the Donnelly Act" *(State of New York v Mobil Oil Corp., 38 NY2d 460, 462)*, provides that "[every] contract, agreement, arrangement or combination whereby * * * [a] monopoly * * * is or may be established or maintained, or whereby [competition] * * * is or may be restrained * * * is hereby declared to be against public policy, illegal, and void". The act authorizes the Attorney-General to bring actions "to restrain and prevent the doing in this state of any act **[****21]** herein declared to be illegal" or prohibited (*General Business Law § 342*). In the performance of these enforcement responsibilities, the Attorney-General is empowered to investigate any person or business enterprise who is or is about to be engaged in any act "by this article prohibited or declared to be illegal"; who "assisted or participated" in any such act; or "whenever he believes it to be in the public interest that an investigation be made" (*General Business Law § 343*). The investigation provisions of *section 343* do not create new categories of illegal or prohibited acts, but merely provide when and how an investigation should be effectuated.

In *Marsich v Eastman Kodak Co. (244 App Div 295*, *affd* *269* ***[*337]*** *NY 621*), this court affirmed a decision upholding the right of a producer and its dealers to refuse to sell their product to one who violated a price scale established by the producer. The court distinguished that situation from one where the agreement was between several manufacturers or producers which would be covered under *General Business Law § 340*. It stated that "[the] soundness of the economic **[****22]** theories embodied in such a statute is *a legislative question, and the* **[***822]** *courts may not obtrude their economic theories into a statute under the guise of interpreting it" (id., at 296* [emphasis supplied]). Similarly, in *Stemmerman v Kelly (150 App Div 735*, *affd* *220 NY 756*), we affirmed a decision upholding a vertical restraint agreement establishing a sole source distributorship within an exclusive territory. The court there noted that "there may lawfully be a partial restraint of trade, sufficient to protect the interests of a party and not so great as to interfere with the interests of the public" *(id., at 738*; *see also, Alexander's Dept. Stores v Ohrbach's, Inc., 266 App Div 535*, *appeal dismissed* *291 NY 707*).

The most direct and recent pronouncement on the legal propriety under State law of vertical restraint agreements concerning exclusive territorial distributorships arose in *Dawn to Dusk v Brunckhorst Co. (23 AD2d 780*). The manufacturer's exclusive distributor and the **[****23]** exclusive subdistributor within a designated area refused to sell to the plaintiff because the latter refused to deal solely through the subdistributor. Relying upon *General Business Law § 340*, the court noted that "[not] every agreement or combination which is in restraint of trade is proscribed by the statute" *(id., at 781*), and specifically held "[an] agreement or arrangement among parties in a vertical relationship, which restricts the territory within which the buyer, here the defendant jobber Vaccaro, may resell the goods in question does not violate section 340 of the General Business Law" *(id., at 781* [citations omitted]).

Against the backdrop and long history of the statute and cases interpreting it, the court now discerns an implied power for the Attorney-General to investigate and litigate against vertical restraints. Recently, we rejected just such an analysis seeking to create by implication a private action under the Martin Act *(see, CPC Intl. v McKesson Corp., 70 NY2d 268, 276-277)*. In direct contradiction of our past opinions on the Donnelly Act that a "ruling of a Federal court interpreting a Federal statute **[****24]** has **[**541]** no direct bearing upon a State court's analysis of an analogous provision enacted by the State Legislature" **[*338]** *(People v Roth, 52 NY2d 440, 447*; *see also, State of New York v Mobil Oil Corp., 38 NY2d 460, 463*, *supra*; and *Marsich v Eastman Kodak Co., 244 App Div 295*, *affd 269 NY 621*, *supra)*, the majority relies upon Federal court precedents interpreting the Sherman Antitrust Act and borrows their "rule of reason" analysis from that quite different and explicit statute. Surely, had the New York State Legislature deemed that our State court "decisions gave to the statute [Donnelly Act] a meaning or scope different from that [originally] intended, it would have amended the statute as to give it the effect intended", especially since it was specifically importuned to do so *(Marsich v Eastman Kodak Co., 244 App Div 295, 297*, *affd 269 NY 621*, *supra)*. In fact, the Attorney-General has made the effort to align the requirements of the Donnelly Act with those of the Sherman Antitrust Act and **[****25]** "has sought to obtain procedural tools comparable to those available under federal law" because of "the absence of a state per se rule and * * * vertical restraints" (Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, *General Business Law § 340*, 1988 Cum Ann Pocket Part, at 187). He is even in this very matter litigating the same subject under Federal law in the Federal courts.

At least seven recent bills would, in varying degrees, have restructured the Donnelly Act *(see*, Bill No. S. 8399 [introduced 1986]; Bill No. A. 5835 [introduced 1985]; Bill No. A. 1876 [introduced 1985]; Bill No. S. 420 [introduced 1985]; Bill No. A. 6055 [introduced 1984]; Bill No. S. 5121 [introduced 1984]; and Bill No. S. 1591 [introduced 1984]). New and modified provisions directly relevant to this case would have mandated that State courts "give due **[***823]** consideration and great weight" to the Federal courts' interpretations of Federal antitrust statutes specifically including the Sherman and Clayton Antitrust Acts, and "to the per se doctrine to restraints of trade" *(see, e.g.*, Bill No. S. 8399 [introduced 1986]). Other changes would have provided the Attorney-General greater investigatory **[****26]** and enforcement powers and would have made it a specific violation to allocate customers or markets functionally or geographically. Five bills directly and particularly regulating vertical restraints in the malt beverage industry, explicitly declaring such agreements unlawful and empowering the Attorney-General to investigate and litigate such restraints, were rejected (Bill No. A. 5754 [introduced 1985]; Bill No. A. 4077 [introduced 1985]; Bill No. S. 2325 [introduced **[*339]** 1985]; Bill No. A. 4284 [introduced 1983]; Bill No. S. 2668 [introduced 1983]).

All extant judicial construction of *General Business Law § 340* refused to prohibit vertical restraint agreements; yet, the Legislature on no less than 12 occasions refused to change that and rejected bills to give the Attorney-General the very power now conferred.

In *Matter of Knight-Ridder Broadcasting v Greenberg (70 NY2d 151*), this court used the unanimity of precedents in all four Appellate Divisions construing the Shield Law statute (*Civil Rights Law § 79-h*) as protecting only confidential news sources, coupled with subsequent failed legislative efforts to amend the statute to broaden the privilege, as **[****27]** "compellingly persuasive evidence" *(id., at 159*) that the Legislature did not intend that such a broad privilege should exist. The court said that legislative history must be "reviewed in light of the existing decisional law which the Legislature is presumed to be familiar with and to the extent it left it unchanged, that it accepted" that decisional law *(id., at 157*, citing *Arbegast v Board of Educ., 65 NY2d 161, 169*; *Hammelburger v Foursome Inn Corp., 54 NY2d 580, 588*; *Engle v Talarico, 33 NY2d 237, 242)*. Building on this reasoning, in *Boreali* ***[**542]*** *v Axelrod (71 NY2d 1*, *supra)* the court relied, in part, upon negative legislative history, resulting from some 40 failed efforts to expand the prohibitions against smoking in public places *(see*, Public Health Law art 13-E), as evidence that the New York Public Health Council had exceeded the scope of its broad authority to protect the public health by promulgating regulations limiting smoking in certain public places.

If the executive branch, under the separation doctrine, must respect the legislative **[****28]** branch prerogatives and history in a particular area, so must the judicial branch. Conflicting and selective applications of recently announced principles by this court do not well serve the judicial process and its purposes. I would affirm and quash the subpoenas.

America West Airlines, Inc. v. Burnley

United States Court of Appeals for the District of Columbia Circuit

January 12, 1988, Argued ; February 19, 1988, Decided

No. 87-1639

Reporter
838 F.2d 1343 *; 1988 U.S. App. LEXIS 2068 **; 267 U.S. App. D.C. 393; 1988-1 Trade Cas. (CCH) P67,894

America West Airlines, Inc., Petitioner v. James H. Burnley, IV, Secretary U.S. Department of Transportation, Respondents, USAir Group, Inc., Piedmont Aviation, Inc., Intervenors

Prior History: [1]** Petition for Review of an Order of the United States Department of Transportation.

Core Terms

final order, merger, slots, redressed, grievances, city-pair, pointedly, contends, injuries, reversal, transfer of ownership, fail to demonstrate, supplemental brief, license renewal, personal injury, alleged injury, acquisition, handicapped, ownership, Airlines, eastward, Airport, approve, markets, parties, serving, causal, stem, fly

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

Constitutional Law > The Judiciary > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

To demonstrate its standing, plaintiff must allege and prove three elements: (1) personal injury; (2) fairly traceable to the defendant's allegedly unlawful conduct; and (3) likely to be redressed by the requested relief.

Counsel: John E. Gillick, with whom, Robert Reed Gray and Robert A. Burka, were on the brief, for Petitioner.

Diane R. Liff, Assistant General Counsel for Litigation, Department of Transportation, with whom, B. Wayne Vance, General Counsel, Department of Transportation, was on the brief, for Respondent. Thomas L. Ray, Counsel, Department of Transportation, also entered an appearance for Respondent.

Michael S. Sundermeyer, with whom, Brendan V. Sullivan, Jr., Lee M. Hydeman, Stephen H. Lachter, James T. Lloyd, for USAir Group, Inc.; Robert M. Lichtman, Joseph F. Healy, Jr. and David R. Murchison, for Piedmont Aviation, Inc., were on the brief, for Intervenors, USAir Group, Inc. and Piedmont Aviation, Inc.

Judges: Silberman and Sentelle, Circuit Judges, and Greene, * District Judge.

Opinion by: PER CURIAM

Opinion

[*1344] Opinion PER CURIAM. This matter is before the Court on petition of America West Airlines, Inc. (America West) for review of Department of Transportation **[**2]** orders approving the merger of USAir Group, Inc. (USAir) and Piedmont Aviation, Inc. (Piedmont). America West contends that the merger will result in impermissible entry barriers, increased market power and a substantial reduction of competition in the relevant markets. Since it appeared to the Court that a threshold question -- the standing of America West to bring the petition -- could be dispositive, the Court requested supplemental briefs on that issue. [1] Upon review, the Court finds, for the reasons stated below, that America West lacks standing and therefore dismisses the petition.

In a Final Order dated October 30, 1987, the Department of Transportation (DOT), acting pursuant to 49 U.S.C. § 1378, approved the acquisition by USAir of Piedmont. On November 1, 1987, America West petitioned this Court for review of that final order. USAir and Piedmont were permitted to intervene and **[**3]** America West's motion to stay the order was denied. The merits were then briefed by the parties on an expedited basis and the Court heard oral argument on January 12, 1988, at which time it directed the parties to submit supplemental briefs limited to the question of America West's standing, both Article III and antitrust/competitor, [2] to challenge DOT's order.

To invoke this Court's Article III powers, America West must demonstrate standing in a constitutional sense. ***HN1***[] To demonstrate its standing, America West must allege and prove three elements: (1) personal injury; (2) fairly traceable to the defendant's allegedly unlawful conduct; and (3) likely to be redressed by the requested relief. *Allen v. Wright, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984)*. **[**4]**

America West has alleged two injuries. First, it contends that the approval of the merger will inhibit eastward expansion of its airline service, although it does not specify any city-pair markets. Second, it contends that the merger will make it more difficult for America West to obtain slots at Washington National Airport (DCA) and LaGuardia (LGA), specifically because the increased concentration of the slots will increase their value to the post-merger USAir. [3] *Assuming* that these two "injuries" constitute personal injury for purposes of constitutional standing, America West has, nevertheless, failed to demonstrate the existence of the remaining two elements as set out in *Allen, supra.*

In *California Association of the Physically Handicapped, Inc. v. FCC, 250 U.S. App. D.C. 202, 778 F.2d 823 (D.C. Cir. 1985)*, CAPH challenged use **[**5]** of a "short form" process to approve a transfer in ownership of Metromedia. CAPH **[*1345]** claimed it was injured by Metromedia's alleged neglect of its responsibilities to the handicapped. *Id. at 825*. This Court held that CAPH did not satisfy the causation requirement because "CAPH's alleged injury occurred before, existed at the time of, and continued unchanged" after the transfer of ownership. *Id. at 827*. CAPH also did not satisfy the redressability requirement because "even if the Commission had denied the transfer application, Metromedia, despite its allegedly bad record, would remain in control of the stations." *Id.* The Court also pointed out that CAPH's grievance "is properly and pointedly raised in a license renewal proceeding," not in a transfer of ownership proceeding. *Id. at 826*.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

1 *See* *Juidice v. Vail, 430 U.S. 327, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977)*.

2 49 U.S.C. § 1378(b)(1)(A) prohibits approval of any merger "if it would result in a monopoly. . . ." *Cf.* Clayton Act, *15 U.S.C. § 18*.

3 It is by no means certain that a value increase will in fact result. We assume it will, since it makes no difference to the outcome.

Applying *California Association* to the instant case, neither of America West's alleged injuries are sufficient to confer Article III standing. First, America West's generalized allegations about flying eastward are neither causally related to the Department's Final Order nor redressable by reversal of the Order. Just as CAPH's injuries did not stem from the FCC's approval **[**6]** of a transfer in ownership, America West's alleged inability to fly in "the East" does not stem from the Department's Final Order. There is no causal link to the Order because America West did not prove or even allege any interest in serving any city-pair market affected by this merger, or indeed *any* city-pair market. In addition, even if the merger were overturned by this Court, America West would be no better off because it has not identified any interest in serving any identified market actually affected by the merger, certainly none as to which it would have greater access without the Department's order.

Second, America West's inability to purchase slots at DCA and LGA is neither caused by the Final Order nor redressed by a reversal of that Order. The Final Order cannot be the cause of an injury related to slots because neither the merger nor the Final Order deny slots to America West. [4] America West has simply failed to demonstrate that reversal of the Final Order would result in its acquisition of any slots at either airport. Moreover, just as the Court in *California Association* pointed out that the grievances about the handicapped are "properly and pointedly raised **[**7]** in a license renewal proceeding," *778 F.2d at 826*, America West's grievances about slots are "properly and pointedly" raised in the Department's ongoing rulemaking proceeding about slots.

America West has clearly failed to establish the necessary elements of standing and it is therefore unnecessary to reach the substantive issues. The petition is dismissed. [5]

[8]**

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[4] America West admits that, despite its efforts, it was unable to secure slots at DCA and LGA before this merger.

[5] Since we have determined that America West has no Article III standing, it is unnecessary for us to reach the question of antitrust/competitor standing. However, if the Court were to reach that issue, it would seem to be controlled by *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*, and the result would appear to be the same. *Cargill* involved determination of standing under § 7 of the Clayton Act, *15 U.S.C. § 18*, the section on which the relevant portion of 49 U.S.C. § 1378 is modeled, and held the status of competitor does not confer antitrust standing in the absence of an antitrust injury as defined by cases applying the Clayton Act.

Puckett v. Cook

United States District Court for the Eastern District of Arkansas, Western Division

February 19, 1988, Decided and Filed

No. LR-C-87-244

Reporter

1988 U.S. Dist. LEXIS 15156 *; 1988 WL 142628

PAUL PUCKETT, PLAINTIFF v. SANDY COOK, DARRELL CARTER, and SANYO MANUFACTURING CORPORATION, DEFENDANTS

Core Terms

antitrust, alleges, resignation, fired, anti trust law, federal claim, Sherman Act, Defendants', termination

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Scope

HN1[] **Constitutional Law, Substantive Due Process**

The *due process clause of the Fifth Amendment* forbids the federal government from depriving an employee of a constitutionally protected interest in his job. However, in order to pursue such a claim, there must be some federal government involvement in the alleged conduct and a government created right.

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

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

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

HN2[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The federal Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, requires the specific pleading that a plaintiff has been injured through the defendant's commission of one of several enumerated federal or state criminal offenses listed in *18 U.S.C.S. § 1961*.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

HN3[] Regulated Practices, Private Actions

Bribery under both federal law (18 U.S.C.S. § 201) and Arkansas law (Ark. Stat. Ann. §§ 41-2703 et seq.) provide that payment to or from a public official is an essential element of the offense.

Antitrust & Trade Law > Clayton Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Clayton Act, Claims

The type of injury the plaintiffs suffered is not the type the antitrust laws were intended to redress. As employees, the only market the plaintiffs would have a personal stake in would be the labor market in that industry, not the TENS market at which the conspiracy was aimed.

Administrative Law > Judicial Review > Reviewability > Standing

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

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN5[] Reviewability, Standing

In an antitrust action, standing goes beyond the constitutional standard of injury in fact and focuses instead on whether the injury was of the type that Congress sought to redress through the antitrust laws and whether a link was demonstrated between the injury and the market restraint. Mere causal connection between an antitrust violation and harm to a plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect.

Counsel: [*1] Keith Blackman, Jonesboro, Arkanasas for Plaintiff

Donna Galchus, Wallace, Dover & Dixon, Little Rock, Arkansas, for Defendant

Opinion by: FORSTER, JR., Magistrate

Opinion

MEMORANDUM AND ORDER

JOHN F. FORSTER, JR., UNITED STATES MAGISTRATE

This action for wrongful discharge from employment was initially filed in the Circuit Court of St. Francis County, Arkansas on November 17, 1986. Following the filing of Plaintiff's third amended complaint, in which he alleged violation of federal law, the case was removed to Federal court pursuant to 28 U.S.C. § 1441(b). By consent of the parties, the claims presented are before the Magistrate for final disposition, pursuant to 28 U.S.C. § 636. Before the Court is a motion for summary judgment and dismissal of all claims filed by the Defendants.

Plaintiff, Paul Puckett, is a fifty (50) year-old electrical worker. He was employed by Sanyo Manufacturing Corporation as an industrial engineer from April 14, 1982 until June 5, 1985 when he tendered his resignation. By all appearances, Plaintiff was an at-will employee. There was no written agreement outlining the terms or duration of his employment.

The essence of Plaintiff's related claims is his contention that his **[*2]** *resignation from his job at Sanyo was improperly coerced and was therefore a "constructive discharge", rather than a voluntary resignation. Based upon this premise that he was fired, Plaintiff alleges that he is entitled to damages against Sanyo Manufacturing Company and two of its employees, Darrell Carter, a vice president at Sanyo, and Sandy Cook, a 45 year-old female who was Plaintiff's immediate supervisor, for wrongful termination of his job under both state and federal law.*

Plaintiff alleges that Cook and Carter had a meretricious sexual relationship and engaged along with other Sanyo employees in a conspiracy and practice of inducing Sanyo to purchase its goods from certain suppliers in return for kickback payments from the suppliers receiving Sanyo's business. Plaintiff alleges that the Defendants conspired to get him out of the Sanyo organization when he made it known that he would not participate in their scheme. Plaintiff alleges that the Defendants demoted him, reduced his income, denied him raises, and gave him a false and defamatory work performance evaluation that left him no alternative except to resign from his job.

Plaintiff asserts state law tort claims for tortious **[*3]** *interference with a contract, defamation, and wrongful demotion and termination of an at-will employee. Additionally, Plaintiff alleges that his forced resignation constituted deprivation of property without due process. He also asserts that the Defendants' alleged practice of bid-rigging and soliciting bribes from existing and potential suppliers doing business with Sanyo are violations of federal antitrust and racketeering laws. Accordingly, Plaintiff seeks redress for his federal claims under the Fifth Amendment to the United States Constitution, 15 U.S.C. § 15(a) (Clayton Act), and 18 U.S.C. § 1964(e) (Racketeer Influenced and Corrupt Organization Act) (hereinafter referred to as RICO). In reviewing the Defendants' motion for dismissal and summary judgment, the Court will consider Plaintiff's federal claims first.*

I.

Plaintiff's due process and RICO claims must fail, and for essentially the same reason. That reason is Plaintiff's failure to allege any government involvement in the conduct giving rise to his claims.

It is settled beyond debate that ***HN1***[] *the due process clause of the Fifth Amendment forbids the federal government from depriving an employee of a constitutionally protected* **[*4]** *interest in his job. Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264 (1979)*. See also *Bush v. Lucas, 462 U.S. 374, 103 S.Ct. 2404 (1983)*. However, in order to pursue such a claim, there must be some federal government involvement in the alleged conduct and a government created right. *Warren v. Government National Mortgage Association 611 F.2d 1229* (8th Cir.), *cert. denied, 449 U.S. 847 (1980)*. Plaintiff makes no claim of federal government involvement nor does he explain the origin of his alleged constitutional interest in his job with a private employer. The same rules would apply if Plaintiff's claim were construed to invoke the *Fifth Amendment* through the *Fourteenth Amendment*, or the *Fourteenth Amendment* directly prohibiting the deprivation of life, liberty or property through state conduct. Absent allegations of state conduct and the creation of a constitutionally protected interest in his job, the claim must fail. Cf. *Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)*. Plaintiff's due process claim is wholly without merit.

HN2[] The Federal RICO statute, *18 U.S.C. § 1961 et seq.*, through which Plaintiff seeks relief, requires the specific pleading that a Plaintiff **[*5]** has been injured through the defendant's commission of one of several enumerated federal or state criminal offenses listed in *18 U.S.C. § 1961*. *Sedima, S.P.R.I. v. Imrex Company, Inc., 473 U.S. 479, 105 S.Ct. 3275 (1985)*. Plaintiff did not plead violation of any of the enumerated offenses and it does not appear to the Court that he can. The requisite *§ 1961* predicate offense most analogous to Plaintiff's kickback allegations is bribery. However, ***HN3***[] bribery under both federal law (*18 U.S.C. § 201*) and Arkansas law *(Ark. Stat. Ann.* §§ 41-2703 et seq.) provide that payment to or from a public official is an essential element of the offense. Plaintiff's allegations do not allege any involvement by public officials. Plaintiff merely contends that the alleged conduct is illegal. The RICO claim is insufficiently pleaded to state a cause of action.[1] Therefore, this claim is also dismissed. Cf. *Flowers v. Continental Grain Co., 775 F.2d 1051 (8th Cir. 1985)*.

[*6] Plaintiff's third federal claim, that the Defendants' practice of accepting kickbacks from Sanyo suppliers was a conspiracy in violation of ***antitrust law***, creates a closer question. The provisions of the Sherman and Robinson-Patman Acts, codified as *15 U.S.C. §§ 1* and *13(c)*, appear to encompass such conduct. The Defendants cite *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)*, for the proposition that Plaintiff does not have standing to sue. The Defendants argue that an employee who is fired as a result of conduct in violation of the Sherman Act has not suffered an "antitrust injury" and thus has no "antitrust standing". Indeed, in *Associated General Contractors, supra*, the Supreme Court denied antitrust standing to the plaintiff trade unions because they were "neither a consumer nor a competitor" in the market where trade was restrained, but held that standing would exist if the alleged injury was the type that the antitrust statute was intended to forestall.

The Circuit Courts of Appeal have split over the issue of standing by an employee who was fired for whistle-blowing or other reason resulting from his **[*7]** employer's alleged conduct in violation of antitrust laws under *15 U.S.C. § 15*. The Plaintiff cites *Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984)*, for the proposition that a fired employee has standing. The Defendants cite *Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982)*, *cert. denied, 460 U.S. 1016 (1983)*, for the proposition that a fired employee does not have antitrust standing. Both cases are on point, but are only persuasive authority and do not resolve the issue. However, the Court finds that *McDonald v. Johnson & Johnson, 722 F.2d 1370* (8th Cir.), *cert. denied, 469 U.S. 870, 105 S.Ct. 219 (1983)*, establishes the standard for standing in antritrust cases in this Circuit.

In *McDonald,* the plaintiffs sold their interests in a company to the defendants and then accepted employment contracts to work for the company under the defendants' control. The defendants operated the company in a fraudulent manner and eventually fired the plaintiffs from their jobs. The *McDonald* plaintiffs filed suit under the antitrust civil provisions of the Sherman Act and Clayton Act, *15 U.S.C. § 15* for an alleged Sherman Act violation. The Eighth Circuit Court **[*8]** of Appeals denied standing. In so doing, the Court stated:

. . . ***HN4***[] the type of injury the plaintiffs suffered is not the type the antitrust laws were intended to redress. . . . As employees, the only market the plaintiffs would have a personal stake in would be the labor market in that industry, not the TENS market at which the conspiracy was aimed.

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[1] The Court rejects the Defendants' arguments that *Komm v. McFliker, 662 F.Supp. 924 (E.D. Mo. 1987)*, misconstrued *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., 772 F.2d 467 (8th Cir. 1985)*, in holding that a discharged employee has standing to sue under RICO. *Terre Du Lac* correctly reaffirmed its earlier holding in *Alexander Grant & Company v. Tiffany Industires, Inc., 742 F.2d 408 (8th Cir. 1984)* (vacated on other grounds, in light of *Sedima, 105 S.Ct. 3275 (1985)*, that a Plaintiff need not be a target of racketeering activity to have standing. Thus standing requirements for RICO civil suits and antitrust suits are not comparable despite similarly worded statutes.

Id., 722 F.2d at 1379.

The principles set forth in *McDonald* were reaffirmed in *General Industries Corp. v. Hertz Mountain Corp., 810 F.2d 795 (8th Cir. 1987)*. In *General Industries,* the Court denied standing to sue, under *15 U.S.C. § 15* for a Sherman Act violation, to a brokerage firm that worked for defendant on a commission basis because the brokerage firm was neither a consumer nor competitor of the defendant. Citing the Supreme Court's holding in *Associated General Contractors, supra*, and its own holding in *McDonald,* the Court of Appeals stated:

HN5[] In an antitrust action, standing goes beyond the constitutional standard of injury in fact and focuses instead on whether the injury was of the type that Congress sought to redress through the antitrust laws and whether a link was demonstrated between the injury and **[*9]** the market restraint. Mere causal connection between an antitrust violation and harm to a plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect. (citations omitted).

Id., 810 F.2d at 809.

In view of the holdings in *McDonald* and *General Industries,* the Court finds that the Plaintiff in the present action lacks standing to sue for injuries allegedly received as a result of violations of the Sherman and Robinson-Patman Acts. Therefore, Plaintiff's antitrust claims are dismissed for lack of standing.

II.

The remaining issues are Plaintiff's pendent state law tort claims. The Defendants urge the Court to dismiss Plaintiff's interference of contract claim against Cook and Carter on the pleadings and to grant summary judgment for the Defendants on Plaintiff's defamation and wrongful termination claims. In support of their motion for judgment on the termination claim, the Defendants have submitted a copy of an order issued by the Arkansas Court of Appeals affirming an administrative agency's determination that Plaintiff voluntarily resigned from his job and, thus, was not "constructively **[*10]** discharged".

Although the Court is persuaded that Plaintiff is collaterally estopped from asserting his termination claim in federal court because of the state court affirmance of the agency finding, *Gahr v. Tranmel, 796 F.2d 1063, 1067 (8th Cir. 1986)* (see also *Steffen v. Housewright, 665 F.2d 245, 247 (8th Cir. 1981))*, to so hold would fail to dispose of all of Plaintiff's claims and at the same time risk an intrusion upon the state's right to resolve a delicate question of state law unnecessarily. [2] **[*11]** Therefore, in view of the early dismissal of all federal claims from which this Court derived its jurisdiction, Plaintiff's pendent state law tort claims are hereby remanded to the Circuit Court of St. Francis County. [3] *United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966)*; *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., 772 F.2d 467, 475 (8th Cir. 1985)*.

IT IS, THEREFORE, ORDERED that the Defendants' Motion for Summary Judgment is granted or denied as follows: Plaintiff's *Fifth Amendment* claims under the United States Constitution and his federal statutory. claims

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[2] The merits of Plaintiff's wrongful termination claim, including his contract theory, are dubious at best. Nonetheless, the remainder of this case belongs in state court. There is no true diversity jurisdiction. *Aldinger v. Howard, 427 U.S. 1, 96 S.Ct. 2413 (1976)*. Nor does it appear from the cases cited by the parties that the Arkansas appellate courts have squarely decided whether, under what circumstances, and to what effect an administrative factual determination arising from the denial of unemployment benefits is deemed to constitute an absolute bar to further litigation concerning the reason that a plaintiff became unemployed. Cf. *Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098 (1943)* (requiring abstension and dismissal by the federal court where state law is unclear or unsettled).

[3] Accordingly, the trial previously scheduled before this Court is cancelled. All outstanding motions not decided in this opinion have become moot as a result of this Court's decision and are thereby denied without ruling upon their merits.

under the Sherman Act, the Clayton Act, the Robinson-Patman Act and RICO be, and the same hereby are, dismissed with prejudice. Plaintiff's remaining pendent state law tort claims are hereby remanded to the Circuit Court of St. Francis County, Arkansas.

IT IS SO ORDERED.

JUDGMENT - February 19, 1988, Filed

Pursuant to the Memorandum and Order filed in this matter this date, it is Considered, Ordered and Adjudged that all federal claims asserted are hereby dismissed with prejudice; the relief sought is denied.

DATED this 19th of February, 1988.

Boyd International, Ltd. v. Honeywell, Inc.

United States Court of Appeals for the Fifth Circuit

February 22, 1988

No. 87-1042

Reporter
837 F.2d 1312 *; 1988 U.S. App. LEXIS 2094 **

Boyd International, Ltd., Plaintiff-Appellee, v. Honeywell, Inc., Defendant-Appellant

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

Core Terms

notice, requirement of notice, claim for damages, damages, deceptive trade practices, treble damages, file suit, trial court, pleadings

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN1[] **Public Enforcement, State Civil Actions**

Texas Deceptive Trade Practices Act , *Tex. Bus. & Com. Code Ann. § 17.50(a)* (Supp.1987) lays out several theories for relief for consumers.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Trade Practices & Unfair Competition, State Regulation**

Among other things, the Texas Deceptive Trade Practices Act grants a right of action for "unconscionable action" and "deceptive trade practices" by a seller. *Tex. Bus. & Com. Code Ann. § 17.50(a)(1)*, *(3)*. Unconscionable action is defined by *Tex. Bus. & Com. Code Ann. § 17.45(5)* and deceptive trade practices are defined by *Tex. Bus. &*

Com. Code Ann. § 17.46(b). *Tex. Bus. & Com. Code Ann. § 17.50(b)(1)* gives consumers a right to actual damages and provides for treble damages against a seller whose acts are committed knowingly.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Public Enforcement, State Civil Actions**

As a prerequisite to filing a suit seeking damages under *Tex. Bus. & Com. Code Ann. § 17.50 (b)(1)* against any person, a consumer shall give written notice to the person at least 30 days before filing the suit. *Tex. Bus. & Com. Code Ann. § 17.50A(a)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN4[] **Public Enforcement, State Civil Actions**

If the giving of 30 days' written notice is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations or if the consumer's claim is asserted by way of a counterclaim, the notice is not required. *Tex. Bus. & Com. Code Ann. § 17.50A(b)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN5[] **Public Enforcement, State Civil Actions**

The Texas Deceptive Trade Practices Act notice requirement, *Tex. Bus. & Com. Code Ann. § 17.50A(a)*, is to discourage litigation and encourage settlement, in particular, out-of-court settlement.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN6[] **Public Enforcement, State Civil Actions**

Several Texas appeals court cases provide that the only way to correct a Texas Deceptive Trade Practices Act (DTPA), *Tex. Bus. & Com. Code Ann. § 17.50(a)*, suit filed with inadequate notice is to stop and start over again: a dismissal with leave to refile the suit 30 days after giving notice.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

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

HN7[] **Public Enforcement, State Civil Actions**

In a contract suit later amended to include a Texas Deceptive Trade Practices Act (DTPA), *Tex. Bus. & Com. Code Ann. § 17.50(a)*, damage claim, the notice requirement relates back to the time when suit was initially filed, not to the time of the amendment. A relation back of pleadings is allowed when based on the same transaction or occurrence.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN8[] **Public Enforcement, State Civil Actions**

Tex. Bus. & Com. Code Ann. § 17.50A states specifically that the required notice must come before the suit is filed; it does not speak to causes of action added by amended pleadings.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Appeals > Standards of Review > General Overview

HN9[] **Public Enforcement, State Civil Actions**

A judgment under the Texas Deceptive Trade Practices Act (DTPA), *Tex. Bus. & Com. Code Ann. § 17.50(a)*, is reversible for the giving of the required 30 day notice where the only evidence that any notice whatever had been given is testimony by the plaintiff's attorney that a demand letter was sent pursuant to the DTPA. The DTPA requires that notice be given of the amount of actual damages claimed as well as attorney's fees and other expenses. Where the testimony quoted wholly fails to establish that this was done, and that the statute is to be enforced as interpreted by its express language, the court can reverse.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Criminal Law & Procedure > ... > Reviewability > Waiver > Admission of Evidence

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN10[] **Trade Practices & Unfair Competition, State Regulation**

A defendant who, until appeal, raises no objection whatever to the inadequacy of the Texas Deceptive Trade Practices Act (DTPA), *Tex. Bus. & Com. Code Ann. § 17.50(a)*, notice or to testimony about the DTPA cause of action waives its right to object on appeal.

Counsel: A. W. Sorelle, III, Marty L. Rowley, William E. Wickens, Paul A. Koches, SuzAnne C. Nyland, for Appellant.

Tracey D. Conwell, Michael A. Caddell, for Appellee.

Judges: Wisdom, Gee and Carolyn Dineen King, * Circuit Judges.

Opinion by: PER CURIAM

Opinion

[*1313] This appeal concerns notice requirements under the Texas Deceptive Trade Practices Act ("DTPA").

Boyd International, Ltd., was the contractor and Honeywell, Inc., a subcontractor on an officer's quarters building constructed at Sheppard Air Force Base near Wichita Falls, Texas. Specifications for the building include requirements for two elements of the structures climate control system: an Energy Monitoring and Control System ("EMCS") for the entire quarters and temperature controls for each of the quarters individual apartments. The specifications require that all EMCS work be done by Honeywell, but designate no particular party to supply and install the temperature controls.

Disputes arose between them and, on October 17, 1984, Boyd filed suit against Honeywell. Boyd's complaint asserts **[**2]** that Boyd had "paid Honeywell's full price for the EMCS and the temperature controls," that "Plaintiff has given written notice to Defendant of its specific complaint and the amount of damages, expenses and fees," and that Honeywell had "illegally tied" the sale of the EMCS and temperature controls. The first six counts of the complaint assert violations of the federal antitrust laws and the Texas Free Enterprise and Antitrust Act. The seventh count claims damages from an unspecified "deceptive trade practice in violation of the Texas Deceptive Trade Practices Act", cites to *Tex.Bus. & Comm.Code Ann. § 17.46* (which defines and outlaws over 20 "deceptive trade practices"), and demands the treble damages provided for by the DTPA.

Contrary to its assertions, however, Boyd had not in fact sent Honeywell any written notice of its intent to file a DTPA claim before doing so and sent none until October 23, 1984. On December 4, 1984, Boyd filed an amended complaint asserting a new theory (noticed by its October 23 letter) for Boyd's DTPA damage claim -- the "'gross disparity' between the value received by Boyd pursuant to its contract with Honeywell and the amount charged by **[*1314]** **[**3]** Honeywell for this work" -- and citing to a different portion of the Tex.Bus. & Comm. Code Ann. -- *§ 17.45*, which uses this language to define "unconscionable action" by a seller. As did Boyd's first complaint, the amended complaint seeks treble damages under the DTPA. After further developments unnecessary to an understanding of our decision, a jury found, among other things, that there was indeed a "gross disparity," and that Boyd's actual damages resulting from the "gross disparity" were $ 211,092. The jury awarded Boyd treble damages, the maximum punitive damages allowed by the DTPA. The jury also found for Boyd and awarded treble damages under the federal ***antitrust law***. Because the DTPA and antitrust claims derived from the same facts, Boyd was required to elect a claim for recovery. Boyd elected the DTPA claim.

The trial court's judgment and order awarded Boyd $ 513,826 in damages, penalties, attorneys' fees and costs. In addition, the court awarded prejudgment interest on $ 211,092 through August 12, 1985 -- the date of Honeywell's payment to Boyd -- but later reduced the principal by the amount of a payment on account made earlier by Honeywell.

Honeywell appeals, challenging **[**4]** the sufficiency of Boyd's notice of its DTPA damage suit and other aspects of the trial. Because we must reverse on the notice issue, we need not discuss its other claims.

Notice Under DTPA

* Formerly Carolyn Dineen Randall.

HN1[] DTPA *Section 17.50* lays out several theories for "relief for consumers." *Tex.Bus. & Comm.Code Ann. § 17.50(a)* (Vernon Sup.1987). [1] Boyd's original complaint, filed without notice to Honeywell, contains a damage claim based on the "deceptive trade practices" theory. The amendment to Boyd's complaint, filed more than 30 days after Boyd had sent its notice letter to Honeywell, contains a damage claim based on the "unconscionable action" theory.

[5]** We must determine the effect on Boyd's action of the DTPA's notice requirement. That requirement states:

> *HN3*[] As a prerequisite to *filing a suit* seeking damages under Subdivision (1) of Subsection (b) of *Section 17.50* of this subchapter against any person, a consumer *shall give written notice to the person at least 30 days before filing the suit* . . .

Id. *§ 17.50A(a)* (emphasis added).

Boyd maintains that "filing a suit" includes amending a "suit" already on file, one that contains a damage claim under *Section 17.50*, by adding a damage claim under another DTPA theory. In Boyd's view, because its "gross disparity" claim was different from the DTPA claim in its first complaint, the notice requirement for that claim should be measured from the date Boyd's complaint was amended to include the new claim. [2] Boyd cites *Foster v. Daon Corp., 713 F.2d 148, 151 (5th Cir. 1983)*, which can be read as offering a degree of implicit support to this view. *Foster* involved a plaintiff who, like Boyd, failed to give adequate notice before filing her DTPA claim. Our Court reversed the trial court for failing to grant the plaintiff's initial request for **[**6]** a temporary nonsuit without prejudice to allow her to refile the claim in thirty days. Id. After her request for a nonsuit was rejected, the *Foster* plaintiff, like Boyd here, tried to salvage her DTPA action by giving notice to the defendant and then adding a different DTPA claim. Because the two-year statute of limitations had all but run on her DTPA claims, however, the *Foster* plaintiff could not wait 30 days to file the new DTPA claim. The trial court disallowed the amendment, citing the 30-day limit. We held that the trial court should have allowed the addition of the new DTPA **[*1315]** claim under the statutory exception in *Section 17.50A(b)*. [3] *Id. at 152*. Implicit is that a failure to give notice before filing a DTPA suit does not bar the addition of a different DTPA damage claim by amendment, so long as adequate notice is given before the date of the amendment.

[7]** Honeywell maintains, for its part, that no effective notice can be given while a DTPA lawsuit is pending, another unnecessarily broad contention that we need not accept or reject in toto in order to decide today's case. This argument is powerfully supported, however, by clear language in *Section 17.50A(a)*: Because Boyd failed to give notice 30 days before "*filing a suit*" asking for DTPA damages, Boyd's original DTPA claim as well as any new DTPA claims Boyd seeks to add to the same suit are disallowed by *Section 17.50A(a)*. Honeywell correctly notes that *HN5*[] the primary purpose of the DTPA notice requirement is to discourage litigation and encourage settlement, in particular, out-of-court settlement. *See Jim Walter Homes, Inc. v. Valencia, 679 S.W.2d 29, 36* (Tex.App. -- Corpus Christi 1984), aff'd as modified, *690 S.W.2d 239 (Tex.1985)*; *Blumenthal v. Ameritex Computer Corp., 646 S.W.2d 283, 286* (Tex.App. -- Dallas 1983, no writ). This purpose is frustrated if plaintiffs are permitted to evade the notice requirements by filing suit first and giving the initial notice later, at a time when fees and expenses

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[1] *HN2*[] Among other things, it grants a right of action for "unconscionable action" and "deceptive trade practices" by a seller. Id. *§ 17.50(a)(1)*, *(3)*. " Unconscionable action" is defined by *Section 17.45(5)* and "deceptive trade practices" are defined by *Section 17.46(b)*. *Section 17.50(b)(1)* gives consumers a right to actual damages and provides for treble damages against a seller whose acts are "committed knowingly."

[2] As will become apparent, we need not and do not address or decide this contention in today's case: one in which no notice of any kind was given before the initial action was filed.

[3] *Section 17.50A(b)* provides:

> *HN4*[] If the giving of 30 days' written notice is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations or if the consumer's claim is asserted by way of a counterclaim, the notice . . . is not required. Id. *§ 17.50A(b)*.

have already been incurred, **[**8]** when the matter is already before the court, and when the hope of a settlement without litigation has been cast away; nor does Texas authority appear to countenance such a course of procedure.

HN6[] Several Texas Appeals court cases, for example, provide that the only way to correct a DTPA suit filed with inadequate notice is to stop and start over again: a dismissal with leave to refile the suit thirty days after giving notice. *Reed v. Israel National Oil Company, Ltd., 681 S.W.2d 228, 239-40* (Tex.App. -- Houston [1st Dist.] 1984, no writ), held that, ***HN7***[] in a contract suit later amended to include a DTPA damage claim, the notice requirement related back to the time when suit was initially filed, not to the time of the amendment. *Id. at 240*. [4] *Reed* cites the "relation back" theory applied in *Providence Hospital v. Truly, 611 S.W.2d 127* (Tex.App. -- Waco 1981, writ dism'd) as offering guidance. *See* *Reed, 681 S.W.2d at 240*. The court in *Truly*, though silent on causes of action added by amended pleadings, is cited for allowing a "relation back" of pleadings based on the "same transaction or occurrence." *Id.* **[**9]** This reasoning must apply *a fortiori* where, as here, the initial complaint contains a DTPA claim. The *Reed* court noted that:

> ***HN8***[] *Section 17.50A* . . . states specifically that the required notice must come "*before the suit was filed*"; it does not speak to causes of action added by amended pleadings.

Id. (Emphasis added).

Honeywell also cites authority for the proposition that, in a DTPA suit filed without adequate notice that erroneously proceeds to a treble damage award, either the case must be remanded for an abatement proceeding, or the damages **[**10]** must be reduced to actual damages, *see* *Sunshine Datsun, 680 S.W.2d at 654-55*; *see* *Hollingsworth Roofing v. Morrison*, 668 S.W.2d at 872, 875 (Tex.App. -- Ft. Worth 1984, no writ); *Blumenthal, 646 S.W.2d at 287*. The most recent decision which our research has discovered is to like effect as these authorities. In *Certainteed Corporation v. Cielo Dorado Development, Inc., 733 S.W.2d 246* (Tex.App. -- El Paso 1987, writ granted), ***HN9***[] a judgment under the DTPA **[*1316]** was reversed for the giving of the required thirty day notice where the only evidence that any notice whatever had been given was testimony by the plaintiff's attorney that "a demand letter was sent . . . pursuant to the Deceptive Trade Practices Act." *Id. at 249*. Holding that the DTPA required that notice be given of "the amount of actual damages claimed as well as attorney's fees and other expenses," that the testimony quoted wholly failed to establish that this was done, and that "the statute is to be enforced as interpreted by its express language," [5] the court reversed.

[11]** In today's case, no notice whatever was given before suit was filed; and the DTPA judgment therefore cannot stand. To countenance such an entire failure to comply with the Act's notice requirement before bringing suit would frustrate its purpose to encourage settlement and minimize litigation, and we cannot do so. Faced with the extreme case presented, we need not and do not decide whether, in view of Texas's policy allowing free amendment of pleadings, the amending of a properly-noticed existing DTPA action to incorporate a new DTPA theory after thirty days notice of the proposed new theory would suffice to permit the eventual entry of judgment on that theory. We decide only that proper notice of a DTPA action must be given *before suit is initially brought* if the treble damages remedies of the DTPA are to be granted in the case. Insofar as *Foster v. Daon, supra*, may be read to the contrary, we conclude that Texas decisions handed down subsequent to it require that we hold as we do.

Waiver

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[4] Although the Texas Supreme Court apparently has not addressed this issue, *Sunshine Datsun, Inc. v. Ramsey, 680 S.W.2d 652, 655* (Tex.App. -- Amarillo 1984, no writ), suggests that the Texas Supreme Court's construction of the mandatory presuit notice requirements of statutes similar to the DTPA supports Honeywell (*citing* *Schepps v. Presbyterian Hospital of Dallas, 652 S.W.2d 934 (Tex.1983))*.

[5] Citing to *Cail v. Service Motors, Inc., 660 S.W.2d 814, 815 (Tex.1983)*.

Boyd contends that even if its notice was inadequate Honeywell waived any objection to it. Boyd's brief states that the holding of *Pool Company v. Salt Grass Exploration, 681 S.W.2d 216* **[**12]** (Tex.App. -- Houston [1st Dist.] 1984, no writ), is that

> failure to raise with specificity the defects in a DTPA notice letter by either motion or a plea in abatement *constitutes a waiver* [sic] of such claim. (Emphasis added).

Boyd Brief at 18. [6] This greatly overstates the holding. *Pool Company* held that ***HN10***[] a defendant who, until appeal, raised no objection *whatever* to the inadequacy of the DTPA notice or to testimony about the DTPA cause of action waived its right to object on appeal. See *Id. at 219*.

Boyd's other waiver arguments are based on minor deficiencies in Honeywell's amended answer: Honeywell's pleadings refer to the lack of notice as an "affirmative defense" and do not specify that it was a lack **[**13]** of *DTPA* notice that Honeywell asserts. Boyd contends that Federal Rules of Civil Procedures 8(b) and 9(c), among other pleading rules, require that Honeywell be held to have waived its right to object to Boyd's notice. We reject these arguments. There is no doubt that Boyd's DTPA notice letter was in issue in the trial court; its order in connection with its judgment address the matter. There was no waiver.

Conclusion

For the reasons stated, the judgment of the trial court is REVERSED and the cause is REMANDED for further proceedings consistent with our holdings.

End of Document

[6] The brief's use of "emphasis added," in parenthesis, gives the (doubtless unintended) impression that Boyd is quoting from *Pool Company*. While some of the words come from different parts of the opinion, we do not find this precise language in it.

H & W Industries, Inc. v. Formosa Plastics Corp.

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

February 22, 1988, Decided

No. EC87-382-NB-D

Reporter

687 F. Supp. 271 *; 1988 U.S. Dist. LEXIS 4486 **; 1988-1 Trade Cas. (CCH) P67,914

H & W Industries, Inc., Plaintiff v. Formosa Plastics Corporation, USA, Formosa Plastics Corporation, Texas , and J-M Manufacturing Company, Defendants

Subsequent History: [1]** Motion for Reconsideration Denied, May 13, 1988. Reported at: *687 F. Supp. 271 at 276*.

Core Terms

resin, pipe, pounds, plants, preliminary injunction, terminated, supplies, monopolization, cancellation, injunction, antitrust, Plastics, shortage, notice, prices, ship

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Trade Secrets Law > Breach of Contract > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

To secure a preliminary injunction, a plaintiff must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if an injunction is not issued;(3) the threatened injury to the plaintiff outweighs the damage the injunction might cause the defendant; and(4) the injunction will not disserve the public interest.

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

HN2[] **Sales (Article 2), Form, Formation & Readjustment**

A party may waive a provision in a contract limiting modification to a signed writing through a persistent pattern of conduct which ignores the limiting provisions. *Miss. Code Ann. § 75-2-209(4)* (1972).

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Commercial Law (UCC) > ... > Form, Formation & Readjustment > Statute of Frauds > General Overview

Governments > Legislation > Types of Statutes

Commercial Law (UCC) > Sales (Article 2) > General Overview

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

Commercial Law (UCC) > ... > Statute of Frauds > Exceptions > General Overview

Commercial Law (UCC) > ... > Statute of Frauds > Exceptions > Merchant Rule

Contracts Law > Statute of Frauds > General Overview

Contracts Law > Statute of Frauds > Requirements > Signatures

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Output & Requirements Contracts

HN3[] **Types of Contracts, Oral Agreements**

The Uniform Commercial Code provision, *Miss. Code Ann. § 75-2-201(2)* allows merchants to enter oral contracts for over $ 500.00 by sending a confirmation letter. Unless the letter is signed by the party to be charged, it must be performed within 15 months or it falls within Mississippi's general statute of frauds, *Miss. Code Ann. § 15-3-1* (1972).

Contracts Law > Statute of Frauds > General Overview

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Contracts Law > ... > Affirmative Defenses > Estoppel > Statute of Frauds

HN4[] **Contracts Law, Statute of Frauds**

Neither past performance nor a claim of equitable estoppel can avoid the defense of the statute of frauds.

Commercial Law (UCC) > ... > Contract Terms > Gap Filler Provisions > General Overview

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

HN5[] Contract Terms, Gap Filler Provisions

A contract for an indefinite period cannot be perpetual but may be terminated at any time after giving reasonable notice. *Miss. Code Ann. § 75-2-309* (1972).

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

Criminal Law & Procedure > Defenses > Impossibility

HN6[] Monopolies & Monopolization, Attempts to Monopolize

In order to show specific intent to monopolize, a plaintiff must show that a defendant has the ability to do so. A low market share may make attempted monopolization an impossibility as a matter of law. Absent special circumstances, a defendant must have a market share of at least 50 percent before he can be guilty of monopolization.

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

HN7[] Monopolies & Monopolization, Attempts to Monopolize

As a matter of law, a parent corporation may favor its subsidiary so long as it does not lead to control of the relevant market.

Counsel: John M. Edgar, Ronald L. Holt, Kansas City, Missouri, James R. Moore, Jr., Jackson, Mississippi, H. Scott Spragins, Oxford, Mississippi, for Plaintiff.

Thomas J. Suszek, Oxford, Mississippi, for Defendant.

Judges: Neal B. Biggers, Jr., United States District Judge.

Opinion by: BIGGERS

Opinion

[*272] MEMORANDUM OPINION

NEAL B. BIGGERS, JR., UNITED STATES DISTRICT JUDGE.

Comes now before the court the motion of the plaintiff, H & W Industries, Inc. ("H & W"), seeking a preliminary injunction against the defendants, Formosa Plastics Corporation, USA and Formosa Plastics Corporation, Texas ("Formosa"). Having considered the evidence, the parties' memoranda, and being otherwise fully advised of the premises, the court is in a position to rule on the merits.

I.

In 1978, Randy Heath began H & W Industries in Booneville, Mississippi to produce PVC pipe. H & W made the pipe by taking resin it purchased, adding materials to it, and forming pipe by a plastic extruding machine. Soon after Heath built the plant, H & W established another facility in Springfield, Kentucky.

In 1981, Heath traveled to the Formosa Plastics headquarters in Florham Park, New Jersey to discuss a resin supply contract. Heath met with the chairman and vice-president of Formosa, Y. C. Wang and Robert Chou. At the meeting Heath agreed **[**2]** that H & W would purchase a portion of its resin needs from Formosa.

On August 17, 1983, Formosa and H & W signed an "evergreen" contract in which Formosa agreed to supply H & W 4,000,000 pounds of resin each month. The contract contained a provision which stated the contract could only be modified by an agreement signed by both parties. It also included a clause which provided the contract could be cancelled 120 days after receipt of written notice.

In 1983, Formosa formed a subsidiary, J-M Manufacturing ("J-M") which purchased eight PVC pipe plants from Johns-Manville Corporation. Initially, J-M had the capacity to produce 300,000,000 pounds of PVC pipe each year. Formosa supplied J-M with most of its resin requirements.

According to Heath, at the time J-M entered the market the PVC pipe market was highly competitive. The market had numerous pipe producers and had an overabundance of resin selling at low prices. He testified that Formosa could not sell all the resin it produced.

In 1984, Robert Chou called Heath and asked him to purchase more resin from Formosa. According to Heath, Chou wanted Heath to run his plant at full capacity and to expand his business. Heath testified **[**3]** that he agreed to purchase more resin if Formosa would extend H & W's credit terms. Heath said Chou agreed to this, and H & W began to purchase 4,000,000 to 8,000,000 pounds of resin each month from Formosa.

In the summer of 1985, Robert Chou asked Heath to come to New Jersey to meet with Y. C. Wang. Heath and Wayne Hamilton, H & W's vice-president, went to Florham Park, New Jersey on August 22, 1985. According to Heath and Hamilton, Wang wanted H & W to purchase all of its resin supplies from Formosa and wanted H & W to run its plants at optimum capacity. Hamilton and Heath testified that Heath agreed to purchase 80% of the resin requirements for the Booneville and Springfield plants. In return, Heath said Wang agreed to sell resin at a competitive price and promised not to curtail H & W's resin supplies during a time of shortage. After returning to Booneville, Hamilton wrote a letter to Bob Chou setting forth his understanding of the parties' agreement. The letter indicated that Formosa would supply 80% of H & W's resin needs and Formosa would charge H & W the same price Formosa's competitors charged for resin. (Plaintiff's Exhibit 1.) Hamilton testified that after the August meeting **[**4]** he believed **[*273]** Formosa and H & W had entered a long-term contract which could only be terminated by a mutual agreement.

Between September, 1985 and March, 1986, H & W purchased between 88% and 174% of H & W's resin requirements from Formosa. (Plaintiff's Exhibit 37.) According to Heath and Hamilton, H & W accommodated Formosa by purchasing more resin than the Springfield and Booneville plants needed. In March, 1986, Heath refused to purchase resin from Formosa because their price was too high. (Plaintiff's Exhibit 4.)

On April 1, 1986, H & W began to operate the Hunter PVC pipe plant in Lincoln, Alabama and started shipping resin there in June. In November, 1986, Hamilton formed Southern Louisiana Plastics and leased a PVC plant in Slidell, Louisiana. H & W began shipping resin there too.

According to Heath, in the fall of 1986, there was less resin available in the U. S. market. In December, 1986, Formosa began to cut H & W's resin supply. Heath said he continually asked Formosa for 11,000,000 pounds per month and tried to purchase resin from other suppliers, but the market was tight and prices were high.

In early 1987, J-M purchased PVC pipe manufacturing plants in Horton, Texas and **[**5]** Fontana, California. While J-M was expanding, Formosa increased its supply of resin to J-M and decreased its supply to H & W. In February, 1987, Formosa began charging H & W more for resin than it charged J-M. (Plaintiff's Exhibit 56.)

On February 1, 1987, H & W owed Formosa $ 13,700,000 for resin of which $ 6,600,000 was overdue. On February 10, 1987, Gordon Miller, Formosa's new assistant credit manager, wrote Heath and asked that H & W pay its overdue account to get it within 90-day payment terms. (Plaintiff's Exhibit 7.)

In early February, Robert Chou told H & W that Formosa would reduce H & W's resin shipments. Hamilton sent a mailgram objecting to the reduction and demanding more resin. (Plaintiff's Exhibit 9.) Ben Chein, Formosa's coordination manager, wrote Hamilton asking that H & W get its account in order. Chein explained that Formosa was concerned about releasing a resin shipment when H & W's account was $ 4,784,382.61 overdue. (Plaintiff's Exhibit 8.) On March 2, Ben Chein wrote Hamilton that Formosa would send only four rail cars. He told Hamilton that Formosa would not fill H & W's entire order because of a price disagreement and because H & W owed $ 5,178,280.38 which **[**6]** was past due. Chein warned Hamilton that if H & W failed to pay, Formosa would stop making any shipments. (Plaintiff's Exhibit 11).

The same day, Hamilton responded to Chein's February 24 letter. In his letter, Hamilton disagreed with the amount H & W owed and demanded that Formosa ship twenty-one rail cars to make a 10,000,000 pound per month quota he claimed Formosa agreed to. (Plaintiff's Exhibit 10.)

On March 3, Hamilton and Heath met with Ben Chein, Bob Chou and Gordon Miller to arrange a payment schedule for H & W. At the meeting H & W agreed to accept 4,500,000 pounds of resin per month until June and promised to pay Formosa to get its account within 90-day payment terms. During the meeting, Heath invited Miller to Booneville to examine H & W's records. (Plaintiff's Exhibits 12 & 14.)

Miller went to Booneville on March 10 and examined H & W's inventory and accounts receivable. Miller testified that he asked Heath for an audited financial statement. Miller said Heath told him H & W did not have an audited statement but claimed H & W was worth between $ 22,000,000.00 and $ 27,000,000.00. A financial statement introduced into evidence indicated that H & W was worth $ 5,159,901.05 **[**7]** in March, 1987. (Defendant's Exhibit 1A.)

On June 3, 1987, Ben Chein wrote Heath in reply to an order for 8,000,000 pounds of resin. Chein told Heath he could only ship 6,800,000 pounds in June because of production problems. (Plaintiff's Exhibits 15 & 17.) On June 30, 1987, Chein wrote Heath explaining that he could only ship 6,000,000 pounds of resin in July due to Formosa's production problems. (Plaintiff's **[*274]** Exhibit 19.) Heath objected to these reductions. (Plaintiff's Exhibit 18.)

On August 25, Occidental Chemical Corporation sent J-M notice of cancellation of "a resin supply contract" with J-M. (Defendant's Exhibit 915.) On August 21, Formosa sent H & W notice of cancellation of the resin supply contract and told Heath that Formosa wanted to operate under a new contract with H & W. (Plaintiff's Exhibits 20 & 22.) On December 16, 1987, Formosa sent Heath the new contract in which Formosa agreed to supply H & W 4,500,000 pounds of resin each month. Formosa asked Heath to sign the contract and return it by December 31, 1987. (Plaintiff's Exhibit 27.)

Instead of signing the new contract, H & W sought relief from this court by way of a temporary restraining order. On December 31, 1987, **[**8]** this court entered an ex parte temporary restraining order on the representation of counsel that Formosa had a contractual obligation to supply 11,000,000 pounds of resin to H & W each month. H & W asks the court to keep that order in effect by way of a preliminary injunction and asserts that H & W also is entitled to an injunction because Formosa's resin reduction would enable J-M to succeed in monopolizing the PVC pipe market, contrary to federal law.

II.

HN1[] To secure a preliminary injunction, H & W must show:

(1) a substantial likelihood of success on the merits;

(2) a substantial threat of irreparable injury if an injunction is not issued;

(3) the threatened injury to H & W outweighs the damage the injunction might cause Formosa; and

(4) the injunction will not disserve the public interest.

Canal Authority of the State of Florida v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974). H & W asserts six causes of action against Formosa, namely: breach of contract; fraud; misappropriation of trade secrets; defamation; wrongful interference with business relations; and antitrust violations. Initially, the court will ascertain whether H & W has a breach of contract claim against Formosa.

[9]** At trial and in its briefs, H & W claims the parties agreed to a new contract on August 22, 1985. Heath and Hamilton testified that Wang agreed to supply H & W with 11,000,000 pounds of resin each month at the same price Formosa's competition charged and that Formosa would not terminate the contract during a resin shortage. H & W points to the letter Hamilton sent Formosa as a confirmation of the contract. *See* *Miss. Code Ann. § 75-2-201 (2)* (1972). Formosa argued that their 1983 contract with Formosa limited its modification to an agreement signed by both parties. Formosa pointed out that the letter was not signed by Formosa; thus, it is not enforceable. *See* *Miss. Code Ann. § 75-2-209(2)* (1972).

HN2[] A party may waive a provision in a contract limiting modification to a signed writing through a persistent pattern of conduct which ignores the limiting provisions. *Miss. Code Ann. § 75-2-209(4)* (1972); *Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 136 (5th Cir. 1979)*; *City of Mound Bayou v. Roy Collins Constr. Co., 499 So. 2d 1354, 1359-60 (Miss. 1986)*. By supplying H & W with more than 4,000,000 pounds of resin each month as agreed to in the 1983 contract, Formosa **[**10]** waived the provision limiting modification. Even so, the agreement H & W claims Formosa made in August, 1985, must meet the requirements of the statute of frauds. *Miss. Code Ann. § 75-2-209(3)* (1972).

H & W argues that Hamilton's letter to Formosa confirmed the terms of H & W's agreement with Formosa, thus meeting the requirements of *Miss. Code Ann. § 75-2-201(2)* (1972).

This statute, however, does not provide an exception to Mississippi's general statute of frauds, *Miss. Code Ann. § 15-3-1* (1972), rather it compliments it. ***HN3***[] The Uniform Commercial Code provision, *§ 75-2-201(2)* allows merchants to enter oral contracts for over $ 500.00 by sending a confirmation letter. Unless the letter is **[*275]** signed by the party to be charged, it must be performed within fifteen months or it falls within Mississippi's general statute of frauds. *See* *Roberts v. Southern Wood Piedmont Co., 571 F.2d 276, 278 (5th Cir. 1978)* (applying the general statute of frauds to an oral output agreement).

Both Heath and Hamilton testified that Formosa and H & W made a permanent agreement in August, 1985, which they expected to last several years. As such the oral agreement falls within the general statute of frauds. **[**11]** *Roberts v. Southern Wood Piedmont Co, 571 F.2d at 278 (5th Cir. 1978)*; *Stahlman v. National Lead Co. 318 F.2d 388, 395 (5th Cir. 1963)*. ***HN4***[] Neither past performance nor a claim of equitable estoppel can avoid the defense of the statute of frauds. *Ivey's Plumbing & Elec. v. Petrochem Maintenance, Inc., 463 F. Supp. 543, 552-554 (N.D. Miss. 1978)*; *Affiliated Investments, Inc. v. Turner, 337 So. 2d 1263, 1268 (Miss. 1976)*.

Even if the court could ignore the statute of frauds and accepted Hamilton's letter as a contract, H & W is not entitled to specific performance by way of a preliminary injunction. Hamilton's letter did not provide a termination date. Hamilton and Heath claimed that Formosa orally agreed to a long-term contract which could not be terminated during a resin shortage.

HN5[] A contract for an indefinite period cannot be perpetual but may be terminated at any time after giving reasonable notice. *Miss. Code Ann. § 75-2-309* (1972); *King v. Exxon Co. USA, 618 F.2d 1111, 1118-1119 (5th Cir. 1980)*; *Bel-Mar Ford Tractor v. Woods & Copeland Mfg., 602 F.2d 1199, 1200 (5th Cir. 1979)*. Formosa sent H & W notice of cancellation on August 31, 1987, four months before it **[**12]** cancelled the contract. Consequently, Formosa effectively terminated its supply contract with H & W.

H & W is not entitled to a judgment on its contract claim as a matter of law. As a result, the claim will be dismissed and cannot serve as a basis for a preliminary injunction. The only remaining claim which gives rise to the possibility for injunctive relief is H & W's claim that Formosa violated section 2 of the Sherman Antitrust Act. *See Walker v. U-Haul Co. of* *Mississippi, 734 F.2d 1068 (5th Cir. 1984)*.

III.

H & W claims that Formosa and J-M tried to monopolize the PVC pipe market and that Formosa is likely to achieve that end. *See* [Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 275 (5th Cir. 1978)], *cert. denied*., *440 U.S. 939, 59 L. Ed. 2d 499, 99 S. Ct. 1289 (1979)*.

H & W argued that the court should look solely to the area of the country in which H & W sold its pipe and determine whether Formosa seeks to control that market. Heath testified that in 1986 J-M controlled between 30% and 50% of the market in the Southeastern United States where H & W sold pipe. He claimed Formosa secured a 40% to 70% market share by 1987. Heath based his figures on a general **[**13]** feeling he got from talking to sales people in the PVC business.

Even if the court accepts H & W's definition of the relevant market, the plaintiff's own document shows that J-M controlled only 19% of the PVC market in the Southeast and 17.5% in the United States. (Plaintiff's Exhibit 47.) ***HN6***[] In order to show specific intent to monopolize, H & W must show J-M has the ability to do so. *Dimmitt Agri Industries, Inc. v. CPC Int'l, Inc., 679 F.2d 516, 533 (5th Cir. 1982)*. A low market share may make attempted monopolization an impossibility as a matter of law. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 490 (5th Cir. 1984)*. ". . . Absent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization." *Id. at 489*.

H & W claims the shortage of resin gives Formosa and J-M the ability to control the PVC pipe market. H & W did not show what part of the resin market Formosa controlled. The only proof of this was the testimony of the defendant's expert, Dr. Paul Oliver. He testified that Formosa has 11.6% of the resin market in the United States. Consequently, neither Formosa nor J-M has the ability **[**14]** to control either the **[*276]** resin or the PVC market. This is evidenced by Formosa's attempt and failure to raise the resin prices in March, 1986.

H & W failed to show the degree to which the resin shortage was a barrier of entry into the PVC pipe producing industry. The only evidence before the court was Heath's testimony that resin supplies were growing short and resin prices were rising. Heath admitted he had been offered resin at higher prices than he paid Formosa, but he declined to purchase the resin. He complained that by limiting the amount he could purchase, Formosa made J-M more competitive than H & W.

As the market price for resin rose, Formosa charged J-M less for it and supplied J-M with all the resin it needed. When Formosa did this, J-M became competitive and began showing a profit in 1987. It made economic sense for Formosa to favor its wholly owned subsidiary. ***HN7***[] As a matter of law, a parent corporation may favor its subsidiary so long as it does not lead to control of the relevant market. *J.T. Gibbons, Inc. v. Crawford Fitting Co., 704 F.2d 787, 795 (5th Cir. 1983)*. The proof showed that J-M would probably have 22% of the PVC market in the Southeastern United States in **[**15]** 1988. This share is not enough to give J-M control of the PVC pipe market.

H & W's antitrust claim relies on Heath's unsupported conclusions about the PVC industry and the resin market. Such evidence is insufficient to establish the essential elements of an antitrust suit. *See* *J. T. Gibbons, 704 F.2d at 793*. As a result, this claim will be dismissed.

An order in accordance with this memorandum opinion will issue.

THIS, the 22nd day of February, 1988.

AMENDED ORDER

In accordance with the memorandum opinion issued this day, it is hereby ORDERED that:

(1) the plaintiff's motion for a preliminary injunction is DENIED;

(2) Count I of the plaintiff's complaint for breach of contract is dismissed; and

(3) Count VI of the plaintiff's complaint for violation of section 2 of the Sherman Antitrust Act is dismissed.

THIS, the 22nd day of February, 1988.

Phototron Corp. v. Eastman Kodak Co.

United States District Court for the Northern District of Texas, Fort Worth Division

February 22, 1988, Decided ; February 22, 1988, Filed

Civil Action No. CA4-87-910-E

Reporter
687 F. Supp. 1061 *; 1988 U.S. Dist. LEXIS 5128 **

Phototron Corporation, v. Eastman Kodak Company, et al.

Core Terms

finishing, wholesale, pricing, antitrust, enjoined, market share, markets, preliminary injunction, competitors, predatory, retail, Clayton Act, photofinishing, labs, injunctive relief, photographic, combined, amateur, Colorwatch, chemicals, percent, color, film, monopoly, parties, entity, sales, limited record, merger, acquisition

LexisNexis® Headnotes

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN1[] **Private Actions, Standing**

Section 16 of the Clayton Act provides in part that 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, a preliminary injunction may issue. *15 U.S.C.S. § 26*.

Antitrust & Trade Law > Clayton Act > Scope

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act prohibits mergers when the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. *15 U.S.C.S. § 18*.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Evidence > Types of Evidence > Demonstrative Evidence > Photographs

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN3[] **Injunctions, Preliminary & Temporary Injunctions**

When seeking injunctive relief, the moving partying bears the burden of persuasion on each of the following elements: (1) substantial likelihood that it will prevail on the merits; (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to it outweighs the threatened harm the injunction may do to the defendant, and (4) that the granting the preliminary injunction will not disserve the public interest.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

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

Civil Procedure > Remedies > Damages > General Overview

HN4[] **Remedies, Injunctions**

An entitlement to injunctive relief requires a showing that the purported injury cannot be undone through monetary remedies.

Counsel: **[**1]** Richard Lee Brown, S. Gary Werley, Bishop, Payne, Lamsens & Brown, Fort Worth, Texas, for Phototron Corporation.

Joseph L. Alioto, Joseph M. Alioto, Alioto & Alioto, San Francisco, California, for Phototron Corporation.

Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, Daniel R. Shulman, Minneapolis, Minnesota, for Phototron Corporation.

Marvin S. Sloman, Fletcher L. Yarbrough, Tyler A. Baker, Vikram Chandhok, Carrington, Coleman, Sloman & Blumenthal, Dallas, Texas, for Eastman Kodak Company.

E. Glen Johnson, Kelly, Appelman, Hart & Hallman, Fort Worth, Texas, for Fuqua Industries, Inc. and Colorcraft Corporation.

Charles E. Koob, Joseph F. Tringali, Kathryn A. Clokey, Simpson Thacher & Bartlett, New York, New York, for Fuqua Industries, Inc. and Colorcraft Corporation.

Judges: Eldon B. Mahon, United States District Judge.

Opinion by: MAHON

Opinion

[*1062] MEMORANDUM OPINION AND ORDER

ELDON B. MAHON, UNITED STATES DISTRICT JUDGE.

Phototron seeks a preliminary injunction to enjoin Kodak and Colorcraft from combining their United States photo finishing operations. The requirement that the judiciary be candid is perhaps absolute: [1] the Court admits that the question presented here is close. But for the reasons stated below, the Court finds that the proposed combination must be **[**2]** preliminarily enjoined [2] **[**3]** until the merits of this action can be reached, as the Defendants' consolidated operations may tend to harm competition in violation of Section 7 of the Clayton Act. [3]

In sum, the Court concludes the following *solely* for the purpose of determining whether a preliminary injunction should issue:

1. Phototron has standing to challenge the proposed combination;

2. For the purposes of analyzing the proposed combination under Section 7 of the Clayton Act, wholesale photo finishing is the relevant product market;

3. In light of alleged predatory pricing activities and preferential pricing practices, the proposed combination may substantially lessen competition in the national market for the procurement of wholesale photo finishing services in violation Section 7 of the Clayton Act; and,

4. Phototron is threatened with significant loss or damage within the meaning of Section 16 of the Clayton Act as a result of the proposed combination, and preliminary injunctive relief should enter to prevent threatened violations of the Act.

I. FACTS AND PROCEEDINGS

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[1] Shapiro, *In Defense of Judicial Candor*, *100 Harv. L. Rev. 731, 750 (1987)*.

With characteristic honesty and eloquence, Learned Hand recognized this fundamental tension, perhaps paradox, reposed in the antitrust laws. Having concluded that Congress "did not condone good trusts and condemn bad ones; it forbad all," he announced with equal fervor, "the successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945)*.

[2] ***HN1***[] Section 16 of the Clayton Act provides in pertinent 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 . . ., 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 . . . ., a preliminary injunction may issue.

15 U.S.C.A. § 26 (West Supp. 1987).

[3] ***HN2***[] Section 7 of the Clayton Act prohibits mergers when the "effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly . . . ." *15 U.S.C.A. § 18 (West Supp. 1987)*.

The parties mutually agreed that Phototron's Application for Preliminary Injunction would **[**4]** be decided upon affidavits and memoranda of law without an evidentiary hearing. On February 5, 1988, oral argument was heard; counsel for both sides presented fine and thoroughly-prepared arguments. The Court emphasizes that this issue is being decided based upon *limited* documentary evidence; this limitation results solely from the parties' agreement. There has been no discovery. While the evidence submitted in support of and in opposition to the preliminary injunction "need not be repeated" at trial, [4] it should be understood that any fact finding made here is not irrevocably set in stone. Since the scope and weight of the evidence may change as the action proceeds, so may these fact findings. With that admonition in mind, the Court submits the following. [5] **[*1063]** These findings of fact and conclusions of law are based solely upon the affidavits, exhibits, briefs, arguments, and file developed thus far in this cause.

[5]** The Plaintiff Phototron Corporation ("Phototron") has brought an action against Defendants Eastman Kodak Company ("Kodak"), Fuqua Industries, Inc. ("Fuqua"), and Colorcraft Corporation ("Colorcraft"). In addition to its causes of action under Texas common law, Phototron has asserted that the Defendants have violated Sections 1 and 2 of the Sherman Act, and Section 7 of the Clayton Act.

The Defendants Kodak, Fuqua, and Colorcraft have entered into an agreement to combine the photo finishing operations of Kodak and Colorcraft. Kodak and Colorcraft have agreed to postpone the consummation of this transaction until February 22, 1988. The Court agreed to issue a ruling on Phototron's Motion for Preliminary Injunction at that time.

Colorcraft is a wholly-owned subsidiary of Fuqua Industries. Fuqua conducts its photo finishing operations through Colorcraft. Phototron, Kodak, and Colorcraft all provide wholesale photo finishing services. The photo finishing industry is composed of amateur and professional laboratories. There is no dispute that, for purposes of market determination, professional and amateur labs are essentially noncompeting and that only the labs developing the photographs **[**6]** of amateurs must be considered here.

Nor is there any serious dispute between the parties that the amateur photo finishing industry is divided, basically, into four segments or "product markets": [6] **[**7]** (1) "instant" photo finishing services where photo finishing is accomplished on-site at "minilabs"; (2) large integrated processing labs ("captive photofinishing labs") tied to major retail establishments, who process photographs in their own facilities; [7] (3) retail "mail-order" operations where

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[4] *Fed. R. Civ. P. 65(a)*.

[5] *Rule 52(a) of the Federal Rules of Civil Procedure* provides in pertinent part: "In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review."

Rule 65(a) recognizes this fact-finding requirement. It states that even when the hearing on the application for a preliminary injunction is not consolidated with a trial on the merits, "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial."

[6] The "relevant market" concept entails two separate considerations: (1) the product market or "line of commerce"; and (2) the geographic market or "section of the country." *See, e.g., Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 279, 79 L. Ed. 356, 55 S. Ct. 182 (1934)*.

> The outer boundaries of a product market are determined by 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.

Brown Shoe Company v. United States, 370 U.S. 294, 325, 82 L. Ed. 2d 510, 82 S. Ct. 1502 (1962).

[7] Wal-Mart and Eckerd Drugs would be stores with their own "minilab" for film processing.

photographs are sent to large-scale photo finishing laboratories for processing; and, (4) wholesale processing labs that market photo finishing to retailers on a competitive basis.

The parties also agree, or at least for the purposes of argument assume, that the relevant geographic market is the national market. Based upon the record, the Court also agrees that the national market is the applicable one. It is at this point -- the point of determining the relevant product market -- that the parties and the experts part company.

The Plaintiff's expert contends that *wholesale* photo finishing is the relevant economic market for antitrust analysis. Kodak and Colorcraft each have engaged an expert. Their experts contend that *all sources* of photo finishing services that are available to amateurs -- in addition to the wholesale photo finishing market -- should be included in the relevant market. All three experts are knowledgeable, well-qualified, and respected economists.

For the limited purpose of determining whether a preliminary injunction should issue, the Court finds that Phototron's expert is the most persuasive since he emphasizes the actual conditions in the photo finishing marketplace [8] **[**9]** and the theoretical **[*1064]** implications of the proposed combination. [9] Hence, for **[**8]** the consideration of the issue at hand, the relevant product market will be that segment of the amateur photo finishing market defined above as "wholesale photofinishing labs that market photofinishing to retailers on a competitive basis."

In 1954, Kodak had a near absolute monopoly in the color photo finishing market. [10] During that same year, Kodak entered into a consent decree with the Justice Department which dramatically changed the structure of this market. "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." [11] As a result of the consent decree, Kodak reduced its overall market share in photo finishing from 96 % in 1954 to 10% in 1976. However, since 1976, Kodak appears to have embarked upon a series of acquisitions to increase its share of the wholesale photo finishing market.

In 1985, Kodak owned 10 photo finishing laboratories. In December of 1986, Kodak purchased Fox Photo ("Fox") which itself had previously acquired a number of photo finishing plants. At the time of its acquisition, Fox owned 20 such laboratories. In October of 1987, Kodak acquired American Photo Group Corporation, gaining 20 more wholesale photo finishing plants **[**10]** with this acquisition, Qualis Photofinishing Company, and CX Corporation.

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[8] In his Affidavit Professor Saving writes:

> The "quick" finishing market is separate and distinct from the wholesale photofinishing market in that it represents those consumers who place a high value on time. The *Photofinishing Industry Report* indicates that in 1986 minilab processing had an average cost of $ 8.23. Film processed in large labs ranged in cost from $ 5.36 retailed at Department Stores, $ 5.34 retailed at Drug Stores, $ 4.71 retailed at Discount Stores, $ 4.23 retailed at Supermarkets, and $ 3.85 retailed through mail order. The weighted average retail cost of photofinishing in large labs was $ 4.57. Thus, minilab film processing was 80 percent more costly than large lab processing. This large price differential is suggestive of significant market segmentation.
>
> . . . .
>
> Important for the issue at hand is the fact the "captive" labs do not represent a source of processing for retail outlets that are not part of the integrated system. Thus, even though the "captive" photofinishing labs are part of the overall supply of photofinishing services, they may not exert significant competitive pressure on the price and terms upon which the independent wholesale photofinishing lab services are available.

Affidavit of Thomas R. Saving at pp. 5-6.

[9] *See infra* slip op. at pp. 8-10.

[10] *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 270 (2d Cir. 1979)*.

[11] *Berkey, 603 F.2d at 271*.

Fuqua has also demonstrated a proclivity for acquiring its competitors. In 1985, Fuqua purchased Berkey Photo, Inc. In 1987, Colorcraft, a wholly-owned subsidiary of Fuqua, bought Magnicolor Photo Labs, which had six wholesale photo finishing plants. If the Kodak-Colorcraft combination takes place, there will be a dramatic concentration of the wholesale photo finishing industry compared to the industry that existed just three years ago. [12]

In 1986, the amateur photo finishing market had a 4.169 billion-dollar value. Wholesale photo finishers account for approximately 17 to 22 percent of the amateur photo finishing market by value. According to Phototron's expert, this 17 to 22 percent market share translates into a dollar volume **[**11]** for wholesale finishers of between $ 704 and $ 911 million. Kodak is estimated by industry sources to have sales of wholesale photo finishing of $ 300 million. Using the conservative figure of $ 911 million, Kodak now has approximately a 33 percent share of the wholesale photo finishing market.

The proposed merger with Colorcraft would increase this market share. Colorcraft owns 41 photo finishing labs. It had wholesale photo finishing sales of almost $ 300 million in 1986. [13] **[**12]** The Kodak-Colorcraft transaction would result in a firm with 94 large wholesale photo finishing laboratories and projected sales of $ 600 million in sales. Since the entire wholesale photo finishing market is $ 911 million, the **[*1065]** combination of Kodak and Colorcraft will have a market share of 66 percent. The market share of the proposed Kodak-Colorcraft firm measured in terms of sheer numbers of large photo finishing labs is also in line with the dollar-value percentage. [14] The Kodak-Colorcraft combination will produce a combined market share between these two entities of somewhere between 66 to 85 percent in wholesale photo finishing.

This increased market share is particularly relevant since Kodak maintains a dominant position in both producing and supplying raw materials that are used in photo finishing. The materials market consists of photochemicals and paper. Of the firms that supply these materials, Kodak possesses almost 80 percent of the materials market. Kodak occupies a similar position in regard to color and black and white film used by amateur photographers. Phototron's expert states that the "amateur photographer, the largest customer of photographic products and services, purchases more than 80 percent of his film from Kodak." [15] Based upon the record as presented, Kodak will have achieved, after the proposed combination, extensive vertical integration in all three related markets: (1) wholesale photo finishing, (2) photo finishing materials, and (3) color film.

This vertical **[**13]** integration is particularly enhanced by Kodak's "Colorwatch" program. "Colorwatch" is an advertising program which requires retail outlets to limit their selection of wholesale photo finishing firms to those who exclusively utilize Kodak photo finishing materials. Phototron's expert describes the program as follows:

> Kodak requires that wholesale processing labs that process film for Colorwatch customers use only Kodak chemicals and paper for all their photofinishing independent of whether or not that photofinishing is for a Colorwatch customer. Kodak's unique advantage over its competitors stem from the fact that Kodak can advertise its name, thereby enhancing sales of both film, photofinishing materials, and photofinishing services. Because Kodak, owns only a small market share of retail outlets, it cannot directly control the retailers' selection of a wholesale photofinishing firm. However, if through advertising of the Colorwatch seal, Kodak can gain customer preference for retail outlets displaying the colorwatch seal, then Kodak can expand its sales of photofinishing materials. [16]

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[12] After the proposed combination, there will be only four or five separate entities with more than local scope in the wholesale photofinishing market. They are: the Plaintiff Phototron, Fotomat, and Guardian Photo (a member of the Kodak "Colorwatch" program). None of the remaining competitors operating a national scale will have one-fifth of the combined size of the defendants.

[13] Colorcraft had $ 265 million and Magnicolor, a newly acquired subsidiary, had $ 35 million.

[14] The Kodak-Colorcraft combination would represent more than 55 percent of all wholesale photofinishing labs, or 94 out 170 large non-captive wholesale photofinishing labs in the United States. Affidavit of Thomas R. Saving at p. 8.

[15] Affidavit of Thomas R. Saving at p. 9; Affidavit of Joseph T. Borkowski at p. 4.

[16] Affidavit of Thomas R. Saving at p. 10. The Colorwatch program is also fully explained in paragraph 15 of the Plaintiff's Complaint.

[14]** The Kodak's expansion into the wholesale photo finishing labs through the proposed combination gives Kodak the ability to limit entry into the wholesale photo finishing market. This is especially onerous where Phototron and its Affiant, Joseph T. Borkowski, have alleged predatory pricing activities on the part of the Defendants. It is alleged, both in Phototron's verified Complaint and in President's Affidavit, that Kodak and Colorcraft have quoted prices to retailers which demonstrate their subsidiary wholesale photo finishers are either "operating at a loss, or are receiving discounts from Kodak on color print paper and chemicals." [17] Although the record before the Court is limited, it will support a finding that the proposed Kodak-Colorcraft combination will enable the combined entity to effectuate the below-cost pricing activity Phototron alleges it has already engaged in.

In light of the alleged predatory pricing activities, the dominant position that the proposed Kodak-Colorcraft entity would occupy in the wholesale photo finishing market -- considered jointly with the leverage Kodak maintains through its vertical integration **[**15]** in related markets of photo finishing materials and color film -- severely threatens Phototron's ability to compete **[*1066]** for business from retail outlets. After the proposed combination, Kodak and Colorcraft will have significantly increased power to purchase paper and chemicals at reduced prices, while forcing Phototron to purchase the same items at a higher price.

Thus, considered as a whole, the limited record before the Court supports two findings of the utmost importance: (1) that the alleged below-cost pricing activities and preferential pricing practices of Kodak and Colorcraft will "lessen competition" and "tend to create a monopoly;" [18] and (2) that these predatory practices will create a substantial likelihood of significantly impairing, perhaps even destroying, Phototron's business. The loss of Phototron as an independent competitor in the wholesale photo finishing marketplace would further reduce competition and increase the combined entity's alleged monopoly power.

II. LEGAL DISCUSSION AND CONCLUSIONS OF LAW

A. Standing to Enjoin

Phototron's standing to enjoin the proposed Kodak-Colorcraft combination is heavily disputed. In **[**16]** this regard, the applicability of only one case is in issue: *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. The Defendants insist that this recent Supreme Court case prevents the Court from reaching the substance of Phototron's antitrust claims. When viewed in the aftermath of *Cargill*, the Defendants argue, the Plaintiff lacks standing to challenge this joint venture. The Court disagrees. Phototron has standing to enjoin the proposed combination.

In *Cargill*, the Excel Corporation, [19] the second-largest entity in both the cattle slaughtering and boxed beef production markets, sought to merge with the third largest competitor in those markets, Spencer Foods. [20] IBP, Inc., not a party to the *Cargill* action, was the largest beef packer in the United States. After the proposed combination, the relative market shares in the beef industry would have appeared as follows:

Market		Market	
IBP, Inc.	24.4%	IBP, Inc.	27.3%
Defendants	20.4%	Defendants	20.4%
Plaintiff	5.5%	Plaintiffs	

[17] Affidavit of Joseph T. Borkowski at p. 5.

[18] *15 U.S.C.A. § 18 (West Supp. 1987)*.

[19] Excel was a wholly-owned subsidiary of Cargill.

[20] ***Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 487, 93 L. Ed. 2d 427 (1986)***.

[17]** It is important to note that even after the Excel-Spencer merger, their combined market share would still not have exceeded that of the largest market participant, IBP. The Plaintiff, Monfort, the nation's fifth largest beef packer, brought an action under section 16 of the Clayton Act seeking to enjoin the prospective merger. [21]

The parties in *Cargill* agreed to consolidate, under *Rule 65(a)*, the motion for preliminary injunction with a full trial on the merits. Plaintiff Monfort never alleged or proved a scheme of predatory pricing on the part of the Defendants. The District Court in its Memorandum Opinion twice made note of this omission. [22] Yet, the District Court found "that the effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly . . . ." [23] The District Court, pursuant to section 16 of the Clayton **[**18]** Act, permanently enjoined the merger. The Tenth Circuit Court of Appeals affirmed the District Court's ruling but was reversed on appeal to the Supreme Court.

The Supreme Court defined predatory pricing as "pricing *below* an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." [24] **[**19]** **[*1067]** The Court found that Monfort's allegations and proof did not support a finding of this essential form of antitrust injury. The Supreme Court found that Monfort's injury resulted only from increased competition, not anticompetitive tactics on the part of the Defendants. Since price competition was not a predatory activity and no allegation had been made that Excel would act with predatory intent after the merger, the Court concluded that "Monfort neither raised nor proved any claim of predatory pricing before the District Court." [25] The linchpin of the *Cargill* decision is the requirement that a plaintiff seeking to *permanently* enjoin an allegedly unlawful business combination must allege and prove an actionable antitrust injury which results from the proscribed combination. [26]

In this cause, the Defendants' insistence that Phototron lacks standing to attack the Kodak-Colorcraft joint venture stems from their overly broad interpretation of *Cargill*. The case at hand is distinguishable on three grounds.

First, in *Cargill*, the Supreme Court reached its conclusion after there had been a complete trial on the merits. Hence, the requirement that a plaintiff seeking relief under section 16 of Clayton Act plead and *prove* a related antitrust injury. The parties in *Cargill* agreed to a consolidated trial on both the preliminary injunction and the merits of the case. Here, the parties reached no similar agreement. Only the issue of *preliminary* injunctive relief is before the Court. Thus the holding of *Cargill* applies **[**20]** to this case in a more limited sense. Phototron must allege an antitrust injury which flows from the proposed Kodak-Colorcraft combination and sustain only that burden of proof which would entitle it to *preliminary*, not permanent, injunctive relief.

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[21] ***Cargill, 107 S. Ct. at 487-88***.

[22] ***Cargill, 107 S. Ct. at 494***.

[23] *Monfort of Colorado, Inc. v. Cargill, 591 F. Supp. 693, 710 (D. Colorado 1983)*.

[24] ***Cargill, 107 S. Ct. at 493***. The caselaw of the Fifth Circuit is in accord with the requirement that pricing to be predatory must be "below cost." In *Adjusters Replace-A-Car v. Agency Rent-A-Car, Inc., 735 F.2d 884, 890-91 (5th Cir. 1984)*, the Court wrote:

> In sum, although we follow with interest the continuing debate over theories of predation, the law in this circuit is that where barriers to entry are not pronounced predatory pricing is not established unless the defendant has set his price below his average variable cost.

The Court pointed out in a footnote that "when a legitimate dispute arises as to the characterization of certain costs [fixed or variable], the question is one of fact to be resolved by the jury." *Adjusters, 735 F.2d at 891*.

[25] ***Cargill, 107 S. Ct. at 494***.

[26] ***Cargill, 107 S. Ct. at 491*** (citing *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. The Court wrote: "We conclude that in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Id*.

Second, unlike the plaintiff in *Cargill*, Phototron has made the requisite allegations in its Complaint and, as will be seen in Part II(B) of this Opinion, made the applicable showing required for equitable injunctive relief. [27]

In paragraph 15(i) of its verified Complaint, Phototron alleges a predatory pricing scheme:

> Wholesale photo finishing plants owned by defendant Kodak, **[**21]** defendant Colorcraft, and Guardian have charged prices for photo finishing services to actual and potential retail customers of plaintiff that are substantially below the prices plaintiff can charge and still operate profitably, and that reflect that defendant Kodak's wholly owned plants and plants owned by defendant Colorcraft, Guardian, and others are either paying substantially lower prices for Kodak photographic paper and chemicals than is plaintiff, receiving concession, inducements, and other considerations that are equivalent to lower prices for Kodak photographic paper and chemicals, *or operating unprofitably* or at substantially reduced profit margins for at least the **[*1068]** short term, until plaintiff is forced to go out of business or sell to defendants or their surrogates.

Below-cost pricing is further alleged in the Affidavit of Joseph T. Borkowski, President of Phototron:

> Wholesale photo finishers controlled by Kodak and Colorcraft have approached major retail accounts of Phototron with photo finishing prices competitive with or below the photo finishing prices offered to these same customers by Phototron. The prices quoted by wholesale photo finishers controlled by Kodak **[**22]** and Colorcraft demonstrate either that *such wholesale photo finishers are operating at a loss*, or are receiving discounts from Kodak on color print paper and chemicals . . . . [28]

Thus, Phototron has adequately alleged "threatened loss or damage of the type the antitrust laws were designed to prevent . . . ." [29]

Third, the antitrust injury Phototron claims it has or will suffer is sufficiently related to the Defendants' proposed, and allegedly unlawful, combination. [30] This related antitrust injury is markedly different than the injury the plaintiff in *Cargill* alleged -- an injury which resulted only from increased competition. Two striking differences between the case at hand and *Cargill* bear this out.

[23]** The first critical distinction arises in terms of market share. Even after the proposed merger in *Cargill*, the defendants would have had only 20.4 % of the relevant market. The *Cargill* defendants would have occupied only a second-place position of dominance in the relevant market in vigorous competition with the dominant firm, IBP. But this is not the case before the Court. Here, the Defendants are the two largest competitors in the wholesale photo finishing market. They will double this market share through the proposed combination. This dominant market share is particularly important in light of Kodak's strong position in two related markets. Kodak is the dominant supplier to the photo finishing industry. It is also the dominant manufacturer of conventional color photographic film. [31] Kodak's

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[27] The movant bears the burden of proving the four elements necessary for the issuance of a preliminary injunction:

> (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not issued; (3) that threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest.

Gearhart Industries, Inc. v. Smith International, Inc., 741 F.2d 707, 710 (5th Cir. 1984).

[28] Affidavit of Joseph T. Borkowski at pp. 4-5. *See also* Plaintiff's Supplemental Memorandum of Law at p. 4 ("Kodak and Colorcraft photo finishers have been quoting prices to Phototron customers at levels that are either *below cost* or that reflect paper and chemicals pricing substantially below list.") (emphasis added).

[29] ***Cargill, 107 S. Ct. at 491***.

[30] "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

[31] The record before the Court supports this finding. Mr. Borkowski states in his Affidavit:

dominance in these related markets leads the Court to the second distinguishing factor concerning relevant and related markets which arises in this case but was not present in *Cargill*.

[24]** Cleverly, the Defendants argue that Phototron's injury does result from the proposed Kodak-Colorcraft transaction. "Rather, the allegation complains of actions allegedly taken by Kodak in the implementation of the Colorwatch program." [32] This argument is not without merit. But based upon the record as presented and considered as a whole, the Court finds that the Colorwatch program is sufficiently related to the Kodak-Colorcraft transaction so that it could reasonably be said that the proposed combination will further expand and aggravate the antitrust injury which flows from the Defendant's alleged predatory pricing activity. The further facilitation of these alleged activities would constitute "threatened loss or damage by a violation of the antitrust laws" to Phototron's business. [33]

[*1069] A review of the limited record before the Court uncovered no convincing evidence which would militate against such a finding. Rather, Kodak's dominance in related markets supports it. The *Cargill* case is particularly dissimilar in this regard. There, the proposed combination **[**25]** created no threat of dominance in either the relevant or related markets. [34]

For the reasons stated above, Phototron has standing to challenge the proposed combination.

B. Standards Governing the Issuance of an Injunction

HN3[] When seeking injunctive relief, the moving partying bears the burden of persuasion on each of the following elements: (1) substantial likelihood that it will prevail on the merits; (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to it outweighs the threatened harm the injunction may do to the defendant, and (4) that the granting the preliminary injunction will not disserve the public interest. [35] When the wholesale photo finishing is considered the relevant product market, Phototron has met its burden of persuasion on each of these elements.

[26]** 1. Substantial Likelihood of Success on the Merits

Section 7 of the Clayton Act prohibits acquisitions or combinations the effect of which is substantially to lessen competition, or to tend to create a monopoly. [36] Based upon the limited record before the Court and its preliminary finding that wholesale photo finishing is the relevant product market, the combination in issue here is the type precluded by section 7.

The Kodak Colorcraft combination will possess between 66 and 85 percent of the wholesale photo finishing market. Because of previous acquisitions, [37] the whole sale photo finishing market has diminished in size to only two major national entities (the Defendants). If this combination is not enjoined, at least until the structure of the wholesale

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Kodak both sells the film that customers return to retailers for processing by wholesalers, and supplies the materials, i.e., color print paper and chemicals, that wholesale photo finishers primarily use to develop the film delivered to them by retail customers. In both markets, Kodak possesses a dominant share, at least 80%.

[32] Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at p. 8.

[33] *15 U.S.C.A. § 26*.

[34] ***Cargill, 107 S. Ct. at 487***. *See also* Plaintiff's Supplemental Memorandum of Law at p. 8 ("this case presents vertical aspects that render the injury to Phototron much different from that threatened in *Cargill* . . . .").

[35] ***Canal Authority v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974)***; *Gearhart Industries, Inc. v. Smith International, Inc., 741 F.2d 707, 710 (5th Cir. 1984)*.

[36] *15 U.S.C.A. § 18 (West Supp. 1987)*.

[37] *See supra* note 12 and accompanying text.

photo finishing market can be thoroughly examined, a strong case can be made that there will be only one wholesale photo finishing entity operating on a national scale. The concentration threatened here is even more severe than that condemned in other Supreme Court cases. [38]

[27]** This proposed combination also has another menacing aspect: vertical integration. Kodak is not only a horizontal competitor of Colorcraft, but also a substantial, arguably predominant, supplier of raw materials to the wholesale photo finishing industry. This position of dominance and control, considered in conjunction with Kodak's influence over Colorcraft through the "Colorwatch" program, seriously threatens competition not only in the wholesale photo finishing services market but also in the color print paper and chemicals market. This form of vertical integration when analyzed in conjunction with the horizontal aspects of the proposed combination leads the Court to the conclusion that if combination is not enjoined, at least preliminarily, its effect will be to substantially less competition and tend to create a monopoly. [39] The need for immediate temporary relief is further support by Phototron's prima facie showing of predation at the photo finishing level. [40]

[*1070] Moreover, the Court cannot ignore Kodak's long history of anticompetitive behavior. [41] In *United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)*, the Supreme **[**28]** Court stated that "the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the prerequisite purpose or intent attends the presence of monopoly power." [42] The limited record currently developed in this cause -- a record replete with conflicting expert and lay affidavits -- requires the Court to cautiously heed the direction given by the Supreme Court, its master all judicial matters.

The Court's analysis has focused primarily on the Phototron's likelihood of success on its section 7 claim. Having found that Phototron has met **[**29]** its burden of persuasion in proving a likelihood of success on this claim, the Court mentions only in passing that Phototron bears a similar chance success on its claims arising under sections 1 and 2 of the Sherman Act. This likelihood of success on the Sherman Act claims rests on the Court's preliminary determination of the applicable product market. Based upon the limited record before the Court, it has found that the wholesale photo finishing market is the relevant one. The alleged 66 to 85 percent market share that the Kodak-Colorcraft combination would possess clearly evidences the type of combination, monopoly, or attempted monopolization that sections 1 and 2 of the Sherman Act prohibit.

For the reasons stated above, Phototron has sustained its burden of persuasion and shown that it has a substantial likelihood of success on the merits of its claim arising under section 7 of the Clayton Act. [43] **[**30]** Section 7 is

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[38] *See, e.g., United States v. Pabst Brewing Co., 384 U.S. 546, 551, 16 L. Ed. 2d 765, 86 S. Ct. 1665 (1966)*; *United States v. Von's Grocery Co., 384 U.S. 270, 277, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 300, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*.

[39] *15 U.S.C.A. § 18 (1982)*

[40] *See supra* slip op. at pp. 15-16.

[41] *See Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 71 L. Ed. 684, 47 S. Ct. 400 (1927)* (verdict upheld against Kodak for monopolizing photographic material and supply markets); *United States v. Eastman Kodak Co., No. 6450, 1954 Trade Cas. (CCH) P67,920* (W.D.N.Y. Dec. 21, 1954) (consent decree eliminating Kodak processing charge included in purchase of film); *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 299-305 (2d Cir. 1979)* (upholding Kodak's violation of section 1 of the Sherman Act), *affirming in part*, ***457 F. Supp. 404 (S.D.N.Y. 1978)***.

[42] *334 U.S. 131, 174, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*.

[43] *See, e.g., Productos Carnic, S.A. v. Central American Beef & Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980)* ("a showing of *some* likelihood of success on the merits will justify temporary injunctive relief") (emphasis original).

designed to stop "mergers at a time when the trend to a lessening of competition in a line of commerce [is] still in its incipiency." [44]

2. Substantial Threat of Irreparable Injury

This "lessening of competition" is precisely the type of harm that Phototron and other remaining competitors are threatened with in the wholesale photo finishing marketplace. "Antitrust laws . . . were enacted for the protection of *competition*, not *competitors*." [45] This threat of harm is significantly acerbated by (1) the predominant share of the wholesale photo finishing market the Kodak-Colorcraft combination would possess, [46] (2) the horizontal and vertical leverage in both the relevant and related markets that the combined entity could exercise, and indeed in the past has exercised, and (3) the prima facie showing made by Phototron that Kodak has priced its wholesale photo finishing services and raw materials below cost.

[31]** From this predation and loss of competition flows antitrust injury. Activities which threaten this form of injury are may **[*1071]** be enjoined under section 16 of the Clayton Act if under similar circumstances a court of equity would grant injunctive relief. [47] ***HN4***[] An entitlement to injunctive relief requires a showing that the purported injury cannot be undone through monetary remedies. [48] As the movant, Phototron bore the burden of proving that monetary damages would not be an adequate remedy for the alleged antitrust injury.

Phototron has met that burden. Based on the limited record before the Court, the present situation demonstrates the threat of irreparable injury and no adequate legal remedy. Phototron is threatened with the loss of its business. As its verified complaint states, Phototron has already lost several major accounts. If this pattern persists, Phototron could go out of business, further reducing competition in an arguably already monopolized wholesale photo **[**32]** finishing market.

Over the last two years, Phototron has sustained substantial losses; sales have fallen nearly 50 percent. This limited record supports a finding that these losses may be attributable to the predatory pricing practices of Kodak and Colorcraft. [49] This inference is further sustained by the fact finding that Kodak occupies a dominant position in the conventional photographic film and the color print paper and chemicals markets. Both are major competitors in the wholesale photo finishing markets; if combined, no comparable competitor will exist on a national scale.

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[44] *Brown Shoe Co. v. United States, 370 U.S. 294, 317-18, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*.

[45] ***Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 489, 93 L. Ed. 2d 427 (1986)*** (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, and *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*.

[46] The Court again emphasizes, in an overabundance of caution, that it refers only to the relevant product market as the Court has defined it for the limited purpose of determining whether preliminary injunctive relief should issue.

[47] *15 U.S.C.A. § 26 (West Supp. 1987)*.

[48] *See, e.g., Interox America v. PPG Industries, Inc., 736 F.2d 194, 202 (5th Cir. 1984)*; *Spiegel v. City Houston, 636 F.2d 997, 1001 (5th Cir. 1981)*.

[49] *See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)* (injunctive relief is 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 law*** or from a contemporary violation likely to continue or recur"); *Humana, Inc. v. Jacobson, 804 F.2d 1390, 1394 (5th Cir. 1986)* (threatened loss of 50 % of plaintiff's business entitled it to preliminary injunction).

Two other factors which require injunctive relief must also be considered here in addition to Phototron's **[**33]** irreparable harm. First, Courts continue to struggle with the question of divestiture as a private remedy. [50] Second, Phototron and other competitors may close. Indeed, as a result of the Kodak-Colorcraft combination, the Defendants will begin the "rationalization of production facilities and labor forces." [51] Jobs will be lost, physical assets sold, and commercial arrangements permanently altered. This is the sort of "scrambled eggs" that cannot be "unscrambled" through monetary damages. [52]

For the reasons stated above, Phototron has persuasively demonstrated the threat of irreparable harm if the proposed combination is not preliminarily enjoined.

3. Threatened Injury Verses **[**34]** the Damage of Injunctive Relief

Given the lengthy explication of its decision to grant injunctive relief, the Court will briefly address the remaining two elements required for the issuance of a preliminary injunction.

As noted above, the third required element is that the threatened injury to the movant outweigh any damage the injunction might cause the opponent. Here, this requirement poses little difficulty; Phototron has again met its burden of persuasion. The severe and potentially devastating injury threatened to competition in the wholesale photo finishing marketplace and to Phototron's ability to continue as a going concern far outweigh any damage that the injunction may cause the Defendants. **[*1072]** The interests of the Defendants will be adequately protected by Phototron's posting of security to cover any losses that may result from an improper delay of the combination. As noted below in the Court's Order, a hearing to determine the amount of the bond has already been scheduled.

4. Preliminary Injunction Will Not Disserve the Public

The fourth requirement for the issuance of a preliminary injunction has also been met by Phototron; namely, that the injunction will not disserve the **[**35]** public interest. Clearly, preserving competition is the underlying purpose of the federal antitrust laws. [53] The public has an interest in maintaining a free and open marketplace. In light of Phototron's prima facie showing of predation and antitrust jury here, this interest will be *preserved* by temporarily enjoining the proposed combination until the nature of the wholesale photo finishing market can be completely and fully examined.

ORDER

For the reasons set forth fully above, the Defendants Kodak, Fuqua, and Colorcraft are PRELIMINARILY ENJOINED from consummating their agreement to combine the photo finishing operations of Kodak and Colorcraft. A hearing is set for 2:00 p.m., Tuesday, February 23, 1988, to determine the amount of security to be provided by Phototron pursuant to *Rule 65(c) of the Federal Rules of Civil Procedure*.

End of Document

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[50] *Compare International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 518 F.2d 913, 920-25 (9th Cir. 1975)* (no divestiture allowed) *with NBO Industries Treadway Cos. v. Brunswick Corp., 523 F.2d 262, 278-79 (3d Cir. 1975)*, *vacated on other grounds*, *429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* (allowing divestiture).

[51] Affidavit of William P. McCarrick at p. 4.

[52] *See, e.g., Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975)* (irreparable injury present when businesses would be closed).

[53] *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

United Air Lines, Inc. v. Austin Travel Corp.

United States District Court for the Southern District of New York

February 24, 1988, Decided ; February 24, 1988, Filed

No. 87 Civ. 1262 (MP)

Reporter

681 F. Supp. 176 *; 1988 U.S. Dist. LEXIS 1318 **; 1988-1 Trade Cas. (CCH) P67,903

United Air Lines, Inc., Plaintiff, v. Austin Travel Corporation, et al., Defendants

Subsequent History: As Modified, February 29, 1988.

Core Terms

Travel, contracts, airline, liquidated damages, monopoly power, air, charges, terms of the contract, monthly, termination, markets, convention, override, counterclaims, variable, monopolization, vendors, lease, terms, Subscriber, represents, antitrust, bookings, invoiced, probative evidence, genuine, statute of frauds, travel agency, travel agent, calculated

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

HN1[] **Summary Judgment, Evidentiary Considerations**

Summary judgment will be rendered only when no genuine issue as to any material fact exists. *Fed. R. Civ. P. 56(c)*. In assessing whether the evidence presents a genuine dispute as to a material fact, the court must apply the same standard that governs a directed verdict, i.e., whether, under the governing law, there can be but one reasonable conclusion as to the verdict. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Implausible Claims

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

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

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

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

Evidence > Burdens of Proof > Allocation

HN2[] **Burdens of Proof, Implausible Claims**

The moving party in summary judgment bears the initial burden of establishing that no relevant facts are in dispute. The movant may discharge that burden upon a showing of an absence of evidence to support the nonmoving party's case. Then, if the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, no genuine issue of material fact exists and the moving party is entitled to summary judgment. The non-moving party must come forward with more persuasive evidence to support its claim than would otherwise be necessary if the factual context indicates that the claim is "implausible."

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Sherman Act, Claims**

There are two elements to a valid monopolization claim under *§ 2* of the Sherman Act, codified at *15 U.S.C.S. § 2*: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

HN4[] **Monopolies & Monopolization, Actual Monopolization**

It must be established that a business possesses a dominant position in the market to establish a valid monopolization claim.

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

HN5[] **Monopolies & Monopolization, Actual Monopolization**

The existence of monopoly power is the primary requisite to a finding of monopolization. Monopoly power is defined as the power to control prices or exclude competition.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Sherman Act, Claims**

Three elements must be established in an attempt to monopolize claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*: 1) anticompetitive or exclusionary conduct; 2) specific intent to monopolize, and 3) a dangerous probability that the attempt will succeed.

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

HN7[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is an agreement by a party to sell one product, the tying product, but only on the condition that the buyer also purchases a different, or tied, product.

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

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

The law requires proof of the existence of five elements to establish an antitrust violation due to illegal tying: (1) two distinct products; (2) evidence of actual coercion by the seller that forced the buyer to accept the tied product; (3) sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; (4) anticompetitive effects in the tied market; and (5) involvement of not an insubstantial amount of interstate commerce in the tied product market.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN9[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The element of control is crucial. Tying arrangements are condemned when the seller has some special ability -- usually called "market power" -- to force a purchaser to do something that he would not do in a competitive market. Market power is synonymous with monopoly power.

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

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

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying arrangements need only be condemned if they restrain competition by forcing purchases or leases that would not otherwise be made; there must be a showing of acceptable evidence that an unreasonable restraint of competition occurred.

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

HN11[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

An exclusive dealing arrangement does not violate *§ 3* of the Clayton Act unless it is probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN12[] **Robinson-Patman Act, Claims**

Under *15 U.S.C.S. § 13(a)* of the Robinson-Patman Act, three elements are necessary to state a claim for an actionable violation. A plaintiff must complain that (1) the alleged price discrimination meets the "in commerce" requirement, i.e., that either or any of the purchases involved are in commerce; (2) there has been discrimination in price between different purchasers of products of like grade and quality; and (3) the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly.

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

HN13[] **Antitrust & Trade Law, Robinson-Patman Act**

See *15 U.S.C.S. § 13(a)*.

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

HN14[] **Regulated Practices, Market Definition**

Convention booking does not constitute a special submarket; rather such business is a treatment of volume bookings within the relevant general market of computerized reservations which neither requires nor utilizes special vendors or distinct customers. A discount operation for computerized reservations does not create a separate economic entity nor does it create a separate product so as to constitute a submarket.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Contracts Law > Breach > General Overview

Contracts Law > ... > Damages > Types of Damages > Liquidated Damages

HN15[] Measurement of Damages, Foreseeable Damages

A liquidated damage clause in a contract provides an estimate, made by the parties at the time they enter into their agreement, of the injury that would be sustained due to a breach of the agreement. Such provisions are enforced if the court is convinced that it is a genuine pre-estimate by the parties of the extent of injury that will be caused by a future breach of the contract.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Contracts Law > ... > Damages > Types of Damages > Liquidated Damages

HN16[] Measurement of Damages, Foreseeable Damages

A sum becomes a penalty rather than an enforceable damage liquidation clause if it is disproportionate to the damage which could have been anticipated from a breach of the contract, and which is agreed upon in order to enforce performance of the main purpose of the contract by the compulsion of this very disproportion.

Contracts Law > ... > Damages > Types of Damages > Liquidated Damages

HN17[] Types of Damages, Liquidated Damages

Under New York law, where the actual damages are uncertain and difficult to ascertain or prove, or are of a peculiarly speculative character, and the contract furnishes no data for their ascertainment, a stipulated amount which on the face of the contract does not appear to be unreasonable or disproportionate to the probable loss will be held to be one for liquidated damages rather than a penalty. The standard applicable is whether the provision constitutes a reasonable attempt to estimate damages which, though real, may be uncertain in amount.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Contracts Law > Contract Conditions & Provisions

Contracts Law > Personal Property > Personalty Leases > General Overview

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

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

HN18[] Contracts, Contract Conditions & Provisions

Acceleration clauses are upheld in long-term leases for equipment.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

HN19[] **Contract Conditions & Provisions, Waivers**

Although either party to a contract may waive any of its provisions made for his benefit, the intent to waive must be clear and unambiguous.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > Admissibility > Statements as Evidence > Parol Evidence

HN20[] **Contract Interpretation, Parol Evidence**

When an agreement has been reduced to writing, evidence of prior or contemporaneous agreements may not be offered to contradict, vary, or subtract from the terms of the writing.

Contracts Law > Statute of Frauds > General Overview

HN21[] **Contracts Law, Statute of Frauds**

An agreement not reduced to writing is not enforceable if by its terms it is not to be performed within one year from the making of the agreement. *N.Y. Gen. Oblig. Law § 5-701* (1978 & Supp. 1987).

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Statute of Frauds > General Overview

Contracts Law > Statute of Frauds > Exceptions > General Overview

Contracts Law > Statute of Frauds > Exceptions > Partial Performance

Contracts Law > Statute of Frauds > Requirements > Performance

HN22[] **Types of Contracts, Oral Agreements**

Part performance that is clear, certain, and definite in object and design as to be unequivocally referable to the agreement, and which will precipitate a fraud if the agreement is not enforced, removes the action from the defense of the statute of frauds. The criteria for estopping the use of the statute of frauds defense are (i) a fraudulent oral promise by the defendant; (ii) upon which the plaintiff justifiably relies; (iii) by engaging in acts which are "unequivocally referable" to the oral promise; (iv) resulting in substantial injury to plaintiff. If the part performance is equally consistent with an explanation having a basis in other than the alleged oral agreement, however, such as an agreement that could be performed within a year, the part performance relied upon does not remove the agreement from the statute of frauds.

Counsel: [1]** Covington & Burling, Roberts B. Owen, S. William Livingston, Jr., Carolyn F. Corwin, John E. Hall, Kaye, Scholer, Fierman, Hays & Handler, Michael Malina, Attorneys for Plaintiff.

Cravath, Swaine & Moore, David Boies, Stephen S. Madsen, Alan B. Vickery, Rodney L. Stenlake, Attorneys for Defendants.

Judges: Milton Pollack, Senior United States District Judge.

Opinion by: POLLACK

Opinion

[*178] DECISION AND OPINION

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MILTON POLLACK, Senior United States District Judge

Plaintiff United Air Lines, Inc. ("United") moves for dismissal of the defendant's defenses and counterclaims and for judgment in plaintiff's favor on the complaint, pursuant to *Rule 56, Fed. R. Civ. P.* The suit is brought to recover unpaid accrued rentals and damages for breach of leases of equipment by plaintiff to defendant Austin Travel Corporation ("Austin") upon the latter's premature termination of the leases.

United contends that there is no *genuine* defense or counterclaim available to or asserted by Austin herein.

Austin has interposed affirmative defenses to the suit and asserted counterclaims, both of which are largely posited on purported anti-trust law violations by United, its lessor. The defendant's pleading is predicated on the premise **[**2]** that United possesses monopoly power in the relevant CRS market and in the air passenger business. Four species of anti-trust violation are charged against plaintiff, viz., 1) monopolization and attempt to monopolize; 2) exclusive dealing contracts foreclosing competition; 3) tie-ins in restraint of trade and **[*179]** competition; and 4) price discrimination in restraint of competition.

Defendant's counterclaims include demands for an injunction and voiding of plaintiff's subscriber agreements allegedly as part of an unlawful scheme to monopolize the local and national markets for computerized reservation systems and airline passenger services and to engage in unlawful anticompetitive practices in those markets, in violation of §§ 1 and 2 of the Sherman Act and *§§ 2* and *3* of the Clayton Act. The counterclaims also assert violations of New York ***antitrust law***.

Austin also claims it had a five year oral contract to be paid 5% override commissions on airline flown revenue in addition to the stipulated 10% commission provided for in the written contract of the parties. United denies any such obligation as is claimed by Austin and points to the written contracts which contain no such provision.

[3]** I. *Procedural History*

The complaint herein was filed February 26, 1987. After the Answer was interposed the parties engaged in extensive discovery of documents and took the depositions of a number of witnesses.

On October 15, 1987, plaintiff served notice of motion pursuant to *Rule 56, Fed. R. Civ. P.*, and Rule 3(g) of the Civil Rules of this Court for summary judgment in plaintiff's favor on the grounds that there is no *genuine* issue as to any material fact and that as a matter of law plaintiff is entitled to relief and defendants are not entitled to relief.

In response thereto, defendant filed five and one-half inches of briefs and appendices containing governmental reports, *e.g.*, Comments and Proposed Rules of the Department of Justice, Notice of Proposed Rulemaking from the Civil Aeronautics Board (CAB), Rules of the CAB, Report from the General Accounting Office on Airline Competition and Hearings before the Subcommittee on Aviation of the Senate. In addition, the materials include affidavits, letters, the lease agreements, their assignments and lengthy (yet sometimes misleading) deposition excerpts.

The motion was duly argued and on November 30, 1987 the Court entered **[**4]** an order directing that specified matters would be heard further on oral testimony. The Court's order stated in part that:

> The Court's effort to extract the facts significant to the motion has been significantly impeded by the nature and scope of the defendant's enormous submission. To pierce the doubts created whether genuine factual controversies, as distinct from mere differences of details, exist so as to warrant a trial of issues, the Court will direct that the following matters be heard further on oral testimony (*Rule 43(e), Fed. R. Civ. P.*). [The order details these matters.]

Prior to the hearing, defendant requested and was granted leave to take depositions of persons who had submitted affidavits in support of the motion for summary judgment.

The Court heard the alleged evidence on the specified issues which the defendant proffered to show the existence of a genuine issue for trial on relevant matter and due deliberation was had thereon. The requisite evidence thereof is found wanting. The defendant failed to submit admissible specific probative evidence in support of the relevant matter involved herein.

II. *Standard for Decision -- Rule 56*

HN1[] Summary judgment will be rendered **[**5]** only when no genuine issue as to any material fact exists. *Fed. R. Civ. P. 56(c)*. In assessing whether the evidence presents a genuine dispute as to a material fact, the Court must apply the same standard that governs a directed verdict, *i.e.*, whether, "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)*. "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

HN2[] The moving party bears the initial burden of establishing that no relevant facts are in dispute. *Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975)*. The movant may discharge that **[*180]** burden upon a showing of an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986)*. Then, if "the nonmoving party . . . fail[s] to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," no genuine issue of material fact exists and the moving party is entitled to summary judgment. *Id. at 2553*. The non-moving party **[**6]** must come forward with "more persuasive evidence to support [its] claim than would otherwise be necessary" if the factual context indicates that the claim is "implausible." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*.

As stated by the Advisory Committee Notes to the Federal Rules of Civil Procedure, the purpose of the summary judgment procedure is to pierce the pleadings and to assess the proof to see whether there is a genuine need for a trial. To that end, the Court employed the summary procedure of *Rule 43(e), Fed. R. Civ. P.*, by ordering a hearing to assay the alleged probative evidence on several issues. *See Argus Inc. v. Eastman Kodak Co., 612 F. Supp. 904, 908-909 (S.D.N.Y. 1985)*, *aff'd*, *801 F.2d 38 (2d Cir. 1986)*, *cert. denied*, *479 U.S. 1088, 107 S. Ct. 1295, 94 L. Ed. 2d 151 (1987)*. A hearing was held to aid the Court in extracting from the avalanche of submissions by Austin the facts significant to the motion solely on the issues of market share of United in the relevant markets, alleged substantial foreclosure of the competition of other vendors, United's use of alleged market power to force Austin to lease United's systems to the exclusion of **[**7]** other systems, alleged price discrimination in restraint of trade, and the claimed unreasonableness of the liquidated damages provisions of the Apollo contracts.

At the hearing, defendant introduced literally no relevant admissible specific probative evidence on any of these issues. Austin relied upon inadmissible hearsay from irrelevant governmental publications, testimony of witnesses without first-hand knowledge of any facts relating to United's practices or to the relevant Long Island market, and speculative assertions unaccompanied by specific direct evidence. As described below, defendant has not raised any genuine issue of material fact by acceptable factual evidence. In fact, Austin introduced expert testimony that readily disposes of the monopolization and attempt to monopolize and tying counterclaims altogether. Plaintiff's motion for summary judgment will be granted for the reasons indicated herein.

III. *Background*

The underlying facts as to which it is admitted by defendant in the response to the Rule 3(g) statement by the plaintiff that there is no genuine issue to be tried are the following:

Plaintiff United Air Lines owns and markets to travel agents in Long Island **[**8]** a computerized reservation system ("CRS") known as Apollo. Subscription agreements for Apollo require payment of installation, equipment and subscription charges and permit a travel agent to have access to a vast data bank that includes listings of flights of virtually all airlines, as well as information on many hotels, rental car companies, and other travel services. The agent can use the system to make bookings (or to change or cancel bookings), to print tickets and itineraries, to store relevant information about customers and their travel plans, and to perform a variety of other travel-related functions. United also markets a so-called Apollo Business System (ABS), which is a back-office accounting system that performs travel agency accounting, reporting and management reporting functions.

Among the CRS vendors in the United States are: American Airlines (which markets the "SABRE" system); United Air Lines (which markets "Apollo"); SystemOne Holdings Inc., a subsidiary of the Texas Air Group, which includes Continental and Eastern Airlines as well as others that have been merged into Continental (which markets the "SystemOne", or "SODA", system); Pars Marketing Corp., which is **[**9]** owned by TWA and Northwest Airlines (and markets the "PARS" system); and **[*181]** Delta Airlines (which markets the "DATAS II" system).

American's SABRE system is the largest CRS in the United States. SABRE's national market share of CRS transactions for the years 1983 through 1985 exceeded 45%. Approximately 28% of the more than 28,000 travel agency locations in the United States use SABRE as the principal CRS.

Defendant Austin Travel is located and is the largest travel agency of the more than 1,000 travel agencies on Long Island. It is undisputed that prior to 1985 Austin Travel had always used the SABRE CRS at a majority of Austin's locations.

This suit involves United's subscription agreements covering three of Austin's thirteen agency locations on Long Island.

In 1985, Austin Travel had acquired two travel agencies on Long Island, both of which were Apollo subscribers: Karson Travel in Oceanside, New York and Fantasy Adventures in Great Neck, New York.

In August, 1985, Austin Travel executed an assignment agreement pursuant to which it assumed Karson's contract for Apollo Business Systems ("ABS").

In October, 1985, Austin Travel executed an assignment agreement pursuant to which it **[**10]** assumed Fantasy Adventures' Apollo contract.

Also in October, 1985, Austin Travel executed a contract (with United) for use of Apollo in offices in Oceanside and in Mitchell Field, New York.

Austin Travel moved competing CRS systems into the three locations covered by its Apollo contracts. It moved SABRE into the Oceanside and Great Neck locations within a few months after it signed the Apollo contracts. Austin used SABRE along with Apollo at the Mitchell Field location, and it ultimately replaced Apollo with SystemOne at that location.

IV. *United's Breach of Contract Claim*

United seeks $ 423,155.09, representing unpaid accrued rentals and liquidated and consequential damages for breach of the contracts involved.

In or about June 1986 Austin Travel informed United that Austin intended to install SystemOne at the Mitchell Field location and that Austin Travel would prefer, if United would agree, to have the Apollo equipment installed at Mitchell Field picked up by United, rather than continuing to use it. In or about October 1986, Austin Travel repeated its request to United to remove Apollo equipment from the Austin Travel locations. As of June 1986, the Apollo contracts had not **[**11]** expired and by their terms are stated to extend for periods of more than a year after June 1986. Austin Travel never paid United any amounts for the use of the equipment and services furnished to Austin under the said Apollo contracts referred to above.

Austin Travel informed United that Austin Travel did not intend to use Karson's ABS equipment. Consequently, in or about February 1986, United sent an ABS Suspension Amendment Agreement to Austin Travel, providing that Austin Travel could discontinue its use of ABS, but if it ceased to use Apollo before November 30, 1989, Austin Travel would be obligated to pay United $ 90,511.43 in liquidated damages under the July 1983 ABS Agreement. Austin contended in its papers that United had orally agreed to relieve Austin of its ABS obligations for a mere deinstallation fee. Austin failed to proffer any specific probative evidence, however, as to why the written agreement should not be enforced.

Austin Travel no longer uses United's Apollo CRS or United's ABS system. Austin Travel never purchased CRS terminals or other CRS equipment from United.

On June 3, 1986, William S. Lush, vice-president, Marketing Automation, Eastern Air Lines, wrote **[**12]** to Austin Travel as follows:

Mr. Jeffrey Austin
Austin Travel
15 Charles Lindbergh
Mitchell Field, NY 11533
Dear Mr. Austin:

This letter is in reference to your existing agreement with United Airlines, Inc. for automated services with the APOLLO system at the above location.

[*182] If you should enter into an agreement with Eastern Air Lines, Inc. for automated reservations and ticketing services with Eastern's SYSTEMONE, this is to advise that Eastern will indemnify you with respect to liability to United Airlines arising from the APOLLO agreement, including any expenses and settlement costs associated with litigation that may stem from the termination, but excluding charges outlined in Paragraph 21C.

Very truly yours,

William S. Lush

The said letter was stamped "CONFIDENTIAL".

Since this lawsuit was initiated, Austin Travel has refused to permit United's sales representative to make sales calls at Austin Travel.

With respect to Austin's defenses to United's claim for damages for breach of contracts, Austin frivolously contends that plaintiff did not give notice of breach or an opportunity to cure and now fails to identify the nature of the breach. Plaintiff sent monthly invoices **[**13]** which was sufficient notice and clearly identified defendant's breach, enumerating the damages sought. Austin agreed to the terms of the contracts; it used the Apollo Service, but it has never paid a penny for that use. Austin walked away from its contract obligations before the expiration of the terms of the contracts. The mathematics of United's claim are indisputable.

V. *Defendant's Antitrust Counterclaims*

A. Monopolization and Attempt to Monopolize

Defendant first counterclaims that plaintiff has a monopoly in the CRS or air passenger business and used its monopoly power to obtain, retain and enhance its power in those businesses, by engaging in exclusionary practices -- liquidated damage provisions in the subscription agreements, and so-called rollover and tying requirements -- in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*.

1. *Monopolization*

HN3[] There are two elements to a valid monopolization claim under *Section 2*: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." **[**14]** *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*.

The relevant market is Long Island; that is the effective area of competition; defendant's travel agencies are located there and defendant would contract for United's services only in that area.

HN4[] It must be established that United possesses a dominant position in that market. *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. Austin's experts conceded on cross-examination that no airline, excluding American Airlines, enjoys a monopoly in either the air carriage or the CRS market in the New York/Long Island area. Since the crux of a claim of monopolization is possession of monopoly power, and since United lacks monopoly power, Austin's claim fails.

HN5[] The "existence of monopoly power . . . is 'the primary requisite to a finding of monopolization.'" *Id.* Monopoly power is defined as "the power to control prices or exclude competition." *United States v. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*.

The record herein permits no reasonable inference other than that United lacks monopoly power in the CRS and the air passenger businesses in Long Island, or **[**15]** elsewhere for that matter. The record contains no significant probative evidence concerning the market structure of the CRS and air passenger businesses to show that United's share of those markets give it monopoly power. *See* *Broadway Delivery Corp. v. United Parcel Service of America, 651 F.2d 122, 129* (2d Cir.), *cert. denied*, *454 U.S. 968, 70 L. Ed. 2d 384, 102 S. Ct. 512 (1981)*; *Nifty Foods Corp. v. **[*183]** Great Atlantic & Pac. Tea Co., 614 F.2d 832, 841 (2d Cir. 1980)*. There is an ample supply of substitutes for United to whom travel agents can turn to obtain CRS and ABS systems. Since United lacks monopoly power in the relevant market, the monopolization claim must be dismissed.

2. *Attempt to Monopolize*

Austin also claims an attempt to monopolize by United, in violation of *Section 2* of the Sherman Act. ***HN6***[] Three elements must be established: 1) anticompetitive or exclusionary conduct; 2) specific intent to monopolize, and 3) a dangerous probability that the attempt will succeed. *International Distrib. Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 790* (2d Cir.), *cert. denied*, *482 U.S. 915, 107 S. Ct. 3188, 96 L. Ed. 2d 676 (1987)*.

Austin's expert conceded on cross-examination that no reasonable or realistic risk exists **[**16]** that United will achieve a monopoly of the CRS or air carrier business in the New York City/Long Island area. There being no probability, let alone a dangerous probability, that an alleged attempt to monopolize will succeed, Austin's claim must be dismissed.

B. Unreasonable Restraint of Trade

Austin's second antitrust counterclaim is for an unreasonable restraint of trade, resulting from supposed tie-in and exclusive dealing provisions in United's contracts with Austin, in violation of Section 1 of the Sherman Act and *Section 3* of the Clayton Act.

1. *Tying*

HN7[] A tying arrangement is "an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*.

HN8[] The law requires proof of the existence of five elements to establish an antitrust violation due to illegal tying: (1) two distinct products; (2) evidence of actual coercion by the seller that forced the buyer to accept the tied product; (3) sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; (4) anticompetitive effects in the tied market; **[**17]** and (5) involvement of not an insubstantial amount of interstate commerce in the tied product market. *Power Test Petroleum Distribs. v. Calcu Gas, Inc., 754 F.2d 91, 96 (2d Cir. 1985)*.

Once again, *HN9*[] the element of control is crucial. Tying arrangements are condemned "when the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 13-14, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. Market power is synonymous with monopoly power. *International Distrib. Centers, 812 F.2d at 791 n.3*.

The defendant asserts that United promotes an invalid tying arrangement in the leasing of its Apollo systems. However the record does not provide a basis for applying the per se rule against tying to the presumed arrangement, not shown in fact to exist by admissible, specific probative evidence.

HN10[] Tying arrangements need only be condemned if they restrain competition by forcing purchases or leases that would not otherwise be made; there must be a showing of acceptable evidence that an unreasonable restraint of competition occurred. The evidence thereof is lacking. There has been no **[**18]** showing that the market as a whole for CRS or ABS has been in anywise affected by the Apollo contracts through unreasonable restraint of competition. There is no evidence to show that United has power in the alleged tying product market; nor is there any admissible evidence to shed light on how the alleged tying arrangement appreciably affected consumer demand for separate arrangements with a specific travel agent. *See* *Jefferson Parish Hospital, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551*.

Austin failed to establish at the *Rule 43(e)* hearing or otherwise that United possesses market power in any product market; indeed the proof established the absence **[*184]** thereof, thus United could not possibly force a purchase of another product. Austin's tying claim must be dismissed.

2. *Exclusive Dealing*

HN11[] An exclusive dealing arrangement "does not violate *[Section 3* of the Clayton Act] unless . . . it [is] probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*.

Austin alleges *de facto* exclusive dealing in United's rollover, minimum use and liquidated damages provisions. Austin theorized, **[**19]** but gave no evidentiary proof, that any of these provisions deter agents or make it impossible for them to fulfill contracts with other vendors or deterred Austin from switching CRS vendors. Austin's witness acknowledged that the rollover clause was not employed in any part of the Austin Travel contracts.

The Apollo contract itself states that it is nonexclusive:

> United and Subscriber acknowledge that this is a nonexclusive agreement and nothing in this Agreement will be construed as precluding or prohibiting Subscriber from using any other computerized reservation service or system in its operations. United and Subscriber also acknowledge, however, that the monthly fixed charges under this Agreement have been established at a level which reflects the expectation that Subscriber will actively use Apollo Services in its operations to process Apollo Transactions.

There is an entire absence of probative evidence of a foreclosure of competition by United or that Austin or any other agent was prevented from the use of the CRS services or air passenger services of another vendor. Austin has always used SABRE, PARS, SystemOne and DATAS II (all of which are competitive CRS systems) under

[20]** five-year contracts and Austin in fact rejected the Apollo system and had United remove it. The Apollo contracts affect only three of thirteen Austin Travel locations. With 1000 agencies on Long Island and 28,000 in the United States, any market foreclosure would be *de minimis* (approximately 0.77%). In addition, other major carriers, such as American Airlines and TWA, have five-year contracts with travel agencies similar to United's.

In practical application the United contract does *not* prevent lessees of CRS or Business Systems from using or dealing in the systems of a competitor and competition has not been foreclosed in a substantial share of the line of commerce affected. *See* *Tampa Elec., 365 U.S. at 327*.

The market area in which United operates and to which Austin can turn for CRS systems -- the area of effective competition in the known line of commerce -- is Long Island. *Id*. "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition." *Id. at 328* (quoting *Standard Oil Co. v. United States, 337 U.S. 293, 299 n.5, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949))*.

United's share of the only relevant market, 3% **[**21]** of the agencies and 8% of the revenues from CRSs, was insubstantial and was not sufficient to foreclose competition in that area. *See* *Tampa Elec., 365 U.S. at 328*. That dictates a finding that United's Apollo contracts were not a clog on competition required to be removed by the application of antitrust legislation. Since the contracts of United do not fall within the broader proscription of *§ 3* of the Clayton Act it follows that they are not forbidden by §§ 1 or 2 of the Sherman Act.

C. Price Discrimination

Austin's final antitrust counterclaim alleges illegal price discrimination in violation of Sections 1 and 2 of the Sherman Act and *Section 2* of the Clayton Act, as amended by the Robinson-Patman Act. [1] ***HN12***[] Under the Robinson-Patman Act,

> **[*185]** Three elements are necessary to state a claim for an actionable violation . . . Plaintiff must complain that (1) the alleged price discrimination meets the 'in commerce' requirement, i.e., that 'either or any' of the purchases involved are in commerce; (2) there has been discrimination in price between different purchasers of products of like grade and quality; and (3) the effect of the discrimination 'may be substantially to lessen competition **[**22]** or tend to create a monopoly.'

Energex Lighting Indus. v. North American Philips Lighting Corp., 656 F. Supp. 914, 919 (S.D.N.Y 1987) (quoting *Hoyt Heater Co. of Northern California v. American Appliance Mfg. Co., 502 F. Supp. 1383, 1386-87 (N.D. Cal. 1980))*.

Austin alleges that United offered override commissions and Apollo contracts to other agents on more favorable terms than to Austin, and that United's power affects competition among agents and therefore among airlines and CRS vendors. Austin argues that there exists a genuine issue of fact as to its **[**23]** allegations.

Not a scintilla of specific identifiable evidence is proffered to show that alleged price discrimination led to a substantial lessening of competition or even a possibility that competition may be lessened; no injury to competition is even mentioned in Austin's inflated papers. Since Austin's experts readily acknowledged on the witness stand

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[1] The Robinson-Patman Act provides, in pertinent part:

> ***HN13***[] It shall be unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where 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 . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . .

15 U.S.C. § 13(a).

that United does not have monopoly or market power in either the CRS or air passenger business, United is perforce unable to wield power to affect competition. [2]

The law is crystal clear: Absent monopoly power coupled with an improper monopolistic purpose the claimed antitrust violations fall to the ground. The evidence shows that the assertion by Austin that United had or has monopoly power in the CRS business or in the air passenger business was frivolous and had no basis in fact. There **[**24]** is no genuine basis on which to claim that United's contracts or activities interfered with competition in the relevant market or threatened to do so.

Austin made no effort to defend the original monopoly allegations of the pleadings. However, Austin advances two ploys not revealed by its pleading; it now asserts in its opposing papers that United possesses and has abused its alleged monopoly power in the "convention market on Long Island" and in "the market for airline access to travel agents who use Apollo." [3]

The alleged antitrust violations are mere bald contentions without any admissible specifically identifiable evidence submitted to support them. None is supported by the requisite show of evidence to provide a hook on which to hang violative conduct, viz., exclusive dealing contracts (here, suggesting use of the Apollo contract prevents use of the CRS contracts of another vendor of CRS), tie-ins to foreclose competition (here, suggesting use of supposed market power in one product to force a purchase of another), or of price discrimination in restraint of trade and competition. Not a scintilla **[**25]** of specific identifiable evidence is proffered to show that alleged price discrimination led to a substantial lessening of competition; no evidence of injury to competition is even mentioned by Austin.

In addition, the "convention market" allegations are illusory. ***HN14***[] Convention booking does not constitute a special submarket; **[*186]** rather such business is a treatment of volume bookings within the relevant general market of computerized reservations which neither requires nor utilizes special vendors or distinct customers. *Cf. Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. A discount operation for computerized reservations does not create a separate economic entity nor does it create a separate product so as to constitute a submarket.

Apart from the foregoing, United has no monopoly of the convention business. Convention business for an airline involves provision of transportation for people who are traveling from around the country to a convention. There is no "Long Island market" for convention travel. Every major airline competes for convention travel, just as they compete for travel of other persons and groups, and each offers special deals to attract convention business. **[**26]** [4] Austin Travel itself entered into convention agreements with most other airlines besides United. A monopoly is not created simply because United offered a form of contract that differed from some used by other air carriers. Other airlines, including Texas Air, are obviously in a position to offer competitive convention packages by providing discounted fares, for example. Even if United offered the most lucrative convention contract, that would show only that United offered the most competitive price, and would neither confer nor reflect monopoly power.

Neither can a cognizable "market for airline access to travel agents who use Apollo" be defined. By owning the Apollo system, United possesses a share of this "market" that approaches 100 percent. United never possessed monopoly power of "airline access" to Austin Travel or any other agency. Austin Travel always used other CRS systems, principally SABRE, and other airlines **[**27]** had continuous access to Austin Travel and to other agents.

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[2] The issue of whether the Robinson-Patman Act even applies to this case, *i.e.*, whether "commodities" are involved, need not be addressed. As to the Sherman Act, price discrimination "is not and never has been within the purview of the Sherman Act." *State v. Mobil Oil Corp., 38 N.Y.2d 460, 344 N.E.2d 357, 381 N.Y.S.2d 426, 428 (1976)*.

[3] Austin's counterclaim contained no reference to monopolization of these markets.

[4] Examples of advertising and promotional materials relating to the convention offerings of other carriers have been submitted. They include a boast by Eastern Airlines (a Texas Air affiliate) that it was the "preferred carrier" for 5000 conventions in 1986.

Austin's sales of airline tickets on other carriers greatly exceed its sales on United, and it treats American and Texas Air as its "preferred carriers."

Austin Travel has made no showing of admissible evidence that United has the power to control price and exclude entry in the semantically created convention or the imaginary "airline access to travel agent" markets or in any other markets.

VI. *Liquidated Damages Defense*

Austin raises a defense that United's liquidated damages clause is void and unenforceable as a penalty. [5]

[28]** Under the contract with Austin, United received from the agent a monthly fixed fee for usage of the system. In addition, United received certain "variable" charges based upon the agent's generation of tickets or itineraries. When an agent terminates its Apollo contract prior to the end of its term, United loses the monthly fixed charges it was scheduled to receive during the remainder of the contract term. In addition, it loses the variable charges that Austin would have paid if it had continued to generate tickets and itineraries through Apollo Services rather than through the **[*187]** replacement system. The amount of variable charges paid by the agent in the month preceding the contract termination has been selected by United as the best approximation of the charges an agent would have continued to pay if it had adhered to the Apollo contract.

When an existing subscriber abandons Apollo prior to expiration of the contract term, United does not recoup part of its loss by placing that subscriber's equipment elsewhere. In effect, United loses the entire amount of the subscriber's business.

Most of the costs associated with Apollo are either fixed or incurred in the early stages of a contract. **[**29]** However, there are some costs that United will not incur after Apollo is removed from an agency. In consultation with individuals in Apollo Services, United determined that, generally, these *avoidable costs were less than 20 percent of the amount of revenue from the monthly fixed usage fees and variable charges*. United therefore drafted the liquidated damage provision in such a way as to permit United's recovery of only 80% of its fixed and variable charges and thus to provide the agent with more than ample benefit for the costs United avoids as a result of an agent's premature termination of an Apollo contract.

Each time a travel agent makes a booking on an airline or with another vendor through the Apollo Services, that airline or vendor pays a booking fee to United. When an agent terminates Apollo prematurely, United loses the booking fees it otherwise would have received as a result of the agent's use of Apollo. For contracts entered into after early 1985 United has included in the calculation of liquidated damages a minimum amount of lost booking fees.

United's Apollo contract requires an agent to book only a minimum amount of business through Apollo -- 50 percent of the **[**30]** average level of bookings the agent made on Apollo in the early months of its contract. In drafting the liquidated damage provision, United based an element of liquidated damages on the minimum level that the agent

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[5] United's contract provides, in pertinent part:

> Subscriber will pay to United liquidated damages in an amount calculated as follows:
>
> A. The amount of the monthly fixed charge . . . will be multiplied by the number of months, including any portion thereof, remaining under the term of this Agreement and the product thereof multiplied by.80;
>
> B. The amount of the variable charges . . . paid by Subscriber for the calendar month immediately preceding the date of termination will be multiplied by the number of months, including any portion thereof, remaining under the term of this Agreement and the product thereof multiplied by.80;
>
> C. The Monthly Minimum Guarantee will be multiplied by the amount of the airline booking fee in effect on the date of termination and the product thereof will be multiplied by the product of the number of months, including any portion thereof, remaining under the term of this Agreement multiplied by the number of Apollo CRTs . . .; and
>
> D. The amount of the liquidated damages will equal the sum of the amounts derived under [A., B., and C.].

was expected and required to book under the Agreement. Thus, even if the agent in fact has continued to book far more than this minimum level, United's liquidated damages formula conservatively assumes only the revenue from other airlines associated with the agent's minimum booking level.

HN15[] A liquidated damage clause in a contract provides an estimate, made by the parties *at the time they enter into their agreement*, of the injury that would be sustained due to a breach of the agreement. 5 Williston, Contracts § 776 (3d ed. 1961). Such provisions are enforced "if the Court is convinced that it is a genuine pre-estimate by the parties of the extent of injury that will be caused by a future breach of the contract." 5 Corbin, Contracts § 1059 (1964).

HN16[] A sum becomes a penalty rather than an enforceable damage liquidation clause if it is disproportionate to the damage which could have been anticipated from a breach of the contract, and which is agreed upon in order to enforce **[**31]** performance of the main purpose of the contract by the compulsion of this very disproportion. 5 Williston, Contracts § 776.

HN17[] Under New York law, where the actual damages are uncertain and difficult to ascertain or prove, or are of a peculiarly speculative character, and the contract furnishes no data for their ascertainment, a stipulated amount which on the face of the contract does not appear to be unreasonable or disproportionate to the probable loss will be held to be one for liquidated damages rather than a penalty. 36 N.Y. Jur. 2d, Damages § 160 (1984). The standard applicable is "whether the provision constitutes a reasonable attempt to estimate damages which, though real, may be uncertain in amount." *Staten Island Rapid Transit Ry. Co. v. S.T.G. Constr. Co., 421 F.2d 53, 59* (2d Cir.), *cert. denied*, *398 U.S. 951, 90 S. Ct. 1871, 26 L. Ed. 2d 291 (1970)*.

The Second Circuit has applied this standard:

> Contractual provisions fixing liquidated damages in the event of breach will not be voided as unconscionable or contrary **[*188]** to public policy if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation.

*Leasing **[**32]** Service Corp. v. Justice, 673 F.2d 70, 73 (2d Cir. 1982)*. In that case the Second Circuit upheld a lease provision permitting the lessor to resell trucks and heavy equipment repossessed upon breach by the lessee and deduction of 15% of the total rent required for the entire unexpired term. The value of the lessor's interest in the repossessed equipment depended upon the equipment's condition and market conditions when the equipment was returned. Both of these were "incapable of precise estimation" at the time of execution of the lease. *Id. at 74*.

HN18[] Acceleration clauses are upheld in long-term leases for equipment. *Walter E. Heller & Co. v. Video Innovations Co., 730 F.2d 50 (2d Cir. 1984)*.

The Court is convinced that the United liquidated damage clause is standard and vindicated by industry practice. Indeed, the CRS contracts of the competitors of United were even more stringent; they called for payment of 100% of the rentals for the unexpired term while the United contract obligated Austin for only 80% thereof. The terms of United's contract were a genuine pre-estimation by sophisticated parties fully aware of the terms and of the nature of the injury that would be **[**33]** caused by a future breach of the lease. Defendant has failed to show the existence of any proof available to it to the contrary. The disputable analysis of presumed cost savings belatedly submitted by Austin does not discredit the reasonableness of United's anticipatory estimate in light of the anticipated or actual loss caused by the breach and the difficulties of proof.

The elements of cost avoidance to United following a breach of an Apollo contract merely demonstrate in theory that there was reasonable ground for the agreed-in-advance quantum of lost future benefits to *United at 80*% thereof as stated in the contract rather than the 100% thereof charged by United's competition.

Clearly the actual damages from the breach of contract were uncertain when the parties sat down to contract and were difficult both to ascertain or prove thereafter and the contract furnishes no data for their ascertainment. The estimate of damages was made by knowledgeable, sophisticated businessmen in the industry on both sides acting at arm's length without any coercion or inability to contract freely. The amount of United's actual loss was difficult, indeed incapable of precise estimation, and the **[**34]** amount liquidated has been shown without contradiction to bear a reasonable proportion to the probable loss.

The only element that could be said to be capable of objective estimation precisely in the liquidated damages formula was the amount of the loss of the booking fees payable by the airlines. But these could be ascertained only retrospectively since they are being pocketed by Eastern based on the transactions of SystemOne which substituted for Apollo at Austin. As to these, the damage clause does not call for all the amount reaped by SystemOne, but only the pre-estimated amount thereof calculated at the minimum booking level of Austin, which would yield a lower figure than the amount reaped by SystemOne.

It is interesting to note that the Department of Justice after its investigation of liquidated damage clauses came to the conclusion that "a rule abrogating liquidated damages should be approached cautiously because there may be good reasons for the new liquidated damage clauses, such as the need for vendors to compensate themselves for the shorter 5-year contract period required by the rules. A prohibition on liquidated damages clauses might also handicap potential entrants more **[**35]** than it assists them." The defendant's expert was asked, "Are you in disagreement with the conclusion stated there by the Department of Justice?" He responded: "No, I am not."

Invoices covering amounts owed to United by Austin Travel Corporation under the terms of two subscriber lease agreements for Apollo Reservations and Ticketing Services were prepared and forwarded by United to Austin. Contract number 79566 **[*189]** covers Apollo Services for Austin Travel's Oceanside, New York, and Mitchell Field, New York, locations. Contract number 60195, which was assumed by Austin Travel pursuant to an assignment agreement, covers Apollo Services for Fantasy Adventures, Great Neck, New York. The total amount invoiced to Austin Travel under the terms of the two Apollo agreements referred to above is $ 305,205.56. Austin Travel has never paid this amount or any portion thereof.

The total amount invoiced in connection with Apollo for the Oceanside location was $ 72,866.04. Of this amount, $ 10,222.09 represents unpaid monthly fixed and variable charges and installation fees accrued by Austin Travel for the period February 1986 through November 1986; $ 541.25 represents a deinstallation charge; and **[**36]** $ 62,102.70 represents liquidated damages owed by Austin Travel as a result of its termination of Apollo at the Oceanside location, calculated pursuant to paragraph 21 of Contract No. 79566. The figure for liquidated damages for the Oceanside location includes amounts representing a percentage of the monthly fixed charges and variable charges that would have been paid to United during the remainder of the contract term and an amount representing a minimum level of booking fees United would have received as a result of Austin Travel's use of the Apollo system during the remainder of the contract term.

The total amount invoiced in connection with Apollo for the Mitchell Field location was $ 217,185.06. Of this amount, $ 16,127.90 represents unpaid monthly fixed and variable charges accrued by Austin Travel for the period January 1986 through November 1986; $ 1,604.00 represents a charge for partial deinstallation; $ 1,317.60 represents a charge for final deinstallation; and $ 198,135.56 represents liquidated damages owed by Austin as a result of its termination of Apollo at the Mitchell Field location, calculated pursuant to paragraph 21 of Contract No. 79566. The figure for liquidated **[**37]** damages for the Mitchell Field location includes the same components as those described above in connection with the Oceanside location. The final summary invoice for this location inadvertently included $ 5,808.47 in Apollo Business System (ABS) charges and this amount has been deducted in reaching the total amount owed under the Apollo contract for this location ($ 217,185.06).

The total amount invoiced in connection with Apollo at the Great Neck location was $ 15,154.46. Of this total, $ 5,168.06 represents unpaid monthly charges accrued by Austin Travel for the period December 1985 through October 1986; $ 540 represents a deinstallation fee; and $ 9,446.40 represents liquidated damages owed by Austin as a result of its termination of Apollo at the Great Neck location, calculated pursuant to paragraph 21 of Contract No. 60195. The figure for liquidated damages for the Great Neck location includes amounts representing a percentage of the monthly fixed charges and variable charges that would have been paid to United during the remainder of the contract term.

The total amount invoiced in connection with ABS at the Mitchell Field location was $ 117,949.53. This includes monthly charges **[**38]** and liquidated damages calculated pursuant to paragraph 21 of Contract No. 59484.

The total amount owed to United by Austin Travel for unpaid Apollo and ABS invoices is $ 423,155.09.

Attachment A to this decision shows the manner in which liquidated damages were calculated for Apollo for each of the three Austin locations at issue herein.

Attachment B to this decision shows the manner in which United calculated the early termination charges owed by Austin Travel in connection with its decision to remove the ABS system in late 1986.

The liquidated damage clauses in United's contract are reasonable and no valid proof has been shown by the defendant to be available to it to the contrary and the terms thereof are enforceable.

VII. *Other Affirmative Defenses*

A. Waiver

Defendant's third affirmative defense is that plaintiff waived its right to recover **[*190]** liquidated damages because United released other agents from paying them. Austin has failed to produce probative evidence of factual support for this defense.

The Apollo contracts contain a provision dealing with waiver: "The right of either party to require strict performance and observance of any obligations hereunder will not be **[**39]** affected in any way by any previous waiver, forbearance or course of dealing." From the terms of the contracts, therefore, it appears that United has not waived its right to liquidated damages.

Furthermore, ***HN19***[] although "either party to a contract may waive any of its provisions made for his benefit[,] the intent to waive must be clear and unambiguous." *Liberty Mut. Ins. Co. v. Lodha, 131 Misc.2d 670, 500 N.Y.S.2d 989, 991 (Sup. Ct. 1986)*.

United certainly gave no indication of an intent to relinquish its right to collect liquidated damages from Austin. Moreover, Larry Austin recognized United's policy of enforcement of these clauses. The only evidence that Austin offers is testimony of a United representative describing United's use of "suspension agreements," under which United would allow an agency to terminate Apollo use at one location in exchange for the right to install Apollo if the agency opened a new location. The deponent did not know whether Apollo demanded payment of liquidated damages in those instances. In addition, a former United employee testified at the *Rule 43(e)* hearing that United's policy was to enforce its contracts with travel agencies.

B. Failure **[**40]** to Install Terminals

Austin raises as its fourth affirmative defense United's alleged failure to install Apollo terminals at the Great Neck location. Austin admits, however, that it had no intention of preparing that office for installation and it never did prepare it.

C. Coercion and Duress

Austin also raises as a defense that any contracts with United were executed by Austin under coercion and duress, due to United's alleged exercise of monopoly power and illegal tying arrangements. No probative evidence was adduced to support this extreme suggestion.

It has already been shown that United possesses *no* monopoly power and was not engaged in any illegal tying arrangements whatsoever, which alone preclude any possibility of coercion or duress by United.

VIII. *Breach of Override Contract Counterclaim*

Austin claims that United breached an oral agreement under which United allegedly promised to pay override commissions of a flat additional 5% for five years on all United sales. The parties allegedly entered into this oral agreement prior to the execution of the written override contracts between Austin and United that did not provide for such a flat fee but instead linked **[**41]** overrides to Austin's volume of United sales. United raises the parol evidence rule and the statute of frauds as defenses to Austin's claim. Either or both of these constitutes a complete defense to the claimed oral override.

A. Parol Evidence Rule

HN20[] When an agreement has been reduced to writing, "evidence of prior or contemporaneous agreements may not be offered to contradict, vary, or subtract from the terms of the writing." *Wallace Steel, Inc. v. Ingersoll-Rand Co., 739 F.2d 112, 115 (2d Cir. 1984)* (finding that the oral testimony permitted to be introduced by the district court did not vary the terms of the contract). *See also Restatement (Second) of Contracts § 215* ("evidence of prior or contemporaneous agreements of negotiations is not admissible in evidence to contradict a term of the writing").

Conversations between Larry Austin and the United sales representative(s), in which United allegedly promised the flat additional override commissions, could be offered solely to contradict the terms of the written 10% override contracts subsequently executed and are thus inadmissible under the parol evidence rule.

[*191] B. Statute of Frauds

HN21[] An agreement not reduced to writing **[**42]** is not enforceable if by its terms it is not to be performed within one year from the making of the agreement. *N.Y. Gen. Oblig. Law § 5-701* (McKinney 1978 & Supp. 1987); *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., 614 F.2d 832, 837 (2d Cir. 1980)* ("By its terms the alleged contract could not have been performed within one year, and [plaintiff] failed to present a writing . . . .").

The alleged oral agreement falls within the Statute of Frauds and is therefore unenforceable as an agreement not to be performed within one year.

Austin argues that, even if the alleged agreement falls within the Statute of Frauds, Austin relied on United's oral representations and would not have entered into Apollo contracts otherwise. Austin relies on *L. Fatato, Inc. v. Miller Brewing Co., 582 F. Supp. 1377, 1379 (E.D.N.Y. 1984)*, in which the court denied a motion for summary judgment, stating that although the doctrine of promissory estoppel has not been given a "warm reception in New York," the plaintiff should have an opportunity to establish the facts which might support an estoppel. Austin has not claimed any such facts.

Austin further argues that it partially performed the override contract, **[**43]** which, it posits, removes the agreement from the Statute of Frauds.

HN22[] "Part performance that is clear, certain and definite in object and design as to be unequivocally referable to the agreement, and which will precipitate a fraud if the agreement is not enforced, removes the action from the defense of the statute of frauds." *Marcraft Recreation Corp. v. Francis Devlin Co., 506 F. Supp. 1081, 1085 (S.D.N.Y. 1981)*. The criteria for estopping the use of the statute of frauds defense are "(i) a fraudulent oral promise by the defendant; (ii) upon which the plaintiff justifiably relies; (iii) by engaging in acts which are 'unequivocally referable' to the oral promise; (iv) resulting in substantial injury to plaintiff." *Id. at 1086*. If the part performance is "equally consistent with an explanation having a basis in other than the alleged oral agreement," however, such as an agreement that could be performed within a year, the part performance relied upon does not remove the agreement from the statute of frauds. *Cunnison v. Richardson Greenshields Securities Inc., 107 A.D.2d 50, 485 N.Y.S.2d 272, 276-77* (1st Dep't 1985).

Austin contends that it began to promote United as one of **[**44]** its preferred carriers, something it had never done before, which is partial performance that refers to the oral override contract. Austin's acts could, however, be equally consistent with performance under the written override contracts, and Austin's breach of override contract claim must be dismissed.

IX. *Conclusion*

Plaintiff is entitled to judgment in its favor dismissing the defenses and counterclaims asserted in the Answer. The Clerk is directed to enter judgment in plaintiff's favor for $ 408,375., together with interest from February 26, 1987 and costs.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

So Ordered

ATTACHMENT A

1. Oceanside Location (Contract No. 79566, para. 21) - early termination charge of $ 62,102.70.

a) $ 630 (monthly fixed charge for Oceanside location per Attachment A to contract) times 44 (months remaining in term of contract) times.80 = $ 22,176.

b) No variable charge component.

c) 163.5 (50% of average of bookings per CRT for first six months for Oceanside and Mitchell Field locations) times 44 (months remaining in term of contract) times $ 1.85 (booking fee) times 3 (number of CRTs at Oceanside) = **[**45]** $ 39,926.70.

2. Mitchell Field Location (Contract No. 79566, para. 21) early termination charge of $ 198,135.56.

a) $ 1,330 (monthly fixed charge for Mitchell Field location per Attachment A to contract) times 44 (months remaining in term of contract) times.80 = $ 46,816.00.

[*192] b) $ 139.82 (variable charges from 10/86 invoice) times 44 (months remaining in terms of contract) times.80 = $ 4,921.66.

c) 163.5 (50% of average of bookings per CRT for first months for Oceanside and Mitchell Field locations) times 44 (months remaining in term of contract) times $ 1.85 (booking fee) times 11 (number of CRTs at Mitchell Field) = $ 146,397.90.

3. Great Neck Location (Contract No. 60195, para. 21) - early termination charge of $ 9,446.40.

a) $ 492 (monthly fixed charge per Attachment A to contract, with 8% escalation per contract) times 24 (months remaining in term of contract) times.80 = $ 9,446.40.

b) No variable charge component.

ATTACHMENT B

Apollo Business Systems (Contract No. 59484, paras. 16D, 21) - early termination charge of $ 73,884.47.

a) $ 1,732.12 (monthly continuing use charge) times 21 (months remaining in term of contract) times.80 = $ 29,099.62.

b) $ 44,784.85 (remaining **[**46]** principal under contract at time of termination).

Indiana Grocery Co. v. Super Valu Stores, Inc.

United States District Court for the Southern District of Indiana, Indianapolis Division

February 26, 1988, Decided

Cause No. IP 85-176-C

Reporter
684 F. Supp. 561 *; 1988 U.S. Dist. LEXIS 5845 **; 1988-1 Trade Cas. (CCH) P67,917

Indiana Grocery Co., Inc., and Preston-Safeway, Inc., Plaintiffs, v. Super Valu Stores, Inc., d/b/a Cub Foods, Markkay of Indiana, Inc., d/b/a Cub Foods, and The Kroger Company, Defendants

Core Terms

pricing, predatory, plaintiffs', predation, monopoly, competitors, Grocery, losses, recoup, rivals, market share, anti trust law, antitrust, monopolize, summary judgment, costs, consumers, variable, profits, summary judgment motion, alleges, probability of success, enter a judgment, levels, retail, cases, specific intent, probability, inferred, injure

LexisNexis® Headnotes

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Monopolies & Monopolization, Attempts to Monopolize**

The elements of an attempted monopoly case reflect the concern of the courts over the tension between the competing economic benefits of market control and market freedom. Those elements are: (1) specific intent to control prices or destroy competition with respect to a part of commerce; (2) predatory or anti-competitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success in the relevant market that requires evidence that the defendant had sufficient market power to have been reasonably able to create a monopoly.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Monopolies & Monopolization, Attempts to Monopolize**

Courts must carefully evaluate the theories on each element of an attempted monopoly claim and observe the interrelationships of the three elements. The Ninth Circuit, unlike the Seventh, considers the elements so closely related that they are willing to infer a dangerous probability of success from intent and conduct in some circumstances.

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > Clayton Act > Penalties

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN3[] **Sherman Act, Penalties**

Intent to monopolize not mean that "intent to harm rivals" is not a useful standard in antitrust cases. Intent to harm rivals without more offers too vague a standard in a world where executives may think no further than "let's get more business" and long term effects on consumers depend in large measure on competitors' responses. Neither is "intent to do more business," which amounts to the same thing. Vigorous competitors intend to harm rivals, to do all the business they can. To penalize this intent is to penalize competition. Culpable intent in a *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, attempted monopoly ***antitrust law*** does not mean intent to do more business, to increase market shares, or to harm rivals.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Monopolies & Monopolization, Attempts to Monopolize**

Competition and not competitors is the protected entity under *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*

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

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Monopolies & Monopolization, Attempts to Monopolize**

The element of intent is a specific intent to monopolize, that is, to gain the power to control prices or to exclude competition in a line of commerce. The relationship of the specific intent requirement and the second requirement of predatory conduct to accomplish the monopoly end. While specific intent to monopolize can sometimes be inferred from predatory acts, the plaintiff must show that the defendant's actions were not primarily motivated by legitimate business purposes.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Liability for predatory pricing represents an exception to the general antitrust regime which contemplates that no limits on price competition shall be imposed. Predatory pricing is prohibited because of the fear that a monopoly or dominant firm will deliberately sacrifice present revenues for the purpose of driving rivals from the market and then recoup its losses through higher profits earned in the absence of competition.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The gravamen of predation is not the recoupment of losses from increased market sales at competitive prices, it is the recoupment of losses from monopoly prices. Predatory pricing is pricing by a monopoly or at least a dominant firm that will cause that firm to suffer losses, the purpose for which is to allow the predator to recoup losses through higher prices set in the no longer competitive market. This again is the concept that distinguishes anticompetitor conduct from anticompetitive conduct. Predation is a two-fold notion: prey and recoup at higher prices than a competitive market would permit.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. The loss to be recouped is more than the dollar amount of the loss suffered.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A showing of specific intent to control prices and destroy competitors is insufficient to make a case for attempted monopoly. Predatory behavior must also be shown.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The classic case of predation is the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition. Thus, predatory pricing would make little economic sense to a potential predator unless he had: (1) greater staying power than his rivals; and (2) a very substantial prospect that the losses he incurs in the predatory campaign will be exceeded by the profits to be earned after his rivals have been destroyed. It should be recognized that predation cannot be successful and therefore is unlikely to occur when the predator's rivals possess resources comparable to his own. Thus, pricing is not predatory unless the predator has greater staying power and resources than his rivals.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Monopolies & Monopolization, Attempts to Monopolize**

It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act, *15 U.S.C.S. § 1 et seq.*, scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Monopolies & Monopolization, Attempts to Monopolize**

While size is an element of monopoly power, a substantial part of the market must be controlled by the monopolist to enable the raising and lowering of prices and the undue restriction on competition. Of nine cases condemning monopolies under *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, the percentage of market share ranges from 70 percent to 100 percent.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Monopolies & Monopolization, Attempts to Monopolize**

To predict dangerous future probability, it must be shown that the defendant possesses a measure of present proximity to completed monopoly - a measure of power in a relevant market. As with monopoly, the requisite market position is normally measured through an analysis of market share. Although precise definition of the requisite position is no easier here than in the case of monopoly itself, it is clear that the basic thrust of the classic rule is the presumption that attempt does not occur in the absence of a rather significant market share. The defendant need not have present market power, but its position must be sufficiently "proximate" to monopoly that the challenged conduct threatens success. The presumption resting on market share may be overcome on a showing that the market is so narrowly defined, or entry so free, that "success" would not yield the substantial market power needed for the offense of completed monopolization.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Actual Monopolization, Anticompetitive & Predatory Practices

Predatory pricing is presumed not to have occurred if market circumstances will not permit later recoupment of the losses resulting from the pricing. If predation can't be successful (market circumstances would not permit later recoupment), it may reasonably be presumed that it has not occurred, even before an inquiry is made into price-cost relationships. Thus, the concept of dangerous probability of success is intertwined with predation and intent.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

HN15[] Summary Judgment, Entitlement as Matter of Law

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. The plain language of *Fed. R. Civ. P. 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. In such a situation there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

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 > Supporting Materials > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Inferences & Presumptions > General Overview

HN16[] Judgment as Matter of Law, Directed Verdicts

The clear-and-convincing standard of proof that should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are the jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

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

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

HN17[] **Jury Trials, Jury Instructions**

There is no genuine issue for trial unless a properly instructed jury could return a verdict for the non-moving party.

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

HN18[] **Summary Judgment, Entitlement as Matter of Law**

To determine whether, as a matter of substantive law or policy, a court should permit a jury to draw from the undisputed material facts the inferences necessary to sustain liability, the court should answer the following questions: (1) whether evidentiary or historical facts material to the disposition of the motion are disputed; and (2) if not, whether the mixed question of fact and law arising under the governing substantive law must be submitted to the jury.

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

Governments > Courts > Judicial Precedent

HN19[] **Summary Judgment, Burdens of Proof**

Other factors that may determine the question of summary judgment include whether the issue calls for the application of a regulatory scheme or other technical considerations, the interpretation of a statute or a written instrument, or consistency and adherence to precedent. These kinds of issues, although involving fact questions, are often treated as questions of law. On the other hand, questions involving reasonableness of human conduct, the adequacy of care exercised by a person, and the timeliness of action are the kinds of fact questions within the common experience of jurors and normally left for decision at trial.

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

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Sherman Act > General Overview

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

HN20[] **Monopolies & Monopolization, Attempts to Monopolize**

There is a need for a competing inference in antitrust cases, i.e., a competing inference to the traditional summary judgment inferences that favor the non-moving party. That inference is necessary because the substantive law from the statute and precedent is reflective of competing economic benefits of controlling a given market and allowing it to remain uncontrolled, and reflective of the policymaking difficulty inherent in determining what is competitive and what is anticompetitive. The inference is that the factual behavior of the defendant was motivated by competitive rather than monopolistic intent.

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

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

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Implausible Claims

HN21[] **Monopolies & Monopolization, Attempts to Monopolize**

A limitation on inference in antitrust cases is that the inference of monopolistic intent under all the facts must be a plausible inference. If the factual context renders a claim implausible - if the claim is one that simply makes no economic sense - plaintiffs must come forward with more persuasive evidence to support their claim than would otherwise be necessary to defeat a summary judgment motion.

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

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Sherman Act > General Overview

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

HN22[] **Monopolies & Monopolization, Attempts to Monopolize**

Matters of antitrust substantive law and policy reflected in statutory language and precedent require a closer scrutiny in antitrust litigation at the summary judgment level. Of particular importance in an antitrust case is the question of whether a party can properly overcome an inference of competitiveness by reliance on an inference of intent from behavior they insist is per se predatory and again rely on that same inference to support an inference of dangerous probability of success.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To be predatory it is generally agreed that a price must be below the short-run profit maximizing level and must discipline or destroy rivals such that the predator thereafter gains sustained excess (that is, monopoly) profits far larger than those lost during the rival-bashing period. The uncertain future gains must greatly exceed the present actual losses to overcome the uncertainty that rivals will be destroyed or disciplined and that monopoly profits can be reaped in the face of future entry. If rivals survive or entry occurs, not only will predation be unsuccessful, but the very prospect reduces the likelihood that a challenged low price is in fact predatory. Whenever the market circumstances make such predation unlikely, it is probably absent.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Although sacrifice of short-run profits is a necessary condition for the existence of predation, not every such sacrifice is predatory. A firm might charge less than it could get away with in the short-run to forestall government price ceilings, to discourage long-run substitution of other products, or to expand the market. The predatory behavior is not itself predatory unless the predator intends to recoup and if unabated will acquire the ability to recoup his losses in a non-competitive market.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN25[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A statement of intent to compete, even if perceived as a threat, is not unlawful. Such a manifestation of intent to triumph in the competitive market, in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish an antitrust violation.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN26[] **Actual Monopolization, Anticompetitive & Predatory Practices**

In order for behavior to be a violation of *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, it must be done with the intent to control prices and destroy competition so that losses sustained thereby may be recouped by the exercise of monopoly pricing. The element "dangerous probability of success" requires an analysis of the market and defendant's ability to succeed in controlling prices above market factors.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN27[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Analysis of dangerous probability of success further requires an understanding of the concept of monopoly power. Monopoly power is the power to control prices or exclude competition. Every seller of nonfungible commodities has power over the price and production of his own product, but this is not the power that makes an illegal monopoly.

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

Governments > Courts > Common Law

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

Torts > Business Torts > Unfair Business Practices > General Overview

HN28[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

Indiana law does not recognize low pricing as a common law tort.

Torts > Business Torts > Unfair Business Practices > General Overview

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

HN29[] **Business Torts, Unfair Business Practices**

Underselling can be tortious where its purpose is to injure a rival. If the same tradesman, singly or with others, advertises his goods, undersells, solicits, and wins away the customers of his rival by false representation, intimidation or artifice, not to better himself, but to injure his rival, he has committed an actionable wrong. The gravamen of the tort, therefore, is underselling by means of false representation, intimidation or artifice, not underselling in and of itself.

Torts > Business Torts > Unfair Business Practices > General Overview

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

HN30[] **Business Torts, Unfair Business Practices**

The test of unfair competition is whether the acts of the defendant are such as are calculated to deceive the ordinary buyer making his purchases under the ordinary conditions that prevail in the particular trade to which the controversy relates.

Torts > Business Torts > Unfair Business Practices > General Overview

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

HN31[] **Business Torts, Unfair Business Practices**

A searching analysis only of motive is not, in most instances, enough to send tortious interference cases to the jury. There must still under Indiana cases be something "illegal" about the means employed. Illegality means violence or intimidation, defamation, injurious falsehood or other fraud, violation of the criminal law.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN32[] **Monopolies & Monopolization, Attempts to Monopolize**

Competitors may sue other competitors under the antitrust laws only when their business losses derive from injury of the type the antitrust laws were intended to prevent. The antitrust laws are designed to benefit consumers by encouraging low prices, not to protect competitors. The threshold issue is whether a competitor as opposed to the government has standing to attack an agreement to set low prices absent an allegation of predation. The standard requirement is that plaintiffs must show that the conspiracy caused them an injury for which the antitrust laws provide relief. That showing depends in turn on proof that the petitioners conspired to price predatorily in the American market.

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

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

HN33[] **Conspiracy to Monopolize, Elements**

A plaintiff must prove the following for a conspiracy to monopolize claim: (1) the existence of a combination or conspiracy; (2) overt acts in furtherance of the conspiracy; (3) an effect upon a substantial amount of interstate commerce; and (4) the existence of specific intent to monopolize. The mere intention to exclude competition and to expand one's own business is not sufficient to show a specific intent to monopolize.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN34[] **Concerted Action, Civil Conspiracy**

Indiana law is clear that there is no cause of action for conspiracy as such. If a complaint is to state a valid cause of action, the plaintiff must allege that the defendants conspired to accomplish an unlawful purpose or a lawful purpose by unlawful means.

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

Governments > Courts > Judicial Precedent

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

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN35[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

No Indiana precedent establishes price fixing or predatory pricing as a tort. Such conduct is unlawful only if it violates *§ 1* or *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*

Judges: [1]** Larry J. McKinney, Judge United States District Court Southern District of Indiana.

Opinion by: McKINNEY

Opinion

[*563contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

ORDER OF DISMISSAL

Larry J. McKinney, Judge United States District Court Southern District of Indiana

The Court, having on this date entered its Judgment Entry in this cause,

IT IS ORDERED that the plaintiff take nothing by their complain against the defendants and their complaint is now dismissed with prejudice.

JUDGMENT ENTRY

The Court having made its Entry on February 26, 1988 on a summary judgment motion filed by Kroger addressed to Counts I, II and III, a summary judgment motion by Super Valu on Counts II through VII, and a summary judgment motion by Markkay on Counts II through VII, which said Entry is in the following words and figures, to-wit:

(H.I.)

the Court now enters Judgment in favor of defendant Kroger Company and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count I.

The Court further enters Judgment in favor of defendant Kroger Company and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count II.

The Court further enters Judgment in favor of defendant Super Valu Stores, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count II.

The Court **[**2]** further enters Judgment in favor of defendant Markkay of Indiana, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count II.

The Court further enters Judgment in favor of defendant Kroger Company and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count III.

The Court further enters Judgment in favor of defendant Super Valu Stores, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count III.

The Court further enters Judgment in favor of defendant Markkay of Indiana, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count III.

The Court further enters Judgment in favor of defendant Super Valu Stores, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count IV.

The Court further enters Judgment in favor of defendant Markkay of Indiana, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count IV.

The Court further enters Judgment in favor of defendant Super Valu Stores, Inc., d/b/a Cub Foods, **[**3]** and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count V.

The Court further enters Judgment in favor of defendant Markkay of Foods, and against plaintiffs Indiana Grocery Indiana, Inc., d/b/a Cub Co., Inc. and Preston-Safeway, Inc. as to Count V.

The Court further enters Judgment in favor of defendant Super Valu Stores, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc., and Preston-Safeway, Inc. as to Count VI.

The Court further enters Judgment in favor of defendant Markkay of Indiana, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count VI.

The Court further enters Judgment in favor of defendant Super Valu Stores, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count VII.

The Court further enters Judgment in favor of defendant Markkay of Indiana, Inc., d/b/a Cub Foods, and against plaintiffs Indiana Grocery Co., Inc. and Preston-Safeway, Inc. as to Count VII.

IT IS SO ORDERED this 26th day of February, 1988.

Plaintiff Indiana Grocery filed its complaint against defendants Super Valu Stores, Inc., d/b/a Cub Foods, Markkay **[**4]** of Indiana, Inc., d/b/a Cub Foods, and The Kroger Company on February 4, 1985. Plaintiffs, Indiana Grocery, Inc., and Preston-Safeway, Inc., filed an amended seven count complaint against the same defendants on January 30, 1986. This cause is before the Court on a motion for summary judgment filed by Kroger addressed to Counts I, II and III, and on motions for summary judgment by Super Valu and Markkay addressed to Counts II through VII. Also pending before the Court are a motion to dismiss filed by Kroger on Counts II and III, and motions to dismiss filed by Super Valu and Markkay on Counts II, III, VI, and VII. The motions to dismiss will not be discussed since the Court's disposition of the motions for summary judgment will render these motions to dismiss moot.

Paragraph I of plaintiffs' complaint alleges that both Kroger and Super Valu attempted to create a monopoly in the Indianapolis, Indiana, retail grocery market in violation of *§ 2* of the Sherman Antitrust Act found at *15 U.S.C. § 1 et. seq.* The plaintiffs having dismissed its *§ 2* claim against Super Valu now proceed in Paragraph I only as against Kroger. The Court will set out its findings of fact and then proceed **[**5]** to deal with issues paragraph by paragraph of the complaint.

FINDINGS OF FACT

1. During the period at issue in this litigation, Kroger faced competition in the Indianapolis area from a large corporation (Super Valu Stores, Inc.), which had both the intent and the resources to remain in Indianapolis as a significant competitor.

2. Given Super Valu's size and resources, Kroger could not reasonably have expected that it would be able to drive the Cub stores out of the Indianapolis area.

3. Kroger thought it could force Super Valu to "re-think" its plans in Indianapolis and elsewhere through its aggressive response to Cub Foods' entry into Indianapolis. Kroger hoped that Super Valu would introduce

subsequent Cub stores in Indianapolis on a smaller, less aggressive scale. More recently, Kroger planned to "co-exist" with Cub at "acceptable profit levels".

4. During the period at issue in this litigation, Kroger did not have the power to control the supply of groceries to consumers in the Indianapolis Metropolitan Statistical Area ("MSA") or in any part thereof.

5. During the period at issue in this litigation, Kroger did not have the power, in the Indianapolis MSA or any of the alleged **[**6]** "submarkets" defined by plaintiffs, to control market prices for any products typically sold in retail grocery stores.

[*564] 6. During the period at issue in this litigation, there was not a dangerous probability that Kroger would acquire the power to control the supply of groceries to consumers in the Indianapolis MSA or in any part thereof.

7. During the period at issue in this litigation, there was not a dangerous probability that Kroger would acquire the power, in the Indianapolis MSA or any of the alleged "submarkets" defined by plaintiffs, to control market prices for any products typically sold in retail grocery stores.

8. At the time Super Valu entered the Indianapolis market in August 1983, Kroger operated 32 grocery stores in the Indianapolis MSA. Kroger's competitors included the following companies, who operated approximately the following numbers of stores: Marsh Supermarkets, Inc. -- 29 stores; Preston-Safeway, Inc. -- 15 stores; Indiana Grocery ("Standard", "Super Standard" and "No Frills") -- 29 stores; The Great Atlantic & Pacific Tea Co. ("A&P") -- 11 stores; O'Malia Food Markets, Inc. -- 6 stores; Dietel's, Inc. ("Mr. D's") -- 4 stores; Aldi, Inc., -- 4 stores; and Seven-Eleven **[**7]** Supermarkets, Inc. -- 4 stores. There were at least 40 additional full-line grocery stores operated by others in the Indianapolis metropolitan area and numerous small markets such as convenience stores.

9. The "numerous small markets and convenience stores" are not in the relevant product market as defined by plaintiffs' experts.

10. Commencing in 1983, Super Valu opened four Cub stores in Indianapolis. The first, located on Lafayette Road on the west side of Indianapolis, began operating Labor Day weekend of 1983. The second, which was on East Washington Street on the east side of Indianapolis, opened in December 1983. The third, in Greenwood, opened in July 1984, and the fourth, located in the Castleton area on the north side of Indianapolis, opened in May 1986.

11. In the spring of 1984, plaintiff Indiana Grocery acquired six retail grocery stores from plaintiff Preston-Safeway. After that transaction, Preston-Safeway had six remaining stores.

12. In 1985, the owners of Indiana Grocery **[**8]** acquired all of the capital stock of Preston-Safeway. Since that time, the two corporations have been affiliated companies. Commencing in early 1986, Indiana Grocery converted all of its stores in the Indianapolis MSA to the "Preston-Safeway" name.

13. As of September 1987, Kroger had 33 stores in the Indianapolis MSA. Kroger's multi-store competitors include the following companies, who operate approximately the following numbers of stores: Marsh -- 30; Indiana Grocery/Preston-Safeway -- 24; Cub -- 4; O'Malia -- 9; Mr. D's -- 5; Aldi -- 5; Seven-Eleven -- 4. There are approximately 38 additional full-line grocery stores operated by others in the Indianapolis area, as well as numerous smaller retailers such as convenience stores.

14. The entry of Cub stores into Indianapolis in 1983 engendered intense price competition among retail grocery firms. Retail price levels were reduced from the levels that had previously existed in the market.

15. After the entry of the Cub stores, retail price levels gradually increased somewhat from the lowest levels that prevailed in the months immediately after the entry of those stores. Nevertheless, retail price levels have remained lower than they **[**9]** were before Cub's entry.

16. The pricing of Kroger complained of by plaintiff has ended.

17. Kroger's retail prices were never at a level at which the company's revenues in the Indianapolis MSA as a whole failed to cover its variable costs in the MSA.

18. In the alleged north "submarket" that plaintiffs have defined, Kroger's revenues never fell below its variable costs.

19. According to plaintiffs' expert, Kroger's revenues exceeded its variable costs in the alleged south, east and west "submarkets" during all accounting periods except for the following: south -- 2 periods; east -- 3 periods; west -- 5 periods.

[*565] 20. Super Valu is a public company which operates primarily as a wholesale grocer.

21. Super Valu also owns and operates a limited number of retail grocery stores in various parts of the United States.

22. One of Super Valu's retail operations is the Cub Foods division.

23. Super Valu acquired Cub Foods from the Hooley family in 1980.

24. Super Valu has subsequently expanded operations of corporately-owned and franchised Cub Foods stores into other states.

25. Markkay was formed in 1983.

26. Markkay owns and operates a Cub Foods franchise in Indianapolis.

27. Markkay's principals **[**10]** are George McKay and Donald Murphy, both of whom are retired former executives of Super Valu.

28. Markkay's store, which is located across the street from Lafayette Square Shopping Center, was opened on August 31, 1983.

29. A corporately-owned Cub Foods store, located at the Eastgate Shopping Center, was opened in December 1983.

30. A corporately-owned Cub Foods store, located in the Greenwood area, was opened in July 1984.

31. A franchise Cub Foods store, located in the Castleton area, was opened in May 1985.

32. Under the Cub Foods franchise program, a franchisee acquires from Super Valu the right to use the "Cub Foods" name.

33. Under the Cub Foods franchise program, a franchisee is provided a site screening and development service, a preopening training program for certain of the franchisee's employees and subsequent access to management advice and other forms of technical assistance.

34. All Cub Foods franchisees execute an Affiliates Agreement, which establishes the basic terms of the franchise.

35. All Cub Foods franchisees also enter into a Policy Agreement, which outlines the basic features of the Cub Foods' marketing concept.

36. Franchisees may also enter into an Umbrella **[**11]** Agreement.

37. Under the Umbrella Agreement, Super Valu provides additional supervisory and marketing services, the right to participate with other area Cub Foods stores in a joint advertising program, assistance in coordinating the franchisee's scanner pricing program, and advice concerning the optimum levels at which the more than 10,000 items in a Cub Foods store should be priced.

38. The Umbrella Agreement expressly states that the pricing service to be provided by Super Valu will be to recommend prices.

39. Markkay entered into an Umbrella Agreement with Super Valu.

40. The Cub Foods price lists are stored in computer programs maintained by Super Valu at its Minneapolis, Minnesota, headquarters and its Ft. Wayne, Indiana, warehouse.

41. The information on the Cub Foods price lists for the local and regional markets where stores are located is kept current by Super Valu employees in the regional offices, who review changes in the cost of items to be sold by the stores and assign to the items new retail prices to reflect such changes.

42. These cost changes, together with other changes to reflect special promotions or desired responses to local competitors' prices, are transmitted **[**12]** electronically to the central computer system where they are entered in the system and transmitted back to the regional offices as revised price lists.

43. The information on the Cub Foods price lists is then printed out in hard copy in a price book.

44. The prices in the price book are checked by the local store's pricing coordinator to assure that the store's posted shelf prices conform with the revised price book, after which they are ready to be transferred onto the store's cash register **[*566]** scanning system for use at checkout counters.

45. At a corporately-owned Cub Foods store, prices that are entered on the basic price lists are automatically used unless the store manager requests, and the regional merchandiser approves, a different price.

46. At a franchisee Cub Foods store, price changes that originate with the regional merchandising manager need not be accepted and may be rejected by declining to transfer the changes onto the store's cash register scanning system.

47. In late 1983, Super Valu granted Markkay a $ 500,000 credit against sums it owed to the Ft. Wayne warehouse after it became apparent that Markkay's losses had nearly exhausted the initial working capital that had **[**13]** been earmarked to carry the company through its first 12 months of operations.

48. In 1984, the Ft. Wayne warehouse discovered an accounting error which had produced a build-up of approximately $ 450,000 in Markkay's accounts receivable.

49. Markkay was allowed to pay back this amount in installments of $ 12,500 per month, without interest.

MEMORANDUM OF LAW

For its attempted monopoly claim plaintiffs allege that defendant Cub Foods entered the Indianapolis retail grocery market in September 1983. Cub Foods is a super warehouse store [1] owned by defendant Super Valu. Plaintiffs complain that the aggressive response of Kroger, a supermarket, [2] to the entrance of Cub Foods into the Indianapolis retail grocery market was in fact Kroger attempting to monopolize the Indianapolis grocery market. Plaintiffs allege that Kroger's response to Cub Foods' entry was to sell its groceries for a substantial period of time for less than its average variable costs. Plaintiffs allege that this pricing strategy amounts to predatory pricing and that it has resulted in substantial and intentionally incurred losses to Kroger. Plaintiffs allege that these predatory pricing practices in the Indianapolis **[**14]** market and Kroger's willingness to incur these substantial losses are part of Kroger's strategy to drive other competition from the relevant market so that Kroger can raise its prices in the future to abnormally high levels which will permit Kroger to recoup its losses.

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[1] As defined in Amended Statement on Opinions of Bruce W. Marion [plaintiffs' expert] filed June 15, 1987, p. 9.

[2] As defined in Amended Statement of Opinions of Bruce W. Marion filed June 15, 1987, p. 3.

Plaintiffs go on to allege that the retail grocery market in Indianapolis is inelastic in consumer demand. They urge that price increases or decreases do not greatly affect the total amount of groceries sold in any market or submarket. Plaintiffs claim that because Kroger sold at such low prices in response to Cub's entry in the market place Kroger raised a substantial barrier to new entries into the market further injuring competition. That is, no one will want to enter the Indianapolis grocery market if they are to be subjected to the substantial below average variable cost pricing of which Kroger has allegedly shown itself capable. Plaintiffs complain that if Kroger's pricing had continued unabated plaintiffs **[**15]** and other independent competitors would have been driven out of business in the Indianapolis market and Kroger would have attained monopoly status able to charge monopoly prices.

Further, plaintiffs specifically complain that as a result of Kroger's present and potential market power, its financial resources, its intent to monopolize the Indianapolis market, its pricing policies, the inelasticity of demand in the market, and deterrents to market entry caused by Kroger's pricing policies, there is and has been a dangerous probability that Kroger would succeed in its perceived attempt to eliminate competitors and obtain the power to control prices in the Indianapolis retail grocery market. This conduct, plaintiffs claim, amounts to a violation of *§ 2* of the Sherman Act, as an attempted monopoly.

Plaintiffs have survived a motion to dismiss on these allegations of a *§ 2* violation. **[*567]** *Indiana Grocery Co., Inc. v. Super Valu Stores, Inc., 647 F. Supp. 254 (S.D. Ind. 1986)*. The issue of whether plaintiffs alleged the proper matters has been put to rest. The question now is whether the plaintiffs can survive a motion for summary judgment.

Plaintiffs' complaint involves concepts of market **[**16]** share, market power, market definition, market deterrents, monopoly power, monopoly pricing, predatory pricing, and competition. These are not easily definable concepts nor does their interface with a given set of facts admit to facile process. The stage upon which all of these terms play a part is sometimes lighted by the penumbra cast by the caution that "we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* quoting *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983)*. Unsanctioned tampering with free market pricing by monopolists can damage competition and ultimately the consumer. Separation of injury to competitors from injury to competition and ultimately consumers can be as difficult as it is crucial.

HN1[] The very elements of an attempted monopoly case reflect the concern of the courts over the tension between the competing economic benefits of market control and market freedom. Those elements are "(1) specific intent to control prices or destroy **[**17]** competition with respect to a part of commerce, (2) predatory or anti-competitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success." *Chillicothe Sand and Gravel v. Martin Marietta Corp., 615 F.2d 427, 430 (7th Cir. 1980)* quoting *Gough v. Rossmoor Corp., 585 F.2d 381, 390 (9th Cir. 1978)*. The case of *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981)*, added a further clarification to the third element: "a dangerous probability of success in the relevant market which requires evidence that the defendant had sufficient market power to have been reasonably able to create a monopoly." *Id. at 270* (citations omitted).

As each of these elements has been discussed post *Chillicothe*, lower ***HN2***[] courts have been cautioned to carefully evaluate the theories on each element and to observe the interrelationships of the three elements. The Ninth Circuit, unlike the Seventh, considers the elements so closely related that they are willing to infer a dangerous probability of success from intent and conduct in some circumstances. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981).* **[**18]**

Addressing the requirement of ***HN3***[] intent to monopolize, Judge Easterbrook, in *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986)* reminds us what intent does *not* mean: "'intent to harm rivals' is not a useful standard in antitrust." *Id. at 1338*. Judge Easterbrook further quotes from *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983)*: "Intent to harm [rivals] without more offers too vague a standard in a world where executives may think no further than 'Let's get more business' and long term effects on consumers depend in large measure on competitors' responses." Further, Judge Easterbrook states "Neither is 'intent to do more business', which amounts to the same thing. Vigorous competitors intend to harm rivals, to do all the business they can. To penalize this intent is to penalize competition." *Ball Memorial, 784 F.2d at 1338-39*. Judge Easterbrook does not decide what culpable intent means. He decides what it does not mean. Culpable intent in a *§ 2* attempted monopoly ***antitrust law*** does not mean intent to do more business, to increase market shares or to harm rivals. *See also* *Great Escape, Inc. v.* ***[**19]*** *Union City Body Co., 791 F.2d 532 (7th Cir. 1986)* and *MCI Communications Corp. v. American Telephone and Telegraph Co., 708 F.2d 1081 (7th Cir. 1983)*.

Having pointed out that ***HN4***[] competition and not competitors is the protected entity under *§ 2*, Judge Easterbrook in *Ball Memorial,* ***[*568]*** *supra*, acknowledges that the distinction is not as easy as it sounds:

> "Sometimes injury to rival firms can be a precursor to injury to the consumers; after knocking rivals out of the market, a firm may curtail output and raise prices. *Section 2* may be used to prevent this conduct. Yet it must be used with the greatest caution. Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition. Thus the plaintiff faces a stiff burden in any *§ 2* litigation." *784 F.2d at 1338* (emphasis in original.)

Plaintiffs in the instant case face a stiff burden. They must show more than the intent to injure competitors. They must show the intent to subsequently injure consumers by the raising of prices to monopoly levels, the second portion of the two-fold definition of monopoly. The culpable intent must include **[**20]** the intent to injure consumers with prices unrestrained by competitive forces.

Lektro-Vend, supra, elaborated on the intent issue stating that ***HN5***[] element number one was "a specific intent to monopolize, i.e., to gain the power to control prices or to exclude competition in a line of commerce." *660 F.2d at 270*. Further, Judge Pell, speaking for the court, pointed out the relationship of the specific intent requirement and the second requirement of predatory conduct to accomplish the monopoly end. At page 272, Judge Pell acknowledges, "While specific intent to monopolize can sometimes be inferred from predatory acts, the plaintiffs have failed to show that Vendo's actions relating to Stoner were not primarily motivated by legitimate business purposes." A monopolizer generally doesn't leave a paper trail, and revelation from an examination of his conduct would of necessity assist in the finding of intent. The predatory acts and the intent deduced therefrom require examination. Were there legitimate business purposes in the actions? Were the actions predatory because of the intent to control prices or exclude competition?

The second requirement of a showing of attempted monopoly is evidence **[**21]** of predatory or anticompetitive conduct directed to accomplishing the unlawful end. Of the kinds of predatory conduct that have been discussed by the courts, plaintiffs herein accuse Kroger of predatory pricing. Again, this is not an easy concept. Judge Easterbrook in his article entitled *Predatory Strategies and Counter Strategies*, 48 U. Chi. L. Rev. 263 (1981) says,

> "There is a highly competitive market for predatory pricing theories. Scholars have produced a blizzard of rules defining unlawful predatory practices. Some of the rules depend on the relationship between price and cost, some on the relationship between price and time, some on the relationship between quantity sold and time. One approach eschews rules altogether and suggests the courts examine the totality of the circumstances. The proponents of cost-based tests do not agree among themselves. Should the rule depend on marginal, average, variable, or average total cost? What is the rule of intent and intent to do what? The most recent approaches propose a collection of cost-based tests; which one applies depends on the structure of the industry and the availability of other strategies that the alleged predator could **[**22]** have pursued." *Id*. at 263-64.

In this quagmire of theories, courts should be cautious of inferences and per se rules based On predatory pricing theories.

Judge Cudahy addressed the principle in *MCI Communications v. American Telephone and Telegraph Co., 708 F.2d 1081 (7th Cir. 1983)*:

> *HN6*[] "Liability for predatory pricing represents an exception to the general antitrust regime which contemplates that no limits on price competition shall be imposed. Predatory pricing is prohibited because of the fear that a monopoly or dominant firm will deliberately sacrifice present revenues for the purpose of driving rivals from the market and then recoup its losses through higher profits earned in the absence of competition." *Id. at 1112*.

[*569] *HN7*[] The gravamen of predation is not the recoupment of losses from increased market sales at competitive prices, it is the recoupment of losses from monopoly prices. Predatory pricing is pricing by a monopoly or at least a dominant firm that will cause that firm to suffer losses, the purpose for which is to allow the predator to recoup losses through higher prices set in the no longer competitive market. This again is the concept that distinguishes anticompetitor **[**23]** conduct from anticompetitive conduct. Predation is a two-fold notion: prey and recoup at higher prices than a competitive market would permit.

Justice Powell in *Matsushita, supra*, quotes Professor Bork, for this notion of predation:

> "Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in the future undisturbed profits (where rivals are to be disciplined). The future flow of profits appropriately discounted must then exceed the present size of the losses." *Matsushita, 475 U.S. at 589*, quoting R. Bork, *The Antitrust Paradox* 145 (1978).

Again, there is nothing predatory about recouping from increased market sales or competitive prices.

This concept of predation is extremely important in the *§ 2* scheme. If a predatory act itself will support an inference of intent as Judge Pell suggests in *Vendo, supra*, then the predatory behavior must be examined closely.

Note that while the predatory conduct is two-fold as explained above, **[**24]** the predatory intent is also two-fold: To prey and to recoup. As Justice Powell further points out in *Matsushita*, *HN8*[] "The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *475 U.S. at 589*. The loss to be recouped is more than the dollar amount of the loss suffered.

Having examined the first two thresholds of an attempted monopoly case, it is clear that by itself *HN9*[] a showing of specific intent to control prices and destroy competitors is insufficient to make the case. Predatory behavior must also be shown. Applied to the instant case, the requisite intent to monopolize can be found in defendants' pricing below cost only if appended thereto is the goal of recouping losses and more in a competitor free market. *Matsushita; MCI, supra.*

Areeda and Turner are cited continually in antitrust matters. In Volume III of their work on antitrust, *An Analysis of Antitrust Principles And Their Application* (1978) Areeda and Turner make the following contribution to the theory of predation:

> "Indeed, *HN10*[] the classically feared case of predation has been the deliberate sacrifice of present revenues **[**25]** for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition. Thus, predatory pricing would make little economic sense to a potential predator unless he had (1) greater staying power than his rivals, and (2) a very substantial prospect that the losses he incurs in the predatory campaign will be exceeded by the profits to be earned after his rivals have been destroyed . . . . [It] should, of course, be recognized that predation cannot be successful and therefore is unlikely to occur when the predator's rivals possess resources comparable to his own." 3 P. Areeda & D. Turner, ***Antitrust Law***, para. 7116 (1978). (Hereinafter "Areeda & Turner".)

Thus, specifically, pricing is not predatory unless the predator has greater staying power and resources than his rivals. A theory of predation would not be plausible under the above scenario.

It is fair to conclude from the cases and literature on predation that the behavior of an alleged attempted monopolizer requires scrutiny. When the intent to monopolize is sought to be supplied by one of the theories

[*570] of predation, the predatory label should not be applied to the **[**26]** behavior under analysis without some view to the staying power of the alleged predator's rivals, some inquiry into the probability of the prospect of the costs of the pricing being recouped, and some examination of the comparable resources of the alleged predator's rivals.

This scrutiny of the second element, predatory behavior, shows its relationship to the third element, substantial probability of success. Did the alleged monopolizer intend to finance his predatory behavior by higher monopoly profits and could he have plausibly done so, had his behavior continued unchecked? Was there a substantial probability of success?

Judge Easterbrook in *Ball Memorial, supra*, quotes from *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, which while reflecting on the balancing of interests between regulation and freedom in the market points out the interrelationship between the requisite monopolistic intent and the danger of realizing that intent.

> ***HN11***[]
>
> "It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression. . . . In part because it is sometimes difficult to distinguish robust competition from **[**27]** conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Copperweld*, 467 U.S. 767-68.

Hiland Dairy, Inc. v. Kroger Company, 402 F.2d 968 (8th Cir. 1968) addresses the dangerous probability of success criterion. The size of an alleged monopolist's market share and its relationship to the probability of success is discussed.

> ***HN12***[]
> "While size is an element of monopoly power, a substantial part of the market must be controlled by the monopolist to enable the raising and lowering of prices and the undue restriction on competition.
>
> Of nine cases condemning monopolies under *§ 2* of the Act the percentage of market share ranges from 70 percent in *United States v. Paramount Pictures, Inc., 334 U.S. 131, 167, 68 S. Ct. 915, 92 L.Ed 1260 (1948)* to 100 percent in the [sic] *United States v. Pullman Co., [50 F. Supp. 123 (E.D. Pa. (1943)]*.

These nine cases considered are:

	Percent Market Share
United States of America v. American Tobacco Company, 221 U.S. 106, 162, 31 S. Ct. 632, 55 L. Ed. 663 (1911)	86%
Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 33, 31 S. Ct. 502, 55 L. Ed. 619 (1911)	90%
United States v. Eastman Kodak Co., 226 F. 62, 79 (W.D.N.Y. 1915), appeal dismissed, 255 U.S. 578, 41 S. Ct. 321, 65 L. Ed. 795	75-80%
United States v. Pullman Co., 50 F. Supp. 123,	

	Percent Market Share
135 (E.D.Pa. 1943) aff'd per curiam, 330 U.S. 806, 67 S. Ct. 1078, 91 L. Ed. 1263	100%
United States v. Aluminum Co. of America, 148 F.2d 416, 425 (2d Cir. 1945)	90%
United States v. Paramount Pictures, Inc., 334 U.S. 131, 167, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)	70%
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	75%
International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 249, 79 S. Ct. 245, 3 L. Ed. 2d 270 (1959)	81%
United States v. Grinnell Corp., 384 U.S. 563, 567, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)	87%"

[28]** **[*571]** *Id. at 974*, and 974 n.6

Further, the Hiland Dairy Court cites *United States v. United States Steel Corp., 251 U.S. 417, 444, 40 S. Ct. 293, 64 L. Ed. 343 (1920)* in which the Supreme Court declined to find a monopoly on a market share of 50 percent or less stating "the power attained was much greater than that possessed by any one competitor - it was not greater than that possessed by all of them. Monopoly, therefore, was not achieved." In *United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)* the Court found a 90 percent share a monopoly, but said ". . . it is doubtful whether sixty or sixty-four percent would be enough and certainly 33 percent is not." *148 F.2d at 424*.

Areeda and Turner offer the following explanation of the relationship between market share and market power as they relate to a dangerous probability of monopolistic success:

> "Perhaps as an aid ***HN13***[] to predicting dangerous future probability, the cases also require that the defendant possess a measure of present proximity to completed monopoly - a measure of power in a relevant market. As with monopoly, the requisite market position is normally measured through an analysis of market share. Although precise definition of the **[**29]** requisite position is no easier here than in the case of monopoly itself, it is clear that the basic thrust of the classic rule is the presumption that attempt does not occur in the absence of a rather significant market share. The defendant need not have present market power, but its position must be sufficiently 'proximate' to monopoly that the challenged conduct threatens success. Moreover, the presumption resting on market share may be overcome on a showing that the market is so narrowly defined, or entry so free, that 'success' would not yield the *substantial* market power needed for the offense of completed monopolization." 3 Areeda & Turner para. 831 (emphasis in original).

Areeda and Turner conclude re attempted monopoly cases:

> "We suggest the following rules of thumb, but caution, however, that such refined judgments of conduct and power are very difficult to make and may often be illusory:

(1) Claims involving 30 percent or lower market shares should presumptively be rejected, with the two 'no power' exceptions mentioned above. [3]

(2) In the 30-50 percent range, we would normally reject an attempt claim (with the usual exceptions) [see footnote 3]. We do, however, **[**30]** reserve two categories of conduct - which may or may not exist in a given case - that would justify an attempt finding; (a) conduct which, given the defendant's market share, is very likely, but not quite as certainly as in the first unusual exception, to achieve monopoly; and (b) conduct which is so invidious as to almost, but not quite, satisfy the criteria for per se liability developed in para. 836.
(3) Claims involving 50 percent or larger market shares should presumptigvely be treated as attempts where the conduct requirements of para. 825-830 are also satisfied." Areeda & Turner at para. 835c.

This later Areeda and Turner quotation is included not to show that this Court agrees or disagrees with these attempted objective guidelines. The quotation is included to illustrate the role of market share in the determination of market power as it applies to attempted monopoly cases. All these rules are qualified as not helpful if predation can be shown. Additionally, ***HN14***[] predatory pricing is presumed not to have occurred if market circumstances will not **[*572]** permit later recoupment of the losses resulting from the pricing. Areeda and Turner can but caution that ". . . if predation can't be **[**31]** successful [market circumstances would not permit later recoupment], we may reasonably presume that it has not occurred, even before we inquire into price-cost relationships." Areeda & Turner para. 836b.

Thus, the concept of dangerous probability of success is intertwined with predation and intent.

Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971) says this about the dangerous probability test:

"A reliable or accurate measure of the actual likelihood that plaintiff would have achieved monopoly status if Beall's wrongful conduct had never been disclosed is, of course, not possible. However, we do not understand the 'dangerous probability' test to involve an evaluation of the actual likelihood that an attempt would have succeeded if not frustrated by an intervening event. Rather, it requires an appraisal of the alleged offender's ability **[**32]** to achieve the forbidden result, his intent, and the nature of his overt actions. In an antitrust context we must consider the firm's capacity to commit the offense, the scope of its objective, and the character of its conduct. The ultimate concern is the firm's actual or threatened impact on competition in the relevant market." *Id. at 598*.

Kearney involved a patent wherein the court found that the patent was procured "by violation of conflict of interest principles." The character of that conduct was the predatory act, not the pricing. *Kearney* is quoted and applied in *Lektro-Vend Corp. v. Vendo Co., supra*, for the above principles. In any case, the relationship of the three requirements for prevailing in an attempted monopoly cause of action is clearly shown. There must be present intent to control prices in order to recoup the cost of predatory behavior with a dangerous probability of successfully recouping.

This cause is presented to the Court on defendant Kroger's Motion For Summary Judgment. The United States Supreme Court has recently addressed through a trilogy of cases the summary judgment standard. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp., **[**33]** 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* the Court approved of the summary judgment granted by the district court in a complex antitrust action dealing with both *§ 1* and *§ 2* of the Sherman Act. The case involved claims that Matsushita and other Japanese electronic manufacturers had conspired to drive their American competitors from the American market by charging predatory prices for consumer electronic products exported from Japan to the United States. The other two cases approving

[3] Areeda and Turner suggest those two exceptions should be those for instance in which it is clear that the challenged conduct will achieve market power and where there is clearly invidious conduct. *See* 3 Areeda & Turner at para. 836a. Areeda and Turner further suggest that the predatory pricing is invidious.

grants of summary judgment within different legal contexts are *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* and *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. These cases taken together provide the guidance from which the instant case may be resolved. A statement from *Celotex Corp. v. Catrett* is illustrative and sets the tone for this summary judgment analysis. ***HN15***[] "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *106 S. Ct. at 2555*. The *Celotex* court had just prior stated:

> "the plain language of *Rule 56(c)* **[**34]** mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. In such a situation there can be 'no genuine issue as to any material fact', since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id*. at 2252-2253.

Under *Celotex* then, defendant Kroger's motion which was properly made and supported by affidavits and references to discovery **[*573]** responses, must be met with affidavits and discovery responses of admissible evidence showing a genuine issue for trial.

Anderson v. Liberty Lobby, Inc. adds to these procedural guidelines. The Supreme Court says:

> "Our holding that ***HN16***[] the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts **[**35]** are the jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *106 S. Ct. at 2513*.

This quotation follows the statement of the rule that ***HN17***[] there is no genuine issue for trial unless a properly instructed jury could return a verdict for the non-moving party.

The Honorable William W. Schwarzer, United States District Judge, Northern District of California, in his article *Summary Judgment and Case Management*, 56 Antitrust L.J. 213 (1987) focuses on the Court's use of the phrase "justifiable inferences" in dealing with the import of *Anderson, supra.* Judge Schwarzer says "Upon analysis *Anderson* is simply an application of the same rationale that underlay the earlier decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., that undisputed evidence submitted by a plaintiff may be insufficient to sustain a verdict which turns on a mixed question of law and fact under the applicable substantive law." 56 Antitrust L.J. at 218.

Judge Schwarzer's analysis is of assistance in the instant case. **[**36]** He finds the issue in the above three cases to be the same, i.e., ***HN18***[] "whether as a matter of substantive law or policy, the court should permit a jury to draw from the undisputed material facts the inferences necessary to sustain liability." *Id*. at 218-19. He suggests the courts answer the following questions:

> "(1) whether evidentiary or historical facts material to the disposition of the motion are disputed;
> (2) if not, whether the mixed question of fact and law arising under the governing substantive law must be submitted to the jury."

He offers no easy guidelines to separate these mixed questions of law and fact into those appropriate for the jury and those appropriate for the judge. He does suggest that *Anderson* and *Zenith* indicate the need to probe for elements of substantive law and policy that may circumscribe the freedom of the jury to reach an adverse finding. He writes:

> *HN19*[] "Other factors that may determine on which side of the line an issue falls include whether the issue calls for the application of a regulatory scheme or other technical considerations, the interpretation of a statute or a written instrument, or consistency and adherence to precedent. These **[**37]** kinds of issues, although involving fact questions, are often treated as questions of law. On the other hand, questions involving reasonableness of human conduct, the adequacy of care exercised by a person, and the timeliness of action are the kinds of fact questions within the common experience of jurors and normally left for decision at trial." *Id*. at 220.

The instant case is one wherein certain behavior is alleged to be violative of ***antitrust law***. The facts regarding the behavior itself are not materially at issue. The behavior of Kroger is admitted. At issue are the inferences to be drawn from the behavior. These inferences deal with issues of intent, predation and dangerous probability of success; statements are facts, pricing is a fact, market definition and share are taken as facts. The inferences are the precise mixed law and fact questions referred to in the previously cited article. The issues of fact are the same as the issues of law, namely, is there an intent to monopolize, was the pricing predatory, and was there a dangerous probability of success. Under Judge Schwarzer's analysis, this is not a question of the reasonableness **[*574]** of conduct. Whether Kroger's responses **[**38]** to Cub's entry were reasonable or not isn't the issue. The issue is not a question of timeliness of action or the adequacy of care exercised. The issues are of substantive law and policy, interpretation of statute and adherence to precedent. In *Matsushita* the Supreme Court has determined that the inferences are already limited by the very fact that this case is an antitrust case.

Specifically, the Supreme Court in *Matsushita* recognized the *HN20*[] need for a competing inference in antitrust cases, i.e., a competing inference to the traditional summary judgment inferences which favor the non-moving party. That inference is necessary because the substantive law from the statute and precedent is reflective of competing economic benefits of controlling a given market and allowing it to remain uncontrolled, and reflective of the policymaking difficulty inherent in determining what is competitive and what is anticompetitive. The inference is that the factual behavior of the defendant was motivated by competitive rather than monopolistic intent. "Respondents in this case, in other words, must show that the inference of conspiracy [illegal behavior] is reasonable in light of the competing **[**39]** inferences of independent action or collusive action that could not have harmed respondents." *Matsushita, 475 US. at 588*.

HN21[] A further limitation on inference in antitrust cases is that the inference of monopolistic intent under all the facts must be a plausible inference.

> "It follows from these settled principles that if the factual context renders respondent's claim implausible - if the claim is one that simply makes no economic sense - respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary [to defeat a summary judgment motion]." *Matsushita* 474 U.S. at 587.

Having set out the facts in the instant case and having reviewed the three proofs necessary for a finding of attempted monopoly, an attempt will be made to determine for summary judgment purposes the plausibility of plaintiffs' proffered inference that Kroger Co. is an attempted monopolizer as measured against the competing inference that the company is a legitimate, albeit tough, competitor.

The Supreme Court in *Matsushita* has recognized that *HN22*[] matters of antitrust substantive law and policy reflected in statutory language and precedent require **[**40]** a closer scrutiny in antitrust litigation at the summary judgment level. Of particular importance in an antitrust case is the question of whether a party can properly overcome an inference of competitiveness by reliance on an inference of intent from behavior they insist is per se predatory and again rely on that same inference to support an inference of dangerous probability of success. This Court thinks the answer to that question is no.

An examination of plaintiffs' evidence and argument will reveal further why this motion for summary judgment must be granted.

Plaintiffs argue in this case that they have substantial evidence that Kroger engaged in predatory pricing. They accuse Kroger of engaging in the "deliberate sacrifice of present revenue for the purpose of driving rivals out of the market and then recouping the losses through higher prices earned in the absence of competition." It should be noted again that the "higher prices" of which the law is concerned are the prices required to recoup the losses created by the low pricing and set not according to free market forces. *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., supra, Lektro-Vend Corp. v. Vendo, supra,* **[**41]** *MCI Communications v. American Tel. & Tel., supra.*

As proof of the predatory nature of Kroger's pricing, plaintiffs allege that Kroger priced below its average variable costs as part of its strategy upon the entrance of defendant Super Valu into the market place. Plaintiffs' expert, Dr. Bruce Marion, divides the Indianapolis market into four zones. Plaintiffs' expert accountant, Robert L. Grottke, concludes that in three of those four zones Kroger priced its products **[*575]** below its average variable costs. For purposes of the summary judgment, the Court will treat Dr. Marion's market definitions as factual and Grottke's average variable cost conclusions as factual.

Plaintiffs, using these guidelines, then point out that Kroger, on the entry of Super Valu in the west submarket, dropped its prices below average variable costs in seven nearby Kroger stores for six 4-week accounting periods. Kroger then raised its prices in those stores to levels above average variable costs but below total costs. Plaintiffs allege and the Court will take as true that when Cub entered the east submarket, Kroger dropped prices below variable costs in five stores for four 4-week accounting periods. In the south **[**42]** submarket, they did the same in three stores for two 4-week accounting periods. Plaintiffs admit that if the Indianapolis market is not divided into four zones, and the total Indianapolis market is considered together, there can be no showing that Kroger's pricing was below average variable costs.

Plaintiffs argue that evidence of pricing below average variable costs is the single best test of predation and refer the Court to Areeda and Turner, 88 Harv.L.Rev. at 733 [4] for the notion that this pricing should be conclusively presumed unlawful. Plaintiffs' expert economist, Dr. Marion, is cited for additional inferences of predation. Professor Marion concludes Kroger intended to eliminate weaker competitors and intended to protect and expand its market share in response to Super Valu's entry. Plaintiffs point out Kroger sales rose in seven Kroger stores in the west zone by 54 percent from 1983 to 1986 and that there were similar gains in the east and south zones. Plaintiffs further urge that in the west submarket, Kroger kept its prices below total cost for almost a year and a half, in the east submarket for one year and one month, and in the south for more than a year. Kroger kept **[**43]** its prices below total cost in the entire Metropolitan Statistical Area (MSA) for twelve 4-week periods.

Plaintiffs' expert concludes that Kroger's pricing is predatory. He bases that judgment on the pricing itself, its persistence, the growth in Kroger's sales, the existence of barriers to entry, and the level of concentration in the market.

Plaintiffs urge that the average variable cost standard is a substitute for intent since tests solely based on intent are unworkable, citing *MCI, 708 F.2d at 1113*. They cite *Chillicothe, 615 F.2d at 431-32*, for the notion that cost-based standards provide an objective means for distinguishing between (1) pro-competitive price-cuts that are intended to maximize short run profits or minimize short run losses, and (2) prices that make the seller worse off in the short run and can therefore be justified only by their effects on competition and the goal of later raising prices to above normal levels. From this, plaintiffs wish to draw the inference that Kroger was pricing for the purpose of harming competition.

[44]** To sum up, plaintiffs believe that since they can show evidence of pricing below average variable costs in three of four submarkets for up to 24 weeks and since they can show pricing below total costs for over almost a year in the total Indianapolis market and since a cost-based theory of predation is the best proof of intent, they are entitled to a presumption that the second half of the definition of predation is present. That is, that Kroger's goal was to recoup its losses from above competitive prices in the future.

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[4] Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975).

Addressing initially the argument by plaintiffs that defendant Kroger engaged in predatory conduct, the concept of predatory pricing must be examined. The previous quotation from Areeda and Turner re per se predation from low pricing has been elaborated upon in P. Areeda & H. Hovenkamp ***Antitrust Law*** para. 711.2c, (Supp. 1987):

> "Indeed the main text confined itself to possible predation by a monopolist, and most commentators have taken the position that predatory pricing is plausible strategy only for a firm that begins with **[*576]** a very substantial market share. Although no single market share number can be offered as a guaranteed minimum below which predation is **[**45]** exceedingly unlikely, it seems reasonable to presume that a market share below 60 percent is too small to make predation likely."

Areeda & Turner's treatise does not, in contravention to plaintiffs' assertion, support plaintiffs' view that from Kroger's pricing predation can be presumed. Plaintiffs have no support for their argument that Kroger's pricing was per se predatory. Plaintiffs have not shown that the inference of anticompetitive predation excludes the inference of legal competitive behavior. They have not shown predatory acts. Plaintiffs' predation argument may work in theory, but it does not work in practice. It does not work because there is no evidence in the record from which it could be plausibly inferred that Kroger intended to or could have recouped its losses in a competitor free market.

Professor Areeda in his article *Monopolization, Mergers and Markets: A Century Past and the Future*, *75 Calif.L.Rev. 959 (1987)*, further defines the issue:

> ***HN23***[] "To be predatory it is generally agreed that a price must be below the short-run profit maximizing level and must discipline or destroy rivals such that the predator thereafter gains sustained excess (that is, monopoly) **[**46]** profits far larger than those lost during the rival-bashing period. The uncertain future gains must greatly exceed the present actual losses to overcome the uncertainty that rivals will be destroyed or disciplined and that monopoly profits can be reaped in the face of future entry. If rivals survive or entry occurs, not only will predation be unsuccessful, but the very prospect reduces the likelihood that a challenged low price is in fact predatory. Whenever the market circumstances make such predation unlikely, it is probably absent." *Id*. at 965.

Further, at p. 967,

> ***HN24***[] "Although sacrifice of short-run profits is a necessary condition for the existence of predation, not every such sacrifice is predatory. A firm might charge less than it could get away with in the short-run to forestall government price ceilings, to discourage long-run substitution of other products, or to expand the market."

Here again is the well accepted notion that the predatory behavior is not itself predatory unless the predator intends to recoup and if unabated will acquire the ability to recoup his losses in a non-competitive market. Here, again, is a reasonable, competitive motive for Kroger's pricing **[**47]** behavior, to increase market share and make increased profit from increased profits at competitive prices which we have seen is neither predatory nor against antitrust laws.

Michael Malina, as if in anticipation of this very case, in an article entitled *Some Thoughts on Monopoly, Markets and Mergers*, *75 Calif.L.Rev. 997 (1987)*, discusses the element of intent and costs and echos the Supreme Courts summary judgment concerns:

> "But with this sound shift of focus from the seller's hard-to-prove intentions to his demonstrable costs, there is a serious risk that, in the guise of protecting competitors from predation, courts will deprive the consumer of the lower cost prices that antitrust ultimately seeks to promote. For that reason, the Supreme Court recently reminded us in the *Matsushita* case that a price below incremental cost is predatory only if it is likely to lead to supracompetitive price and excess profits once the monopolist has eliminated his competition." *Id*. at 1001.

There is no per se predatory pricing in this case.

Dr. Marion offers some instructive evidence on the issue of predatory conduct. At page 27 of his deposition he states that he thought Kroger intended **[**48]** to drive fringe competition from the market but not all competitors. At page 10 of his Statement of Opinions of May 20, 1987, on Kroger's intent to recoup, he says:

> "Over time, I expect both Kroger and Cub will increase prices, gross profits and net profits. Whether Kroger will **[*577]** raise prices above pre-Cub level is not clear. I do believe they will be able to raise prices above the level they would have, absent the price war between Kroger and Cub that eliminated several competing supermarkets, substantially weakened others and raised market barriers."

This, it seems to the Court, falls short of evidence that Kroger engaged in predatory conduct or intended to so engage because there is no evidence that Kroger intended to be able to set its prices above competitive levels so as to recoup the losses it suffered to the detriment of the consumer. Dr. Marion would not infer the intent to do so nor the possibility of successfully doing so. The possibility of unrecouped losses is very real in this case. To inflict losses on oneself doesn't appear to be an antitrust violation. To do so intentionally, creating the possibility of recouping from monopoly pricing, appears to be the violative **[**49]** behavior.

> "Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals - sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition and not competitors. *Ball Memorial, 784 F.2d at 1338*.

In law the plaintiffs are not entitled to either a presumption or an inference that Kroger intended to recoup its pricing loses from monopoly power pricing. Dr. Marion would not infer it. Such an inference would clearly be implausible under *Matsushita*. There is no evidence therefore that defendant's conduct was predatory.

The weakness of plaintiffs' case can be shown further by addressing the intent requirement. Intent, culpable intent, is the intent to control prices and exclude competition, and the Court will look to see the evidence presented by the plaintiffs on both issues. Plaintiffs begin their argument on this issue by stating that they have evidence that **[**50]** Kroger intended to sacrifice revenues and recoup losses. This evidence, they say, is both direct and circumstantial.

Plaintiffs argue that intent to monopolize can itself be inferred from Kroger's pricing practices, citing *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981)*. This is simply not the law in the Seventh Circuit. *MCI, supra.* There is no doubt that there are three requirements for proof of an attempted monopoly in the Seventh Circuit.

Plaintiffs next cite various statements of Kroger executives pointing out that Kroger embarked on an aggressive course. Kroger executive Ted Engle is quoted as writing of the need to impress Super Valu. "Needless to say, this will take a significant investment in gross margins and net profit to prevent him (Super Valu) from taking away a substantial portion of our sales. If we can do this, then it is logical to assume that at some point in the future we should be able to move gross margins to a more profitable level." Kroger 1984 Business Plan.

Plaintiffs cite Kroger's Indianapolis market net loss projection for 1984 of eleven million dollars and for that period between 1984 and 1986 as twenty **[**51]** million dollars. Plaintiffs must then wish the Court to infer that Kroger expected to be able to recover its losses by exercising monopoly power since the losses were so high. This argument is in direct contrast to the previously cited expectations of their expert, Dr. Marion, who had no opinion on the level of pricing going above pre-Cub (Super Valu) entry. Plaintiffs are not entitled to a summary judgment defeating inference that since there was a loss Kroger would have recouped it with monopoly pricing. This does not defeat the competing inference that the loss could be recouped by increased profits from increased sales at competitive prices.

Plaintiffs say that the Kroger business plans show gross profits rising from an intent to increase market share. Intent to increase market share by itself is not **[*578]** intent to monopolize. *Ball Memorial Hospital, supra.* *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. They again point out anticompetitor statements. These statements amount to no more than those found by *Lektro-Vend Corp. v. Vendo Co., supra*, to be unharmful without establishing also predatory behavior or a dangerous probability of success:

> "Finally, **[**52]** appellants rely upon various statements made by Vendo officials which are scattered throughout the voluminous record in this case. In the first place, we would not necessarily regard all of the appellants' examples as evidence of specific intent to monopolize. Secondly, while some of the references might arguably support a finding of specific intent if the evidence had established the existence of predatory acts or dangerous probability, we cannot say that the district court's finding of no specific intent was clearly erroneous in light of the plaintiffs' failure to establish these other factors. We agree with the Fifth Circuit's affirmation in *Hayes v. Solomon, 597 F.2d 958 (5th Cir. 1979)* . . . that ***HN25***[] a statement of intent to compete, . . . even if perceived as a threat, is not unlawful. Such a manifestation of intent to triumph in the competitive market, in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish an antitrust violation." *See Agrashell, Inc. v. Hammons Products Co., 479 F.2d 269, 285 (8th Cir.) cert. denied, 414 U.S. 1022, 94 S. Ct. 445, 38 L. Ed. 2d 313 (1973)* (Court attaches little significance to statement that the other **[**53]** party "had no right in the walnut shell business. This is my domain.") *Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971)* (Court characterizes remark that the defendant would drive the plaintiff out of business if it chose to compete as a "manifestation of intent to triumph in the competitive market, [which] in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish a violation of *§ 2*.)" *Lektro-Vend, 660 F.2d at 255*.

Plaintiffs try to find the requisite intent to recoup from Kroger's projections of profit after the building of new stores. Nowhere do plaintiffs maintain that these projections show a pricing structure that would operate independent of a competitive market. At best they show an intent to increase profit through increased market share.

Plaintiffs then wish to infer intent from Kroger's failure to analyze the antitrust implication of their planned actions. Plaintiffs cite *Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250 (E.D.Pa. 1987)*. Therein the Court was aware of such an analysis but was never treated to written copies. Such is not the case at hand. Intent in this instance cannot be inferred plausibly from **[**54]** a failure of antitrust planning.

On the issue of intent plaintiffs' proof fails to override a competing inference that Kroger's behavior was legitimate competitive behavior. Intent cannot be inferred from the pricing behavior nor from the competitive statements of Kroger executives nor from an intent to increase market share.

Plaintiffs finally argue that there was a dangerous probability that Kroger would gain monopoly power and injure consumers. An analysis of that argument shows the same lack of proof as the recoupment issue. They argue that that probability should be inferred from specific intent, the specific intent being inferred from the predatory pricing. There can be no question that "dangerous probability of success" is in fact an independent element of attempted monopoly. *Ball Memorial Hospital, supra*, *Lektro-Vend, supra.* Plaintiffs want a presumed intent from a per se illegal pricing scheme with an inferred dangerous probability of success. The Court rejects that invitation as not meeting the *Matsushita* summary judgment standard. A per se rule not adopted by this Circuit will not support an inference on presumption and thus defeat a summary judgment motion.

Plaintiffs **[**55]** spend quite a bit of time pointing out that Kroger has disciplined **[*579]** competitors and therefore has violated ***antitrust law***. The discipline complained of is no different than the destroying of competitors. ***HN26***[] In order for the behavior to be a violation of *§ 2* it must be done with the intent to control prices and destroy competition so that losses sustained thereby may be recouped by the exercise of monopoly pricing.

The element "dangerous probability of success" requires the analysis previously set out in *Kearney, supra.* It requires an analysis of the market and defendant's ability to succeed in controlling prices above market factors. The market in this case is a retail market. It is a retail market with at least three strong players; plaintiffs, 24 stores, Super Valu (Cub), 4 stores, and Kroger, 33 stores. It is a market with other players, Marsh, 30 stores, Joe O'Malia, 9 stores, Mr. D's, 5 stores, Aldi, 5 stores, and Seven-Eleven, 4 stores. It is a market of which plaintiffs' economic expert, Bruce Marion, said, "There is no evidence that Kroger thought they could prevent Cub from successfully entering . . ." (Marion Aff., para. 21) It is a market in which Super Valu had enormous **[**56]** staying power (Marion

Dep., p. 485). It is a market, accepting plaintiffs' figures, of which Kroger has less than one-half. On this evidence and the statement of Dr. Marion, regarding price levels, it is not plausible to believe Kroger had or has a "dangerous probability of success."

HN27[] Analysis of dangerous probability of success further requires an understanding of the concept of monopoly power. Monopoly power is "the power to control prices or exclude competition." *United States v. E. I. DuPont deNemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. The Supreme Court in *DuPont* went on to say that every seller of nonfungible commodities has "power over the price and production of his own product," but this is "not the power that makes an illegal monopoly." *Id. at 393*. The plaintiffs' evidence on monopoly power comes from Dr. Marion. When asked at pages 50 to 52 of his deposition, "Now is it your position that Kroger has the power to control prices in Indianapolis" he replied, "No." He later said, "I'm not suggesting that Kroger can dictate or control marketwide prices or prices in any trading area just by itself."

In sum, plaintiffs' burden is to present evidence from which a rational **[**57]** trier of fact could conclude that (1) defendant Kroger had the intent to destroy competition and control prices, (2) Kroger committed predatory acts with the intent to injure competition and to recoup losses from elevating prices in a non-competitive market and (3) there was a dangerous probability of Kroger achieving these goals. Plaintiffs' response to defendant's motion for summary judgment is devoid of evidence that Kroger intended to recoup losses from pricing behaviors by doing anything other than increasing market share. Plaintiffs' response is devoid of any evidence that Kroger preyed on competition with the intent to recoup losses by raising profits above competitive levels as no one has suggested that pre-price-war prices weren't competitive or that post-war prices will exceed pre-war prices. Plaintiffs' response is devoid of any evidence that Kroger came dangerously close to acquiring the forbidden monopoly power as there remains a market with at least two strong participants in Kroger and Super Valu and other participants in Marsh's, Mr. D's, O'Malia's, Indiana Grocery and Preston-Safeway, Aldi's and Seven-Eleven.

The Court GRANTS defendant Kroger's Motion for Summary **[**58]** Judgment on Count I for the foregoing reasons.

Having granted the Motion for Summary Judgment of Kroger addressed to Count I, the Court now moves to a consideration of the Motions for Summary Judgment by defendants Kroger, Super Valu Stores, Inc. and Markkay of Indiana, Inc. on Counts II and III of the Amended Complaint.

Count II alleges that Cub Foods and Kroger have engaged in a pricing which plaintiffs characterize as predatory pricing with the intent and/or effect of injuring the plaintiffs and driving them out of business. Plaintiffs complain that that alleged predatory pricing conduct by Cub Foods **[*580]** and Kroger constitutes unfair competition. Plaintiffs further accuse Cub Foods in Count II of engaging in price discrimination with the intent and/or effect of injuring Indiana Grocery and Preston-Safeway and driving them out of business. They allege that that price discrimination constitutes unfair competition. They allege that the unfair competition by defendants has injured their business.

Count III alleges a tortious interference with business relationships and prospective business advantages. Count III alleges that the defendants Cub Foods and Kroger knew or had reason to know **[**59]** that the plaintiffs had valid and established business relationships with their retail grocery customers. It alleges that Cub Foods and Kroger acted with the purpose of interfering with the plaintiffs' prospective advantage in plaintiffs' relationships with their customers. It alleges that no legitimate business reason justified the defendants' predatory pricing. It further alleges that the predatory pricing constitutes tortious interference with plaintiffs' business relationships and prospective business advantages. Finally, it alleges that the plaintiffs lost customers and suffered injury to their business as a result of the defendants' predatory pricing and interference with plaintiffs' relationships with their customers.

It appears to this Court that *HN28*[] Indiana law does not recognize low pricing as a common law tort and this Court will decline to exercise its pendent jurisdiction over the plaintiffs' common law claims.

The pricing scheme of Kroger being complained of in Counts II and III is the same scheme complained of in Count I. The scheme of Super Valu and Markkay is not quite the same. Plaintiffs allege the Markkay store sold its products at below their average variable costs **[**60]** for 4 months and below its average total costs for 14 months. Plaintiffs allege Super Valu caused its products in their Cub Foods' store in the east zone to be sold at below average variable costs for some 45 days and below total costs for 13 months. Plaintiffs allege that Super Valu caused its products in the south zone to be sold at below average total costs for approximately 16 months. As in their argument under Count I, plaintiffs feel a characterization of pricing as predatory carries with it both allegations and beneficial inferences of culpable intent to injure rivals and competition. Indiana courts have rejected this approach.

Plaintiffs in their memorandum rely strongly on the case of *Karges Furniture v. Amalgamated Woodworkers Local Union No. 131, 165 Ind. 421, 75 N.E. 877 (1905)* for the proposition that Indiana law recognizes ***HN29***[] "Underselling can be tortious where its purpose is to injure a rival." A complete statement of the law from the *Karges* case provides:

> "If the same tradesman, singly or with others, advertises his goods, undersells, solicits, and wins away the customers of his rival by false representation, intimidation or artifice, not to better himself, **[**61]** but to injure his rival, he has committed an actionable wrong." 75 N.E. at 779-80.

The gravamen of the tort, therefore, is underselling by means of false representation, intimidation or artifice, not underselling in and of itself. The acceptance of the plaintiffs' use of the *Karges* case at face value would amount to a finding that Indiana law would prohibit one competitor from underpricing another competitor in order to outsell that competitor.

The Court can find no assistance from the plaintiffs' citation to *Indiana State Fair Board v. The Hockey Corporation of America, 165 Ind. App. 544, 333 N.E.2d 104 (1975)*, *vacated on other grounds*, *429 N.E.2d 1121 (Ind. 1982)*. In that case, which does not involve any charge of price cutting, the court explained that the tort of unfair competition is one that applies to claims of passing off and other similar situations involving consumer deceit. *333 N.E.2d at 108*. The Prosser (Prosser, Law of Torts (4th Ed. 1971), hereinafter "Prosser") quotation contained in *Indiana State Fair Board, supra, at 109*, shows his broad concerns, indicating that ". . . where the defendant is not seeking to **[*581]** acquire the business diverted from the plaintiff **[**62]** for himself, but to gratify ill will or further some unrelated interest . . .", the tort claim ought to exist. It appears that Prosser's concern is that the motive of the action by the defendant is important, that the business diverted from the plaintiff is not being sought just to increase the defendant's market share but to gratify ill will or for some further unrelated purpose. Nowhere in the amended complaint is it alleged that the defendant's motive for its pricing in Indianapolis was ill will toward the plaintiffs. To the contrary, the plaintiffs have alleged that Kroger and Super Valu were motivated by profit, not by ill will.

In *Durakool, Inc. v. Mercury Displacements Industries, Inc., 422 N.E.2d 680 (Ind. App. 1981)*, the court announced that:

> ***HN30***[] "the test of unfair competition is whether the acts of the defendant are such as are calculated to deceive the ordinary buyer making his purchases under the ordinary conditions which prevail in the particular trade to which the controversy relates." *Id. at 682, n.3*.

This Court refuses the invitation of the plaintiffs to expand the tort law of the state of Indiana in the discretionary exercise of pendent jurisdiction, there **[**63]** being no allegations of deceit or ill will in plaintiffs' complaint in Count II.

The Court therefore GRANTS Kroger's, Super Valu's and Markkay's Motions For Summary Judgment on Count II of the plaintiffs' Amended Complaint for the same reason.

Plaintiffs have alleged in Count III that the defendants' pricing scheme previously discussed in the Court's opinion amounts to a tortious interference with the plaintiffs' business relationships by the defendants. Plaintiffs contend that a tortious interference with prospective business advantage claim will survive a motion to dismiss if the allegations are either that the defendants' sole motive in causing the interference was a desire to harm the plaintiff or that the means used in effecting the harm were illegal. *Great Escape, Inc. v. Union City Body Co., Inc., 791 F.2d*

532 (7th Cir. 1986) contradicts plaintiffs' position. In Great Escape, at 542-43, the Court reviewed the Indiana law on the nature of the tort, and concluded:

> "We do not believe **HN31**[] a searching analysis only of motive is in most instances enough to send these cases to the jury. There must still under Indiana cases be something 'illegal' about the means employed."

[64]** Citing Prosser, the Court said illegality means "violence or intimidation, defamation, injurious falsehood or other fraud, violation of the criminal law." *Id*.

Plaintiffs have failed to satisfy their pleading requirement in this Count. The Court has already found that defendants did not engage in predatory pricing. Plaintiffs' claim is therefore deficient as it alleges no illegal behavior. All that is alleged is that Kroger lowered its prices. The absense of an allegation of illegal behavior is fatal. There is nothing inherently tortious about reducing prices.

Defendant Kroger Company's, defendant Super Valu Stores, Inc.'s and defendant Markkay's Motions For Summary Judgment on Count III are GRANTED.

In Count IV, the plaintiffs allege that the defendants Super Valu and Markkay are corporations independent of one another and that they are competitors in the Indianapolis market. They allege that by agreement Super Valu controlled the prices of Markkay and that this agreement and the conduct pursuant to it equaled unreasonable restraining of trade to fix prices among competitors in violation of § 1 of the Sherman Act. Defendants Super Valu and Markkay maintain that the plaintiffs, **[**65]** as the competitors of the defendants, have no standing to challenge any alleged agreement to set low prices unless the agreement was to set prices predatorily.

Plaintiffs have responded that because price fixing is illegal per se, they have standing as competitors to recover damages under § 1 of the Sherman Act without a showing that the alleged agreement was predatory. Plaintiffs do not suggest that they are prepared to prove any agreement to set prices at a predatory level. The **[*582]** standard of review for an antitrust summary judgment was discussed by the Court in Count I.

Under the case of Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) **HN32**[] competitors may sue other competitors under the antitrust laws only when their business losses derive from "injury of the type the antitrust laws were intended to prevent. Id. at 489. The antitrust laws are designed to benefit consumers by encouraging low prices, not to protect competitors. Brunswick, 429 U.S. at 488.

The threshold issue in this cause is whether or not a competitor as opposed to the government has standing to attack an agreement to set low prices absent an allegation of predation. This issue has been **[**66]** addressed recently by the United States Supreme Court in Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), and Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986).

In *Matsushita*, a case involving an alleged horizontal price fixing agreement among Japanese manufacturers to sell their goods at low prices in the United States, the Supreme Court made clear what the standard requirement was: "respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief . . . . That showing depends in turn on proof that the petitioners conspired to price predatorily in the American market." Matsushita, supra at 584, n.7 (citations omitted).

Cargill involved a claim by one competitor against two others to enjoin a merger alleging that it was threatened with the possibility that, after the merger, the defendants would lower prices to cost or above cost in an attempt to increase their market share. The Supreme Court analyzed the plaintiff's allegations under two theories of injury:

> "1) a threat of a loss of profits stemming from the possibility that Exel, after the merger, would lower its **[**67]** prices to a level at or only slightly above its costs;
> 2) a threat of being driven out of business by the possibility that Exel, after the merger, would lower its prices to a level below its costs." *107 S. Ct. at 491*.

The Court rejected both theories. As to the first theory, the Court said:

> "*Brunswick* holds that the antitrust laws do not require the court to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *107 S. Ct. at 492* [citations omitted].

The Court rejected the second **[**68]** theory because there was no evidence of predatory pricing.

Herein the plaintiffs admit that no evidence exists of predatory pricing. Their claim is that they lost market share and suffered greater losses than they would have under what they term legal competitive conditions (plaintiffs' Brief In Opposition, p. 54). Therefore, plaintiffs' claim in the instant action is akin to plaintiff's claim in *Cargill*, i.e., loss of market share and profit as a result of defendants' low prices. The *Cargill* quote applies herein. Small businesses are not protected from loss of profits due to continued vigorous competition. The courts do not protect competitors from practices not forbidden by antitrust laws. Loss of market share is not by itself a protected loss.

The issue has been addressed by the case of *Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698 (7th Cir. 1984)*.

[*583] In *Jack Walters* the plaintiff attacked an alleged vertical price fixing agreement to set low but not predatory prices. The court found that Walters did not suffer an injury of the type which the antitrust laws were intended to forbid. The court found that the loss to Walters from lawful price competition **[**69]** was a gain to consumers and stated: "Walters will not be heard to complain about having to meet lawful price competition which ***antitrust law*** seeks to encourage merely because the competition may have been enabled by an antitrust violation." *Id. at 708-09*. The United States Supreme Court also recently addressed this issue in the *Matsushita* case, *475 U.S. 574*.

Plaintiffs argue that the agreement entered into by the defendants was a price fixing agreement which was illegal per se, thus meeting the standing requirement of an injury which the antitrust laws were intended to prevent. The plaintiffs base their argument on *Arizona v. Maricopa Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. In that case the Court found that the maximum fee price fixing agreements entered into by two county medical societies representing approximately 70% of the county's doctors were per se unlawful under *§ 1* of the Sherman Act. The Court there said: "The per se rule 'is grounded on faith in price competition as a market force. " *Id. at 348* (citation omitted). The Court was unpersuaded by the argument that the agreements were alleged to have pro-competitive justifications. *Id. at 351*. However, in the **[**70]** 1987 supplement to their treatise on ***antitrust law***, Areeda and Hovenkamp, whom both plaintiffs and defendants cite frequently in their pleadings and papers, specifically addressed the situation set forth in *Arizona* and said:

> "For example, imagine that physicians agree upon their maximum prices, which the Supreme Court has condemned as per se unlawful because it tampers with the market or because the price fixed might be a disguised minimum. In addition, a maximum price fix can limit the provision of services consumers desire. Suppose that a rival physician attacks the price-fixers and proves that he lost patients who shifted their patronage solely because the defendant physicians offered lower prices. Such injury-in-fact proximately caused by the illegal price fix is not antitrust injury, because protecting high-price suppliers against lower-priced competition desired by consumers is not an injury that the antitrust laws are designed to prevent, nor does it flow from the rationale for condemning maximum price fixing." Areeda & Hovenkamp, ***Antitrust Law***, para. 335.1c at 263 (1987 Supplement) (footnotes omitted).

They went on to note that the only exception to this rule might **[**71]** arise if the prices were fixed at a predatory level. *Id*., n.27. Of course, there is no such allegation of predatory pricing in this Count. In light of this and relying on the recent decisions in *Jack Walters* and *Matsushita*, this Court is not persuaded by the plaintiffs' reasoning and reliance on the *Arizona v. Maricopa County Medical Society* case.

Any injury which the plaintiffs suffered in this case was as a result of lawful price competition, not as a result of anything forbidden by the antitrust laws. The purpose of the antitrust injury standing requirement is to carve out instances where even though there may be an antitrust violation and resulting injury, the allowance of recovery would be inimical to the purposes of the antitrust laws. *Brunswick, supra, 429 U.S. at 488*. Thus, the Court here finds that the plaintiffs have not met the standing requirement and cannot recover for a *§ 1* violation.

Having so found, the Court hereby GRANTS summary judgment to defendants Super Valu and Markkay on Count IV.

In Count V, the plaintiffs allege that the defendants Super Valu and Markkay conspired to monopolize the Indianapolis market and geographic submarkets in violation **[**72]** of *§ 2* of the Sherman Act. In *Great Escape, supra, at 540-541*, the Seventh Circuit Court of Appeals stated that the ***HN33***[] plaintiff must prove the following for a conspiracy to monopolize claim:

> **[*584]** "1) the existence of a combination or conspiracy;
>
> 2) overt acts in furtherance of the conspiracy;
> 3) an effect upon a substantial amount of interstate commerce; and
> 4) the existence of specific intent to monopolize."

The Court went on to state: ". . . the mere intention to exclude competition and to expand one's own business is not sufficient to show a specific intent to monopolize." *791 F.2d at 541*. Here the plaintiffs withdrew their attempted monopolization claim against the two defendants after the plaintiffs' expert concluded that the pricing practices employed by Super Valu and Markkay were not predatory. The plaintiffs have not suggested in their opposition to summary judgment that they will seek to introduce any evidence to support the existence of defendants' specific intent to monopolize. Having failed to satisfy their burden as to an essential element, the plaintiffs' *§ 2* claim must fall.

The Court hereby GRANTS summary judgment to the defendants Super Valu and Markkay on **[**73]** Count V.

Count VI of the plaintiffs' Amended Complaint alleges a civil conspiracy between the defendants Super Valu and Markkay alleging that they have combined and conspired to accomplish unlawful purposes or lawful purposes through unlawful means. Plaintiffs further allege that defendants have conspired to fix their prices and the prices have been predatory and intended to injure competition and defendants' competitors.

HN34[] Indiana law is clear that "there is no cause of action for conspiracy as such." *Indianapolis Horse Patrol, Inc. v. Ward, 247 Ind. 519, 217 N.E.2d 626, 628 (1966)*. "If the complaint is to state a valid cause of action, the plaintiff must allege that the defendants conspired to accomplish an unlawful purpose or a lawful purpose by unlawful means." *Durakool, Inc., 422 N.E.2d at 682*. The unlawful means alleged in this count of the complaint is the price fixing at predatory levels with the intention of injuring competitors. That same allegation provided the basis of the plaintiffs' fourth and fifth counts. Again, ***HN35***[] no Indiana precedent establishes price fixing or predatory pricing as a tort. Such conduct is unlawful only if it violates *§ 1* or *§ 2* of the Sherman **[**74]** Act. The Court rejects plaintiffs' invitation to expand the state law in Indiana not recognized by controlling Indiana precedents.

The Motions by the defendants Super Valu and Markkay for summary judgment on Count VI are therefore GRANTED.

Count VII of the amended complaint alleges essentially the same price discrimination claim that was dismissed by this Court in its entry of June 18, 1986. The Court now GRANTS summary judgment to defendants Super Valu and Markkay on Count VII for the same reasons set out by Judge Barker in her opinion of June 18, 1986, found at *647 F. Supp. 254*.

Boone v. Redevelopment Agency of San Jose

United States Court of Appeals for the Ninth Circuit

January 4, 1988, Submitted ; March 1, 1988, Filed

No. 87-15046

Reporter
841 F.2d 886 *; 1988 U.S. App. LEXIS 2442 **; 1988-1 Trade Cas. (CCH) P67,911

David A. Boone; Stephen P. Fox, Individually and as General Partners of DSC-3 Group, a California Limited Partnership and as General Partners of Market/Post, Ltd., a California Limited Partnership; Dave Goglio; Donald Goglio, individually and as General Partners of Three G's, a California Limited Partnership, Plaintiffs-Appellants, v. Redevelopment Agency of the City of San Jose, a Public Body Corporate and Politic of the State of California; City of San Jose, a Municipal Corporation and Subdivision of the State of California; The Koll Company, a California corporation, Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Northern District of California, D.C. No. CV-84-20772-WAI, William A. Ingram, District Judge, Presiding.

Core Terms

developers, redevelopment, allegations, antitrust, municipal, immunity, parking, downtown, redevelopment plan, public official, city official, anti-competitive, promises, Sherman Act, adjudicatory, state action, blight, amend, city council, regulation, processes, campaign, estoppel, garage, secret, urban, equal protection, building permit, ordinances, authorize

LexisNexis® Headnotes

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

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Standards of Review, De Novo Review**

The appellate court reviews the dismissal of an action for failure to state a claim de novo. Reading the allegations in the complaint in a light most favorable to the nonmovant, and taking all of the allegations in the complaint as being true, the court will affirm only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Exemptions & Immunities, Parker State Action Doctrine

Anticompetitive acts of a municipality that would normally give rise to liability under the Sherman Act are shielded if the municipality acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. Pursuant to this test, the appellate court must undertake a two-part inquiry to determine whether state action immunity applies. The court must first determine whether the state legislature authorizes the challenged actions. Then the court must determine whether the legislature intends to displace competition with regulation. Both elements are prerequisites to proper application of the state action exception to municipal action. A state policy is considered clearly articulated and affirmatively expressed if the statutory provision empowering the municipality's action plainly shows that the legislature contemplates the kind of action complained of.

Governments > Courts > Authority to Adjudicate

Governments > Public Improvements > Community Redevelopment

HN3[] Courts, Authority to Adjudicate

Decisions made by municipalities acting under the California's Community Redevelopment Law, *Cal. Health & Safety Code §§ 33000*-33738, are reviewable in state courts.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN4[] Equal Protection, Nature & Scope of Protection

The standard governing attacks on economic regulations brought under the *equal protection clause* is well established. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions, court decisions presume the constitutionality of the ordinances and require only that the ordinance challenged be rationally related to a legitimate state interest. Similarly, ordinances survive a substantive due process challenge if they are designed to accomplish an objective within the government's police power, and if a rational relationship exists between the provisions and purpose of the ordinances.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

Efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.

Counsel: Herbert F. Kaiser, for the Plaintiffs-Appellants.

Michael N. Khourie and James G. Gilliland, Jr., Khourie & Crew, P.C., for the Defendants-Appellees-San Jose.

David T. Alexander, Jackson, Tufts, Cole & Black, for the Defendant-Appellee-Koll.

Judges: J. Clifford Wallace and Cecil F. Poole, * Circuit Judges, and Robert J. Kelleher, ** District Judge.

Opinion by: WALLACE

Opinion

[*888] WALLACE, Circuit Judge:

Boone and others (developers) appeal from an order dismissing their antitrust and civil rights action against the Redevelopment Agency of the City of San Jose (agency), the City of San Jose, and the Koll **[*889]** Company (Koll). We have jurisdiction pursuant to *28 U.S.C. § 1291*, **[**2]** and we affirm.

I

This case involves a decision by the agency and the City Council of San Jose (council) not to construct a multi-story parking garage at a certain location in downtown San Jose. The agency is a municipal corporation created under California's Community Redevelopment Law, *Cal.Health & Safety Code §§ 33000*-33738 (redevelopment act), for the purpose of facilitating urban renewal in the downtown San Jose area. On November 17, 1978, the council, on recommendation of the agency, enacted a comprehensive plan for combatting urban blight in the city's downtown area. Under the plan, the city was to finance construction of a multi-story parking garage.

The developers are in the real estate business and, pursuant to the city's redevelopment plan, began construction of an office building in downtown San Jose in mid-1983. They allege that they began construction of this building with the understanding that the city would provide them with adequate parking in the proposed downtown parking building. Because of this understanding, the developers did not construct adequate on-site parking.

Koll is also a real estate developer. On March 29, 1984, the council approved an amendment **[**3]** to the redevelopment plan, which allowed Koll to build an office building in downtown San Jose. This amendment required the relocation of the proposed municipal parking garage to the periphery of the redevelopment area. The developers allege that in return for not protesting the amendment, unnamed city officials promised to reserve a section of the relocated municipal parking structure for the developers' exclusive use. Unlike the developers, Koll planned and constructed adequate on-site parking for its building.

The developers allege that after they finished construction of their building, the city reneged on its promise to provide them with parking in the proposed municipal garage. The developers subsequently brought suit against Koll, the agency, and the city which included claims under the Sherman and Clayton Antitrust Acts, *15 U.S.C. §§ 1*, *2*, *16*, and the equal protection and *due process clauses of the fourteenth amendment*, alleging that Koll had conspired with members of the agency and the council to relocate the proposed parking structure and not to give the developers exclusive parking in that structure, in order to force the developers to sell their building **[**4]** to Koll at a bargain price. This "forced sale," in turn, would allegedly have given Koll a monopoly on office space in the downtown San Jose area.

The district court dismissed the developers' initial and first amended complaints with leave to amend. The first two claims for antitrust and civil rights violations in their second amended complaint were dismissed with prejudice for failure to state a claim upon which relief could be granted. *Fed. R. Civ. P. 12(b)(6)*. The pendent claims for promissory reliance and inverse condemnation were dismissed without prejudice so that they could be pursued in state court. The developers then timely filed this appeal from dismissal of the first two claims.

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* Judge Poole was drawn to replace Judge Kennedy. He has read the briefs, reviewed the record, and listened to the tape of oral argument held on 5/13/87, in case No. 86-2506.

** Honorable Robert J. Kelleher, United States District Judge, Central District of California, sitting by designation.

II

HN1[] We review the dismissal of an action for failure to state a claim de novo. *Fort Vancouver Plywood Co. v. United States, 747 F.2d 547, 552 (9th Cir. 1984)*. Reading the allegations in the complaint in a light most favorable to the nonmovant, and taking all of the allegations in the complaint as being true, *see* *Western Reserve Oil & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985)* *(Western Reserve), cert. denied*, *474 U.S. 1056, 106 S. Ct. 795, 88 L. Ed. 2d 773 (1986)*, **[**5]** we will affirm only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*.

We discuss first the claims against the city and agency and then the claim against Koll.

[*890] A.

The city and agency argue that they are immunized from liability by the state action exception from the antitrust laws created in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* (*Parker*). The basis of the state action exception is that the free market principles embodied by the Sherman Antitrust Act must give way to the countervailing principles rooted in federalism and state sovereignty that states must be free to act upon local concerns, even if these actions have anticompetitive results. *See* *id. at 350-51*. This exception was later expanded to protect municipalities in *Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 51-52, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)* (*Boulder*). The Court ruled in *Boulder* that ***HN2***[] anticompetitive acts of **[**6]** a municipality that would normally give rise to liability under the Sherman Act are shielded if the municipality acted pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation. *Id.; see also* *Hallie v. City of Eau Claire, 471 U.S. 34, 39, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)* (*Hallie*). Pursuant to this test, we must undertake a two-part inquiry to determine whether state action immunity applies. We must first determine whether the California legislature authorized the challenged actions of the city and the agency. Then we must determine whether the legislature intended to displace competition with regulation. Both elements are prerequisites to proper application of the state action exception to municipal action.

A state policy is considered clearly articulated and affirmatively expressed if the statutory provision empowering the municipality's action plainly shows that "the legislature contemplated the kind of action complained of." *Hallie, 471 U.S. at 44*, *quoting* *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*. **[**7]**

Applying these principles to the instant case, the city and agency argue that they are immunized because all of their actions were carried out under the state authority of the redevelopment act. The purpose of the redevelopment act was to combat what the state legislature perceived to be a "serious and growing menace" created by blighted areas. Redevelopment Act § 33035(a). Redevelopment agencies, such as San Jose's, were authorized by the redevelopment act to facilitate urban redevelopment. The agencies and the municipalities were granted powers by the redevelopment act as broad as the problem they faced. The redevelopment act declares that it is the policy of the state to eliminate blight "through the employment of all appropriate means," *id.* § 33037(a). To this end, the redevelopment act authorizes municipalities to enact rehabilitation plans, *id.* § 33131(a), zone and rezone and grant exceptions from building regulations and ordinances, *id.* § 33220(d), issue bonds, *id.* § 33341, and condemn property, *id.* § 33342. In addition, the redevelopment act specifically authorizes the redevelopment agency, with city council approval, to "amend or modify" redevelopment **[**8]** plans as necessary to carry out urban renewal, *see* Redevelopment Act § 33450, as was done here. These acts, which are clearly and affirmatively authorized by the California legislature, are precisely the types of activity that the developers challenge. Hence, the activities of the city and agency satisfy the first part of our two-prong test.

Moreover, the nature of activities enumerated in these provisions expresses an intent by the legislature to authorize the city to do a number of things that are clearly anticompetitive. The power to zone and rezone, for example, by its very nature encompasses the power to exclude competition. These "state statutes need not require anti-competitive conduct for the exemption to apply when it is apparent that anti-competitive effects would result from a broad authority to regulate." *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo, 791 F.2d 755, 757 (9th Cir. 1986)*.

We have ruled that similar broad grants of authority alone are sufficient to immunize "virtually any anti-competitive effect," *id. at 758*, which "logically would result from [such] broad authority to regulate." *Id., **[*891]** quoting* **[**9]** *Grason Electric Co. v. Sacramento Municipal Utility District, 770 F.2d 833, 838 (9th Cir. 1985)*, *cert. denied*, *474 U.S. 1103, 106 S. Ct. 886, 88 L. Ed. 2d 921 (1986)*. Accordingly, we conclude that the second part of our test, which requires that we find a legislative intent to displace the free market with state regulation, has been satisfied.

This specific grant of authority, coupled with the broad power to remedy blight discussed above, convinces us that the state legislature "clearly articulated and affirmatively expressed" a policy to permit anti-competitive acts, and that the state legislature contemplated the kind of municipal action about which the developers complain. *See Hallie, 471 U.S. at 39, 44*. Our conclusion is in accord with that of other courts that have considered the state action immunity exception in light of redevelopment statutes similar to California's, which authorize instrumentalities of the state to engage in activities that could have anticompetitive consequences. *See, e.g., Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032, 1048 (2d Cir. 1986)*; *Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984)*, **[**10]** *cert. denied*, *471 U.S. 1003, 85 L. Ed. 2d 158, 105 S. Ct. 1864 (1985)*; *Reasor v. City of Norfolk, 606 F. Supp. 788 (E.D. Va. 1984)*.

Nevertheless, the developers argue that the redevelopment act does not apply because downtown San Jose was not a "blighted area" at the time the city acted. By its own terms, the redevelopment act was intended to promote redevelopment of "blighted areas." Redevelopment Act § 33037(a). Such areas are defined as those that constitute a "serious physical, social, or economic burden on the community" that they "cannot reasonably be expected to be reversed or alleviated by private enterprise acting alone." Redevelopment Act §§ 33030, 33032. According to the developers, the necessary prerequisites to finding blight were absent at the time the city used the redevelopment act to amend the plan. From this, they conclude that the city and agency cannot rely on the statute to immunize their actions.

Because this is an appeal from a dismissal for failure to state a claim, we must assume as true all factual allegations of material fact in the developers' complaint. *See Western Reserve, 765 F.2d at 1430*. Thus, **[**11]** we must assume, as the developers allege, that the council erroneously determined that, at the time of the amendment, its downtown area was eligible for action under the redevelopment act. Nevertheless, it does not follow that the city and agency would be stripped of antitrust immunity merely because they imperfectly exercise their power under state law. A similar claim was made in *Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985)* (*Llewellyn*), where we ruled that Oregon's Worker's Compensation Department was immune from antitrust liability, despite allegations made by a group of chiropractors that the Board had erroneously set reimbursement rates for chiropractic services artificially low. Although *Llewellyn* involved the action of a state agency, and not a municipality, the same concerns that were raised in *Llewellyn* about the role of this court in reviewing decisions by state actors apply to this case:

> "'Ordinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control." . . . A contrary rule would tempt aggrieved parties to forego available state corrective processes in hopes **[**12]** of obtaining the treble damages remedy conferred by the Sherman Act. Here state corrective processes were available, and the aggrieved parties could resort to them.

Id. at 774 (citations omitted).

HN3[] Decisions made by municipalities acting under the redevelopment act are reviewable in state courts. *See, e.g., Berggren v. Moore, 61 Cal. 2d 347, 38 Cal. Rptr. 722, 392 P.2d 522 (1964)*; *Kehoe v. City of Berkeley, 67 Cal. App. 3d 666, 135 Cal. Rptr. 700 (1977)*; *Babcock v. Community Redevelopment Agency of the City of Los Angeles, 148 Cal. App. 2d 38, 306 P.2d 513 (1957)*. The developers have filed suit in state court, **[*892]** seeking review of the city's and agency's action. In this situation, the concerns over federalism and state sovereignty raised in *Hallie* and *Llewellyn* dictate that the developers not be allowed to use federal ***antitrust law*** to remedy their claim that the city and the agency exceeded their authority under state law. They do not forfeit their immunity merely because their execution of the powers granted to them under the redevelopment act may have been imperfect in operation. **[**13]** *See Llewellyn, 765 F.2d at 774*.

The developers next argue that their allegations that city officials acted in bad faith and as participants in a larger conspiracy, if proven, would strip the city of its antitrust immunity. This claim is also controlled by *Llewellyn*. There, we affirmed a summary judgment against the plaintiffs on their antitrust claims, "despite the possibility of improper motivation on the part of [agency officials]," on the grounds that:

> The availability of *Parker* immunity . . . does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it. This must be so if the state action exemption is to remain faithful to its foundations in federalism and state sovereignty. A contrary conclusion would compel the federal courts to intrude upon internal state affairs whenever a plaintiff could present colorable allegations of bad faith on the part of defendants.

765 F.2d at 774.

For the reasons discussed previously, the city and agency were acting pursuant to a clearly articulated and affirmatively **[**14]** expressed state policy to replace competition, and therefore the objective standards set forth in *Parker* and *Llewellyn* are met. The district court properly dismissed the developers' antitrust claims against the city and agency.

B.

The developers' next claim, brought pursuant to *42 U.S.C. § 1983*, alleges that the city and agency denied them their *fourteenth amendment* equal protection, substantive due process, and procedural due process rights. We first discuss their equal protection and substantive due process claims.

The developers base their equal protection and substantive due process challenge on the claim that the city and agency induced them into constructing an office building through promises of providing adequate parking facilities, and then denied them access to such facilities, which were financed in part through tax assessments on the developers' property. Such actions by the city and agency are alleged to have discriminatorily deprived them of economically viable use of their investment and to have unlawfully diverted funds from property tax assessments to Koll's exclusive use.

HN4[] The standard governing attacks on economic regulations **[**15]** brought under the *equal protection clause* is well established. "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions . . . our decisions presume the constitutionality of the [ordinances] . . . and require only that the [ordinance] challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976)*. Similarly, "ordinances survive a substantive due process challenge if they were designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purpose of the ordinances." *Scott v. City of Sioux City, 736 F.2d 1207, 1216 (8th Cir. 1984)*, *cert. denied*, *471 U.S. 1003, 85 L. Ed. 2d 158, 105 S. Ct. 1864 (1985)*; *see Construction Industry Association of Sonoma County v. City of Petaluma, 522 F.2d 897, 906 & n. 11 (9th Cir. 1975)*, *cert. denied*, *424 U.S. 934, 47 L. Ed. 2d 342, 96 S. Ct. 1148 (1976)*.

Here, the developers have not alleged that the interest of the city and agency in urban **[**16]** redevelopment is illegitimate. Such a claim would be patently frivolous. **[*893]** Moreover, the municipality's regulation of parking is facially "rationally related" to the ends of urban renewal. Thus, we find no violation of the developers' equal protection or substantive due process rights.

Nor have the developers stated a claim under the procedural due process clause. To do so, the developers must allege facts from which we can conclude that they had a vested property right to parking in the proposed garage.

Whether a property right exists is determined by state law. The developers allege that they acquired a property right in the original parking structure, either by the city and agency issuing a building permit, or by common-law estoppel. Under state law, however, we find no basis for such a claim of entitlement under either theory.

The developers' reliance on the building permit issued to them by the city is misplaced. In their complaint, they did not allege that the city promised to provide parking in the building permit itself. The complaint states only that the permit was issued after discussions with the city and agency officials concerning the proposed garage. Absent **[**17]** allegations of a specific provision in the building permit requiring the city to provide parking, the permit alone is insufficient to create a cognizable property interest.

The claim that a property interest in the proposed parking facility was created by estoppel is similarly deficient. The developers have cited no case, nor have we found one, to support their claim that a property interest can be created by estoppel under the facts of this case.

We need not reach that issue, however, because even if estoppel could create a property interest under California law, their pleading is insufficient to state a claim for estoppel. The alleged promises on which the developers argue they relied are pleaded in an entirely conclusory fashion. Moreover, the complaint fails to disclose facts which establish that these promises were made by persons with the authority, or apparent authority, so that the developers, as experienced businessmen, would be justified in relying on them. Nowhere in any of their three complaints do they identify who made the promises, or what the person's legal authority, if any, was to make them. Nowhere in their complaint is there an allegation that the council promised **[**18]** them parking. Under the redevelopment act, it appears that such authority is granted only to the council. *See, e.g.*, Redevelopment Act § 33366-67 (city council approval required for redevelopment plan); *id.* § 33368 (decision of city council will be final); *id.* § 33450 (redevelopment plan can be amended only by city council, subject to referendum). In short, the developers plead no facts from which we can infer that their reliance on the alleged promises was in any way justifiable. Absent such allegations, the developers cannot properly assert a claim of estoppel.

III

The developers also brought antitrust claims against Koll, alleging that it conspired with city officials to amend the redevelopment plan, thereby limiting the amount of parking available to the developers, in order to drive down the value of their building. Koll argues, and the district court ruled, however, that Koll's involvement in the alleged conspiracy consisted of legitimate lobbying activities that are immunized from liability by the *Noerr-Pennington* exception to the Sherman Act. In *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* **[**19]** (*Pennington*), the Supreme Court ruled that

> ***HN5***[] Efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.

Id. at 670; *see also* *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* (*Noerr*). A contrary rule, according to the Court, could impede *first amendment* **[*894]** rights to petition the government. *See* *365 U.S. at 137-38*.

In our analysis of this issue, we will first determine whether the activities of Koll are of the type that the *Noerr-Pennington* doctrine seeks to protect and then discuss whether any exceptions to the *Noerr-Pennington* protections apply. Our review of the developers' arguments, however, is guided in part by the fundamental *first amendment* values that the *Noerr-Pennington* doctrine is designed to protect. In order not to chill legitimate lobbying activities, it is important that a plaintiff's complaint contain specific allegations **[**20]** demonstrating that the *Noerr-Pennington* protections do not apply. *See* *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076, 1080-81 (9th Cir. 1976)* *(Franchise Realty), cert. denied*, *430 U.S. 940, 51 L. Ed. 2d 787, 97 S. Ct. 1571 (1977)*. Conclusory allegations are insufficient to strip them of their *Noerr-Pennington* protection. *Id. at 1081*. Although we may be more generous in reviewing complaints in other contexts, our responsibilities under the *first amendment* in a case like this one require us to demand that a plaintiff's allegations be made with specificity. *Id. at 1082*.

A.

The developers' complaint contains four basic allegations against Koll: (1) that Koll "developed close relationships" with city officials; (2) that Koll made "false reports and misrepresentations" to the council concerning the availability of parking downtown; (3) that Koll had "ex parte secret contact[s]" with city officials that culminated in "secret . . . agreements" to amend the redevelopment plan; and (4) that Koll "hired key city officials" and "made direct payments" **[**21]** to city and agency officials.

The first allegation goes to the very heart of the *Noerr-Pennington* doctrine. Successful petitioning of government often depends on the development of close relations between government officials and those who seek government benefits. Indeed, cultivating close ties with government officials is the essence of lobbying. Such conduct certainly falls within the ambit of the *Noerr-Pennington* doctrine.

The same is true of the developers' allegation that Koll misrepresented facts concerning the availability of parking in the redevelopment district. As pointed out by the Court in *Noerr*, attempts to influence public officials may occasionally result in "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information." *365 U.S. at 140*. Such deception, as "reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." *Id. at 145*. While we do not condone misrepresentations, we trust that the council and agency, acting in the political sphere, can "accommodate false statements and reveal their falsity." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1252, 1271* **[**22]** (9th Cir.) (*Clipper Exxpress*), amended, *690 F.2d 1240, 1261 (9th Cir. 1982)*, *cert. denied*, *459 U.S. 1227, 103 S. Ct. 1234, 75 L. Ed. 2d 468 (1983)*.

The developers' allegations of shadowy secret meetings and covert agreements do not take their claim outside of *Noerr-Pennington*. They have not alleged the nature of these secret agreements and secret meetings, nor have they identified the "key city officials" allegedly involved. Moreover, they have not alleged that these activities were either illegal or outside the "traditional protection[s] afforded this activity by the *First Amendment*." *Franchise Realty, 542 F.2d at 1085*. Most notably, the developers did not allege that these activities were perpetrated for reasons other than legitimate petitioning of government.

Even if they had made such specific allegations, the behavior they ostensibly describe falls squarely within the *Noerr-Pennington* doctrine. In *In re Airport Car Rental Antitrust Litigation, 766 F.2d 1292, 1295 (9th Cir. 1985)*, *cert. denied*, *476 U.S. 1141, 106 S. Ct. 2248, 90 L. Ed. 2d 694 (1986)*, we ruled that private meetings **[**23]** between government officials and individuals seeking to monopolize the airport car rental market was a form of advocacy protected **[*895]** by the *Noerr-Pennington* rule. The redevelopment process, by its very nature, allows for ex parte deliberations between decision makers and advocates of a particular view. *See* *In re Airport Car Rental Antitrust Litigation, 521 F. Supp. 568, 588 (N.D. Cal. 1981)* (evidence of a series of ex parte meetings between defendants and public officials resulting in a contract to exclude competitors "prove[s] nothing other than a classic case for application of the *Noerr-Pennington* doctrine"), *aff'd*, *693 F.2d 84 (9th Cir. 1982)*, *cert. denied*, *462 U.S. 1133, 103 S. Ct. 3114, 77 L. Ed. 2d 1368 (1983)*.

The developers' allegations of "payments to" and the "hiring of" key city officials suffer a similar fate. Again, they make these allegations in the most conclusory of fashions. We are not told who, when, how much, or for what purpose. More important, even if these allegations had been made with the requisite specificity, the alleged activities are facially valid. Former government officials are **[**24]** often times hired by organizations seeking to petition government. Their expertise makes them particularly well suited for such a role. Payments to public officials, in the form of honoraria or campaign contributions, is a legal and well-accepted part of our political process. As stated by the Seventh Circuit:

> Clearly, allegations concerning campaign contributions do not convert into a Sherman Act violation conduct which *Noerr* held was not covered by the Act. We do not condone the giving or acceptance of campaign contributions as inducements to support the donor's interests in the legislative process. We merely hold that this conduct was not intended to be covered by the Sherman Act.

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 231 (7th Cir. 1975) (Metro Cable); see also Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 155 F. Supp. 768, 803-04 (E.D. Pa. 1957), *aff'd*, *273 F.2d 218 (3d Cir. 1959)*, *rev'd, Noerr, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* (allegations that competitors made campaign contributions and worked in close liaison with public **[**25]** officials are insufficient to state an antitrust claim).

The developers did not allege that the hiring of, or payments to, the public officials was otherwise illegal. Thus, even if these alleged activities were carried out solely to influence the agency and the council, they fall within the *Noerr-Pennington* doctrine.

B.

That the complained about conduct is the type protected by the *Noerr-Pennington* rule does not end the dispute. Such conduct may be excepted from the protection in certain circumstances. The developers' argument that such exceptions apply will now be considered.

While the developers' brief is far from clear, they appear to contend that we should apply any one of three possible exceptions to the *Noerr-Pennington* doctrine. The first exception that they argue is known as the "sham exception," and is based on a suggestion made by the Court in *Noerr* that when "a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . [then] application of the Sherman Act would be justified." *365 U.S. at 144*. **[**26]** The developers have neither alleged the existence of a publicity campaign nor that Koll was not genuinely seeking official action from the city and agency. Such allegations are necessary to state a claim under this exception. *See Franchise Realty, 542 F.2d at 1080-81*.

The developers next contend that their allegations of misrepresentations, payments to public officials, and "secret backroom dealings" on the part of Koll fall within a second exception to *Noerr* created in *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)* (*Trucking Unlimited*). In *Trucking Unlimited*, the Court ruled that illegal or fraudulent lobbying activities that would normally be immunized **[*896]** by *Noerr-Pennington* lose their protection if they occur in a judicial or quasi-judicial setting:

> 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; **[**27]** *see also Clipper Exxpress, 674 F.2d at 1271*. Our analysis of the developers' claim, therefore, is guided in part by the role played by the agency and the council when the plan was amended and the developers' parking was limited. If the agency and the council were acting as adjudicative bodies, the range of lobbying activities immunized by *Noerr-Pennington* would be much narrower.

We faced a similar situation in *Franchise Realty*. In that case, the plaintiff sued two associations of restaurant and hotel employers which had allegedly conspired to oppose the plaintiff's efforts to secure building permits from the

San Francisco Board of Permit Appeals. 542 F.2d at 1078. We ruled that the Board of Permit Appeals was "as much a political as an adjudicatory body." *Id. at 1079*. Like the Board of Permit Appeals in *Franchise Realty*, the agency and the council have broad discretion to amend the plan, and approve or disapprove of new projects, whenever they deem it is "necessary or desirable" to carry out the ends of redevelopment. Redevelopment Act § 33450. Determination of what is "necessary or desirable" is vested exclusively with **[**28]** the agency and the council. As in *Franchise Realty*, "the absence of more definite standards suggests that the [agency] is as much a political as an adjudicatory body." *542 F.2d at 1079*. Indeed, nowhere in their complaint do the developers specifically allege that the agency and the council were acting as adjudicatory bodies when they carried out the complained of activities. Rather, they alleged that they were barred access to the city's administrative and "legislative" processes.

The developers now specifically contend that the agency and council's decision was adjudicatory. Their reliance on *Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979)*, for this proposition is misplaced. In *Horn*, the court ruled that the approval of a subdivision redevelopment by a planning department that would result in a "substantial" deprivation in the value of adjoining property was an adjudicatory act to which procedural due process protections attached. *Id. at 612*. The court based its holding primarily on the fact that "subdivision approvals, like variances and conditional use permits, involve the application **[**29]** of general standards to specific parcels of real property. Such governmental conduct, affecting the relatively few, is 'determined by facts peculiar to the individual case' and is 'adjudicatory' in nature." *Id. at 614*. The court distinguished this situation from one involving "general rezoning" of a large area, which is more akin to a legislative process. *Id. at 613*; *see also San Diego Building Contractors Association v. City Council, 13 Cal. 3d 205, 208, 118 Cal. Rptr. 146, 529 P.2d 570 (1974)*, *appeal dismissed*, *427 U.S. 901, 49 L. Ed. 2d 1195, 96 S. Ct. 3184 (1976)*. A redevelopment plan and its amendments obviously involve a large area and affects virtually every member of the community. In addition, all amendments to the redevelopment plan must be approved by the city council, which is defined by the redevelopment act as a "legislative body." Redevelopment Act § 33007. Thus, even though proceedings before the agency have some of the trappings normally associated with adjudicatory procedures, all final decisions are made by the council, a distinctly legislative body. Although this case does not require us to **[**30]** draw a bright line between adjudicative and legislative processes, these considerations convince us that, like the Board of Permit Appeals involved in *Franchise Realty*, the agency and council were carrying out essentially legislative tasks in amending the plan.

[*897] The legislative nature of the city's decision distinguishes this case from *Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830 (9th Cir. 1980)* (*Hahn*). There, the plaintiff (Hahn) alleged that the defendant (Codding) had filed a series of frivolous lawsuits solely to interfere with Hahn's attempt to build a shopping center. *Id. at 836*. We applied the *Trucking Unlimited* exception on the grounds that "Codding has invoked the judicial process not once, but thirteen times, in what the Hahn complaint describes as a thus far successful effort to prevent a competitor from entering the marketplace." *Hahn, 615 F.2d at 842*. *Hahn* clearly involves the misuse of judicial and not legislative processes. We conclude that the *Trucking Unlimited* exception to the *Noerr* protection does not apply to the actions of the city and the agency.

The developers' final **[**31]** argument is that because they have alleged that city officials were active participants in the alleged conspiracy, we should apply the so-called "co-conspirator" exception to *Noerr-Pennington*. In *Harman v. Valley National Bank of Arizona, 339 F.2d 564, 566 (9th Cir. 1964)*, a case decided before *Pennington*, we suggested in dicta that *Noerr* might not apply if a public official were a participating conspirator in the alleged agreement to restrain trade. *See id.* This view, however, was repudiated by *Pennington*. As we stated in *Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 342-43 (9th Cir. 1969)*:

> The Supreme Court decisions have eroded the authority of . . . *Harman* . . .
>
> . . . .
>
> *Pennington* held that efforts to influence public officials are not illegal even if part of a broader anti-competitive scheme. *Harman* was based on this view that an attempt to influence an official when part of a larger scheme is subject to the federal antitrust laws.

Thus, *Noerr-Pennington* cannot be circumvented by merely alleging that a government official was involved in the alleged conspiracy. **[**32]** *See also* *Metro Cable, 516 F.2d at 230* (rejecting co-conspirator exception because it would "abrogate" the *Noerr* doctrine).

IV

The developers have been given two opportunities to amend their complaint to state a cause of action against the city and Koll. The allegations made against the city in their second amended complaint fall squarely within the *Parker* state action antitrust exception. Their allegations against Koll consist of activities clearly protected by the *Noerr-Pennington* doctrine. Their civil rights claims are facially deficient. Therefore, the district court's dismissal of the developers' action is affirmed.

AFFIRMED.

Jaffee v. Horton Memorial Hospital

United States District Court for the Southern District of New York

March 2, 1988, Decided

No. 87 Civ. 1842 (CLB)

Reporter

680 F. Supp. 125 *; 1988 U.S. Dist. LEXIS 1596 **; 1988-2 Trade Cas. (CCH) P68,147

Robert M. Jaffee, M.D., Plaintiff, v. Horton Memorial Hospital, John W. Norton, Marvin Corn, M.D., Kenneth Adams, M.D., Edward Fisher, M.D., John Tortorella, M.D., James M. Pierce, the Horton Hospital Eye, Ear, Nose and Throat Department, Arden Hill Hospital, A. Gordon McAleer, Mark Stamm, M.D., Leslie Green, M.D., and the Arden Hill Ophthalmology Department, Defendants

Core Terms

interstate commerce, anti trust law, privileges, staff

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

The Sherman Act may be invoked in a medical staff privileges action if the defendant is shown to be involved in interstate commerce since the alleged restraint on competition would affect interstate commerce.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN2[] **Judicial Officers, Judges**

Rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment. There is no imperative duty to follow the earlier ruling - only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Private Actions, Remedies**

A claim under federal antitrust laws is not established simply by showing that some aspects of a defendant's business have a relationship to interstate commerce. Rather the inquiry must be whether the defendant's activity that has been infected by unlawful conduct can be shown as a matter of practical economics to have a not insubstantial effect on the interstate commerce involved.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Private Actions, Remedies**

Though a price-fixing conspiracy or a group boycotting scheme can be shown as a matter of practical economics to have an adverse effect on the perpetrator's interstate activities, a complaint must allege facts from which it is inferable that the defendant's activities, infected with the particular illegality alleged, are likely to have a substantial effect on commerce.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Private Actions, Remedies**

Even when monopolistic or anticompetitive activity is alleged, a complaint will be deemed insufficient unless some rational factual support for the allegations is offered.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Private Actions, Remedies**

The antitrust laws endure despite vigorous criticism. There is no reason to extend them to activities, such as the delivery of medical care, that their nineteenth century authors surely would have considered purely local, and therefore beyond the statutory scope. Medical practice per se and without more is a local activity.

Counsel: **[**1]** Rochman, Platzer & Fallick, By: Irwin Rochman, for Plaintiff.

Horton, Malvean, Lewis, Sherwin, McDermott & Rosenstein, By: Monte Rosenstein.

Arden Hill: Hayt, Hayt & Landay: By: Aaron R. Cahn.

Stamm & Green: Feinman, Greher & Kave; By: Warren Greher.

Judges: Charles L. Brieant, Ch. J.

Opinion by: BRIEANT

Opinion

[*125] MEMORANDUM AND ORDER

Brieant, Ch. J.

By motion granted on January 13, 1988 and fully submitted on January 29th in this action under the Clayton Act, *15 U.S.C. §§ 15* and *26*, the Sherman Anti-Trust Act, *15 U.S.C. §§ 1* and *2*, and certain provisions of New York State law, defendants move, under *F.R.Civ.P. 12(b)(6)*, to dismiss the complaint of plaintiff Robert M. Jaffee, M.D., for failure to state a claim upon which relief can be granted. For the reasons discussed below, that motion is granted.

Background

Plaintiff is a licensed physician, board certified in ophthalmology and practicing primarily in Orange County, New York. On various occasions from 1983 to 1986, he sought and was denied staff membership or professional privileges at the Elizabeth A. Horton Memorial Hospital ("Horton") and Arden Hill Hospital ("Arden Hill"). Alleging that the denials by Horton were motivated by an impermissible monopolistic motive, rather **[**2]** than by consideration of his ability or character, Dr. Jaffee filed suit against Horton, its President and Chief Executive Officer, John W. Norton, its Vice President of Professional Services, James M. Pierce, and the Horton Eye, Ear, Nose and Throat Department, along with the Department **[*126]** Chairman, Dr. Marvin Corn (the "Horton defendants") in March of 1987.

On August 8, 1987, the Horton defendants moved under *F.R.Civ.P. 12(b)(6)* to dismiss the complaint for failure to state a claim, alleging that the facts described therein were insufficient to establish jurisdiction under the Sherman Act. Thereafter, on October 5, 1987, plaintiff amended his complaint with leave of this Court to include (a) Drs. Kenneth Adams, Edward Fisher and John Tortorella of Horton (also "Horton defendant"), and (b) Arden Hill Hospital, its Executive Director A. Gordon McAleer, and all doctors practicing ophthalmology and enjoying staff privileges at Arden Hill, including specifically but not exclusively Drs. Mark Stamm and Leslie Green (the "Arden Hill defendants").

This Court denied the motion of the Horton defendants to dismiss, granting leave to renew at the conclusion of all pre-trial proceedings. This ruling, **[**3]** made in a brief oral decision announced from the bench, derived at least in part from *Konick v. Champlain Val. Physicians Hosp. Med. Ctr., 561 F. Supp. 700, 710 and n.10 (N.D.N.Y. 1983)*, *aff'd*, *733 F.2d 1007* (2d Cir.), *cert. denied*, *469 U.S. 884, 105 S. Ct. 253, 83 L. Ed. 2d 190 (1984)*, which held in substance that ***HN1***[] the Sherman Act may be invoked in a medical staff privileges action if the defendant is shown to be involved in interstate commerce, since the alleged restraint on competition would affect interstate commerce.

On January 13, 1988 the newly-joined Arden Hill defendants were heard on a motion grounded on the same contentions of fact and law as the Horton defendants' earlier motion. Primarily by reference to the case of *Furlong v. Long Island College Hosp., 710 F.2d 922 (2d Cir. 1983)*, discussed *infra*, the Arden Hill defendants convinced this Court to reconsider whether the law of this Circuit requires more specific pleading of facts showing an effect on interstate commerce, than that provided in Dr. Jaffee's amended complaint. The Horton defendants were permitted to, and did, join the Arden Hill motion on January 27, 1988.

The Court allowed plaintiff's counsel two weeks to respond to these **[**4]** motions, and advised him not to rely on our prior ruling of October 5th. This *caveat* notwithstanding, plaintiff's counsel informed the Court by letter dated

January 19, 1988, that he would merely resubmit his opposing papers from the Horton motion, since "this motion is the same motion, based on the same reasoning and the same cases, which was made previously by defendant Horton Memorial Hospital." Thus, the notice afforded all parties concerning the Court's reconsideration of the motion was sufficient.

Disposition

While this Court is naturally reluctant to alter a pretrial ruling in a pending case, it is empowered to do so. "It is well established that . . . ***HN2***[] rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment." *In re "Agent Orange" Product Liability Litigation, 733 F.2d 10, 13 (2d Cir. 1984)*, *citing, Slotkin v. Citizens Casualty Co. of New York, 614 F.2d 301, 312 (2d Cir. 1979)*, *cert. denied*, *449 U.S. 981, 66 L. Ed. 2d 243, 101 S. Ct. 395, 101 S. Ct. 396 (1980)*. Indeed, "there is no imperative duty to follow the earlier ruling -- only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their **[**5]** affairs." *Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131, 135* (2d Cir.) (L. Hand, C.J.), *petition for cert. dismissed per stipulation*, *352 U.S. 883, 77 S. Ct. 104, 1 L. Ed. 2d 82 (1956)*, *quoted in, In re "Agent Orange" Product Liability Litigation, supra, 733 F.2d at 13*.

We believe it appropriate to reexamine our holding of October 5, 1987 in this litigation in light of the *Furlong* case. That opinion was not noted by this Court or cited by the parties at our October 5, 1987 hearing, and since it does not cite or distinguish the *Konick* case upon which this Court relied, it was not specifically considered. Plaintiff seeks to invoke federal antitrust laws against denial of medical staff privileges. Such ***HN3***[] a claim is not

> "established simply by showing that some aspects of a defendant's business have a relationship to interstate commerce. **[*127]** Rather the inquiry must be whether the defendant's activity that has been "infected" by unlawful conduct can be shown "'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved."

Furlong, supra, 710 F.2d at 926, *quoting, McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 242, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)*, **[**6]** *quoting, Hospital Building Co. v. Rex Hosp. Trustees, 425 U.S. 738, 745, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*.

Our Court of Appeals did not endorse the view of the trial judge in *Furlong* that such a showing could never be made for a claim based on denial of medical staff privileges, but it did concede that such actions are "at the very margin of the Sherman Act's coverage." *Furlong, supra, 710 F.2d at 927*. The panel concluded ***HN4***[] "though we do not doubt that a price-fixing conspiracy or a group boycotting scheme can be shown 'as a matter of practical economics' to have an adverse effect on the perpetrator's interstate activities," a complaint must allege "facts from which it is inferable that the defendant's activities, infected with the particular illegality alleged, are likely to have a *substantial* effect on commerce." *Furlong, supra, 710 F.2d at 927* (Emphasis added).

The *Furlong* Court acknowledged the liberal pleading requirements of *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*, but concluded that "*Conley* permits a pleader to enjoy all favorable inferences from facts that have been pleaded, [but] does not permit conclusory statements to substitute for minimally sufficient factual **[**7]** allegations." *Furlong, supra, 710 F.2d at 927*. Subsequent cases have accepted this view that, ***HN5***[] even when monopolistic or anticompetitive activity is alleged, a complaint will be deemed insufficient unless some rational factual support for the allegations is offered. *See, Seglin v. Esau, 769 F.2d 1274, 1280 (7th Cir. 1985)* (dismissing psychiatrist's complaint for failure to demonstrate "the required nexus with interstate commerce"); *and, Mamakos v. Huntington Hosp., 653 F. Supp. 1447, 1451 (E.D.N.Y. 1987)* ("Because the 'complaint boil[ed] down to the single assertion that [plaintiff's] . . . suspension had an effect on defendant's interstate commerce activities . . . [it was] insufficient to establish the required [jurisdictional] nexus'", *quoting, Seglin, supra, 769 F.2d at 1274*).

The amended complaint in this action contains no facts in support of its allegations of impermissible monopolistic or anti-competitive motive by the defendants. We agree with Judge McLaughlin that the "talismanic invocation of antitrust argot does nothing to cure the amended complaint's failure to set forth facts from which a conspiracy to restrain trade or monopolize might fairly be inferred." **[**8]** *Mamakos, supra, 653 F. Supp. at 1450*.

This case presents an almost classic example of use of the antitrust laws to obtain relief of doubtful social or economic value, which was never contemplated by the 19th Century trustbusters who drafted these laws. New learning in the field of economic behavior has exploded myths of economic conduct upon which the twin concepts of trebled damages and legal fee shifting, so attractive to pleaders, rested. *See*, R. Posner, *Economic Analysis of Law*, at 3; R. Bork, *The Antitrust Paradox*, 225-45 (1978); R. Blair and D. Kaserman, *Law and Economics of Vertical Integration and Control*, 31-36 (1983); P. Areeda and D. Turner, ***Antitrust Law***, paras. 1000-109 (1980). See also, *United States v. American Cyanamid Co., 556 F. Supp. 361 (S.D.N.Y. 1983)*, *aff'd in part, rev'd and remanded in part*, *719 F.2d 558 (2d Cir. 1983)*, *on remand*, *598 F. Supp. 1516 (S.D.N.Y. 1984)*.

Recently, the Supreme Court has twice declined to consider possession of a significant market share indicative of an anti-competitive effect, *U.S. v. General Dynamics Corp., 415 U.S. 486, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)*; *U.S. v. Citizens & Southern Nat'l Bank, **[**9]** 422 U.S. 86, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)*. Yet, ***HN6***[] the antitrust laws endure despite vigorous criticism. This Court perceives no reason to extend them to activities, such as the delivery **[*128]** of medical care, that their nineteenth century authors [1] surely would have considered purely local, and therefore beyond the statutory scope. *See, Marrese v. Interqual, Inc., 748 F.2d 373, 380 (7th Cir. 1984)* ("medical practice *per se* and without more is a local activity", *quoting, Williams v. St. Joseph Hosp., 629 F.2d 448, 454 (7th Cir. 1980)*, *cert. denied*, *472 U.S. 1027, 105 S. Ct. 3501, 87 L. Ed. 2d 632 (1985))*. While federal "*commerce clause*" jurisdiction has expanded greatly since the passage of these laws, *McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)*, the abuses of monopolies and trusts that provoked their passage, to the extent they ever existed, have substantially abated. Thus, our Courts increase the dosage of medicine after the patient is cured.

Recent cases suggest a new realization that federal antitrust litigation is often harmful. *See, e.g., Cargill, Inc. v. Monfort, 479 U.S. 104, 107 S. Ct. 484, 55 U.S.L.W. **[**10]** 4027, 93 L. Ed. 2d 427 (1986)* (showing of loss or damage due to increased competition caused by proposed merger not adequate under § 16 of the Clayton Act, absent allegations of predatory pricing); *Hosp. Corp. of America v. F.T.C.,, 807 F.2d 1381, 1386 (7th Cir. 1986)*, ("The Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws") (collecting cases); *See also, Ball Mem. Hosp. v. Mutual Hosp. Insur., Inc., 784 F.2d 1325 (7th Cir. 1986)*.

Because the amended complaint in this case is insufficient to state a claim under the federal antitrust laws, it is dismissed. The pendent state claims are dismissed without prejudice.

The Clerk shall enter a final judgment.

So Ordered.

Charles L. Brieant, Chief Judge.

End of Document

[1] The "Sherman Act", *15 U.S.C. §§ 1-7*, was enacted July 2, 1890.

[Lancaster Community Hosp. v. Antelope Valley Hosp. Medical Center]

United States District Court for the Central District of California

March 2, 1988, Decided and Filed

CV No. 87-722-WMB

Reporter

1988 U.S. Dist. LEXIS 12689 *; 1988-1 Trade Cas. (CCH) P67,933

LANCASTER COMMUNITY HOSPITAL, Plaintiff, v. ANTELOPE VALLEY HOSPITAL MEDICAL CENTER, et al., Defendants

Core Terms

immunity, hospital district, Antitrust, state action, municipality, cases, anticompetitive, exemption, anti trust law, articulated, argues, regulation, political subdivision, antitrust liability, Cartwright Act, violations, enabling legislation, healthcare provider, local hospital, entities, courts

LexisNexis® Headnotes

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

Governments > Legislation > Statute of Limitations > Governmental Entities

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

In proving that a state policy to displace competition exists, the municipality need not be able to point to a specific, detailed legislative authorization in order to assert a successful state action defense to an antitrust suit. Rather it would be sufficient for a municipality to show that it acts pursuant to a clearly articulated and affirmatively expressed state policy.

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

Governments > Legislation > Statute of Limitations > Governmental Entities

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

The United States Court of Appeals for the Ninth Circuit construes the state action exception to antitrust liability very liberally. So long as the anticompetitive activity is a "foreseeable result" which results logically from a broad grant of regulatory authority to a city, the "clear articulation" requirement of the exception is satisfied.

Governments > Police Powers

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

HN3[] **Governments, Police Powers**

The powers delegated to California hospital districts include: (1) the power to establish, maintain and operate one or more health facilities within or without the district for the benefit of the district; (2) to exercise the right of eminent domain; (3) to do any and all other acts and things necessary to carry out this division. *Cal. Health & Safety Code § 32121* (Supp. 1987).

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

Civil Procedure > Judicial Officers > Judges > General Overview

Governments > Legislation > Interpretation

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

Judges should seek only to determine whether the challenged anticompetitive conduct was contemplated by the legislature when it enacted the statute at issue.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

HN5[] **Elements, Color of State Law**

Most courts essentially ignore any distinction between proprietary and traditional functions of the state.

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

Governments > Legislation > Statute of Limitations > Governmental Entities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Governments > Local Governments > Claims By & Against

HN6[] **Costs & Attorney Fees, Clayton Act**

The Antitrust Act provides that no damages, interest on damages, costs, or attorney's fees may be recovered under federal ***antitrust law*** from any local government. *15 U.S.C.S. § 35*.

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

Governments > Local Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > Governmental Entities

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

The Antitrust Act is designed to protect localities from an increasing number of lawsuits which interfere with their ability to effectively govern.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN8[] **Public Enforcement, State Civil Actions**

The Cartwright Act, *Cal. Bus. & Prof. Code § 16600*, prohibits restraints on trade and anticompetitive conduct generally.

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

Governments > State & Territorial Governments > Claims By & Against

Healthcare Law > Business Administration & Organization > Employment Issues > Employment Discrimination

Governments > Local Governments > Claims By & Against

HN9[] **Protection of Rights, Section 1983 Actions**

For purposes of civil rights claims brought under *42 U.S.C.S. § 1983*, hospital districts are organized under state statutes and therefore are subdivisions of a state. Local hospital districts are "public entities" for purposes of statutes restricting an individual's ability to sue such entities.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Governments > State & Territorial Governments > Claims By & Against

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

HN10[] **Scope, Exemptions**

There are several opinions which hold that the Sherman Act and the Cartwright Act are similar and that Sherman Act cases apply in construing the Cartwright Act. California district hospitals are eligible for immunity from federal antitrust liability under more than one theory.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Settlements > Settlement Offers

HN11[] **Statute of Limitations, Time Limitations**

Failure to provide the required 100-day notice of a claim, which is failure to comply with *Cal. Gov't Code § 911.2* (1980), bars a tort claim.

Opinion by: [*1] BYRNE

Opinion

ORDER GRANTING DEFENDANT ANTELOPE VALLEY HOSPITAL'S MOTION FOR SUMMARY JUDGMENT

WM. MATTHEW BYRNE, JR., UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

Antelope Valley Hospital (AV) is a medical facility located in Lancaster, California and owned and operated by the Antelope Valley Hospital District. Antelope Valley Hospital District was established in 1953 under the California local Hospital District Law. Lancaster Community Hospital (Lancaster) is also a health care provider in competition with AV. Lancaster filed this complaint alleging state and federal antitrust violations and certain state law tort claims.

Lancaster alleges that AV used its position as the only health care provider in the relevant geographic area to offer perinatal services to pressure large insurance carriers such as Maxicare and Blue Cross to send to AV patients requiring inpatient medical/surgical services. Allegedly, AV accomplished this by threatening to make it difficult for the customers of a particular carrier to obtain perinatal services at AV unless that carrier also sent AV a certain portion of its inpatient medical/surgical business.

Lancaster alleges that these and other actions constituted violations **[*2]** of both state and federal antitrust laws. Moreover, Lancaster alleges that in taking the actions it did, AV interfered with its contractual relationships and its prospective economic advantage.

AV moves for summary judgment claiming that it is immune from federal antitrust liability pursuant to the common law state action exemption and under the Antitrust Act of 1984. Moreover, AV contends that it is not liable for state antitrust violations because political subdivisions are immune from such actions. Finally, AV argues that it is immune from state tort claims due to common law immunity doctrines and because Lancaster failed to provide the required statutory notice of its claim.

II. DISCUSSION

A. *Federal Antitrust Claims*

1. State Action Immunity

The Supreme Court most recently discussed state action Immunity in *Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985)*. In that case, the Court squarely faced an issue substantially identical to the one before this Court: whether a municipality's anticompetitive activities are protected by the state action exemption to federal antitrust laws when the anticompetitive activities are authorized, but not compelled, by the **[*3]** state. In *Hallie,* the state of Wisconsin delegated to the City of Eau Claire the authority to construct, alter and repair sewage systems as well as the power to describe, with reasonable particularity, the area to be served.

Determining that the municipality was entitled to the state action exemption from liability under federal antitrust laws, the Court stated:

HN1[] [I]n proving that a state policy to displace competition exists, the municipality need not "be able to point to a specific, detailed legislative authorization" in order to assert a successful [state action, defense to an antitrust suit. Rather, . . . it would be sufficient . . . for a municipality to show that it acted pursuant to a "clearly articulated and affirmatively expressed . . . state policy. . . ."

Id. at 1716-17 (citations omitted). The Court held that pursuant to the powers delegated to the City, the state had clearly articulated a policy to replace competition with regulation in the area of sewer service. *Id. at 1720*. Accordingly, the municipality was immune from damage suits for federal antitrust violations.

The Ninth Circuit has on numerous occasions determined whether a state grant of authority **[*4]** to a municipality was such that it constituted a clearly articulated policy to replace competition with regulation. In *Grason Elec. Co. v. Sacramento Mun. Utility Dist., 770 F.2d 833 (9th Cir. 1985)*, the court held that a municipality which employed anticompetitive techniques, in connection with its administration of a public utility, qualified for state action immunity. The state statute in *Grason* authorized the Sacramento Municipal Utility District to "acquire, construct, own, operate, control or use . . . works for supplying the inhabitants of the district . . . with light [and] power . . . and may do all things necessary or convenient to the full exercise of the powers herein granted" *Id. at 837*. Interpreting the statute, the court found this grant of authority to constitute a clearly articulated state policy to displace competition with regulation. Therefore, the state action exemption immunized the utility district from federal antitrust liability.

HN2[] The Ninth Circuit has construed the state action exception very liberally. In *Springs Ambulance Service v. City of Rancho Mirage, 745 F.2d 1270 (9th Cir. 1984)*, the court interpreted the following language to contain a **[*5]** clearly articulated purpose of replacing competition with regulation: "The legislative body of a city may contract for ambulance service to serve the residents of the city as convenience requires." *Id. at 1273*. The court determined that the anticompetitive acts complained of were "surely within the contemplation of the legislature" when it enacted the code section quoted above. Id.

In a recent Ninth Circuit opinion, *Kern-Tulare Water Dist. v. City of Bakersfield, 828 F.2d 514 (9th Cir 1987)*, the court adopted language from the *Hallie* decision in stating that "[s]o long as the [anticompetitive activity] is a 'foreseeable result' which results logically from a broad grant of regulatory authority to a city, the 'clear articulation' requirement is satisfied". *Id. at 518-19* (quoting *Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713, 1718 (1985))*.

The authority granted by the state to the AV hospital district is at least as broad as that passed upon in the cases discussed above. *HN3*[] The powers delegated to hospital districts include: (1) the power to "establish, maintain and operate one or more health facilities within or without the district for the benefit of the district; **[*6]** (2) to exercise the right of eminent domain; (3) to do any and all other acts and things necessary to carry out this division. *See* *Cal. Health & Safety Code §§ 32121* (West Supp. 1987). While the district is empowered with other authority, the powers listed above appear to satisfy the Ninth Circuit test for "a clearly articulated policy to replace competition with regulation." *See also* *Coastal Neuro-Psychiatric Assoc. v. Onslow Memorial Hosp., 795 F.2d 340 (4th Cir. 1986)* (holding hospital immune from antitrust liability under state action exemption).

Before AV can be protected by state action immunity, this Court must decide whether a hospital district qualifies as a municipality eligible for immunity. While there appears to be no Ninth Circuit authority, the Court concludes that the hospital district does qualify as a municipality for purposes of state action immunity. Faced with facts very similar to those present in this case, a district court in Florida held that a hospital district was immunized by means of the state action doctrine. *Hospital Dev. & Serv. Co. v. North Broward Hosp. Dist., 619 F. Supp. 535, 538 (S.D. Fla. 1985)*; *see also* *Interface Group, Inc. v.* ***[*7]*** *Massachusetts Port Auth., 816 F.2d 9, 13 (1st Cir. 1987)* (listing factors similar to the factors present in this case as making an entity eligible for protection under the state action doctrine). Moreover, in one piece of legislative history, the districts are referred to as political subdivisions of the state. *See* Exhibit A at 35 attached to memorandum in support of motion.

Lancaster raises three points to counter AV's analysis. First, Lancaster asserts that California has clearly articulated a policy of promoting competition among health care providers and therefore could not be said to sanction the anticompetitive activities attributed to AV. Second, plaintiff argues that the Ninth Circuit authorities discussed above are not controlling because they involve authorizing statutes other than the California Local Hospital District Law. Finally, plaintiff argues that those cases involved municipal functions traditionally reserved to the state or local governments, unlike the operation of a hospital.

In an effort to establish that California maintains a policy to promote competition among health care providers, plaintiff points to three recent amendments to the California Local **[*8]** Hospital District Law. These amendments (1) allow hospital districts to transfer assets; (2) allow closed door meetings of hospital district boards of directors; and (3) provide a trade secret exemption for district hospitals. Plaintiff claims that these changes in the law were designed to protect the ability of local hospitals to compete with private health care providers.

Plaintiff's contentions are not well taken. Although in enacting these amendments the legislature recognized that competition existed among health care providers, this is not persuasive evidence that the California legislature did not intend or could not foresee that hospital districts would engage in anticompetitive activities. Moreover, these amendments appear to have been an effort to strengthen the position of district hospitals rather than to announce a policy favoring competition over regulation.

These recent amendments were discussed by a California court in *Yoffie v. Marin Hosp. Dist.,* 193, Cal. App. 3d 743, *238 Cal. Rptr. 502 (Cal. Ct. App. 1987)*. There, the court recognized that the express goal of the amendments was "to enable local hospital districts to remain competitive with non public hospitals." **[*9]** *Id. at 509*. However, the Court did not construe these revisions as signaling a policy in favor of competition. More likely, the legislature determined that where competition did exist, even more authority was required to buttress the position of local hospitals.

More importantly, in *Hallie,* the Supreme Court cautioned trial judges not to engage in searching analysis of legislative history. *Hallie, 105 S. Ct. at 1719* & n.7. Rather, the Court instructed that ***HN4***[] judges should seek only to determine whether the challenged anticompetitive conduct was contemplated by the legislature when it enacted the statute at issue. *Id.* Here, the broad grant of authority clearly indicates that the complained of anticompetitive acts were within the contemplation of the legislature.

Plaintiff's allegation that the Ninth Circuit authority cited does not concern the California Local Hospital District law is not compelling. Courts constantly analogize to cases similar, but not identical, to the case before them. The authority cited above is substantially similar to the present case and the Court finds it persuasive.

Finally, plaintiff argues that state action immunity is only available in situations **[*10]** where the state is performing a function traditionally reserved to the state. In areas traditionally of a proprietary nature, plaintiff argues that the doctrine should not apply. Plaintiff cites no Ninth Circuit authority to support this proposition. He relies on two points: (1) that the authority defendant cites concerns functions traditionally performed by the state; (2) an except from Professor Areeda's treatise on ***antitrust law*** supporting such a dichotomy. With respect to the Ninth Circuit, plaintiff cites no authority specifically recognizing the dichotomy he wishes this Court to adopt. Moreover, Professor Areeda noted that the majority of the Supreme Court has rejected this dichotomy. Additionally, ***HN5***[] most courts have essentially ignored any distinction between proprietary and traditional functions of the state. *Wall v. City of Athens, 663 F. Supp. 747, 761 (M.D. Ga. 1987)*; P. Areeda & H. Hovenkamp, ***Antitrust Law****,* at 93-94 (Supp. 1986); *see also* *Garcia v. San Antonio Metro. Transit Auth, 105 S. Ct. 1005 (1985)* (rejecting distinctions between traditional and integral governmental functions when determining state immunity from federal regulation under the *Commerce Clause*).

[*11] From the broad grant of authority delegated to the hospital districts, the Court finds that AV is immune from liability under the state action exception to federal antitrust laws.

2. Antitrust Act of 1984

HN6[] *The Antitrust Act provides that "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under [federal* ***antitrust law****] from any local government. . . ." 15 U.S.C. § 35 (Supp. 1987). In Palm*

Springs Medical Clinic Inc. v. Desert Hosp., 628 F. Supp. 454, 456-64 (C.D. Cal. 1986), the district court exhaustively analyzed the legislative history surrounding the Act. Concluding that a hospital district was immune from antitrust liability under the Act, the court dismissed the federal antitrust claims against a district hospital. Id. at 464

Plaintiff argues that the Antitrust Act should not apply to AV because it has failed to comply with its enabling legislation by engaging in profit making activities. Plaintiff cites a number of cases it contends support the proposition that a party must establish strict adherence to its enabling legislation to secure the benefits of any exemption associated with that legislation. Plaintiff's cases do not support that **[*12]** proposition and its contention is not well taken.

Plaintiff initially cites Wall v. City of Athens, 663 F. Supp. 747, 760 (M.D. Ga. 1987). In *Wall,* what the court held was that the municipality's conduct was not foreseeable from the state's grant of authority. It did not hold that because the municipality violated its enabling legislation, it lot its antitrust immunity. Plaintiff's other citations are equally unpersuasive. In those opinions, courts applied antitrust laws to certain activities which fell outside the parameter of exempted conduct. *See* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960); Board of Trade v. ICC, 646 F.2d 1187 (7th Cir. 1981). These cases do not involve situations where an entity allegedly violated its enabling legislation.

Moreover, plaintiff's argument was explicitly rejected in Palm Springs, 628 F. Supp. at 459 n.4. As that court observed, **HN7**[] the Antitrust Act was designed to protect localities from an increasing number of lawsuits which interfered with their ability to effectively govern. Allowing plaintiffs to sidestep the antitrust exemption **[*13]** by finding violations of enabling legislation would inhibit a municipality in the performance of its function and would defeat the purpose of the Act. Plaintiff's argument is unsupported by case authority and inconsistent with the goal of the Antitrust Act.

For the above reasons, the Court finds that AV is insulated from antitrust liability under the Antitrust Act of 1984. [1]

B. *State Antitrust Claims*

AV argues that it is immune from liability under the Cartwright Act [2] pointing to a number of cases which held that political subdivisions are so immune. Blank v. Kirwan, 39 Cal. 3d 31, 322-23, 216 Cal. Rptr. 718, 725, 703 P.2d 58 (Cal. S. Ct. 1985). Defendant, however, correctly notes that no California case has addressed the issue whether a hospital district qualifies as a political subdivision for purposes of the Cartwright Act.

[*14] AV cites cases in which courts have, in other contexts, treated hospital districts as political subdivisions or government entities. For example, in Heath v. Redbud Hospital District, 436 F. Supp. 766, 768 (N.D. Cal. 1977), the court determined that **HN9**[] for purposes of civil rights claims brought under 42 U.S.C. § 1983 hospital districts were organized under state statutes and therefore were subdivisions of a state. Other cases have found local hospital districts to be "public entities" for purposes of statutes restricting an individual's ability to sue such entities. Lutz v. Tri-City Hosp., 179 Cal. App. 3d 807, 224 Cal. Rptr. 787 (Cal. Ct. App. 1986); *see also* Cal. Health & Safety Code § 32492 (West 1973).

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[1] Although the Court need not reach the issue, it believes there are serious questions as to whether AV actually violated its enabling legislation.

[2] **HN8**[] The Cartwright Act, found at ***California Business and Professions Code Sections 16600***, prohibits restraints on trade and anticompetitive conduct generally. Although the California Supreme Court initially determined that the Cartwright Act did not apply to the medical profession, the court reversed itself in a later opinion. See Cianci v. Superior Court, 40 Cal. 3d 903, 16-25, 221 Cal. Rptr. 575, 582-87, 710 P.2d 375 (1985), *overruling* Willis v. Santa Ana Hosp. Assoc., 58 Cal. 2d 806, 26 Cal. Rptr. 640, 376 P.2d 568 (1962).

Also, ***HN10***[] there are several opinions which hold that "the Sherman Act and the Cartwright Act are similar and that Sherman Act cases apply in construing the Cartwright Act." *Derish v. San Mateo-Burlingame Bd. of Realtors, 724 F.2d 1347, 1350 (9th Cir. 1983)*, *disapproved on other grounds,* *Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985)*; *Palm Springs, 628 F. Supp. at 466*; *Rosack v. Volvo of Am. Corp., 131 Cal. App. 3d 741, 751, 182* ***[*15]*** *Cal. Rptr. 800 (Cal. Ct. App. 1982)*. As the Court has concluded above, district hospitals are eligible for immunity from federal antitrust liability under bore than one theory. The Court considers this persuasive in deciding whether hospital districts are eligible for immunity for state antitrust violations.

The Court believes that when faced with the issue, California courts interpreting the Cartwright Act will hold that local hospital districts qualify as political subdivisions for purposes of immunity from state antitrust claims. Accordingly, the Court grants AV's motion for summary judgment with respect to plaintiff's Cartwright Act claim.

C. *State Tort Claims*

AV contends it is immune from tort liability under the California Tort Claims Act. *Cal. Gov't Code §§ 815*, *815.2*, *820.2* (West 1980). Plaintiff argues that immunity under the Act accrues only if the acts complained of are discretionary acts. While this may be true for vicarious liability under *sections 815.2* and *820.2* of the Government Code, it is not the rule where, as with the present case, plaintiff alleges direct liability. Additionally, the actions complained of here are more properly characterized as "planning" **[*16]** rather than operational" and should therefore be considered discretionary. *H & M Assoc. v. City of El Centro, 109 Cal. App. 3d 399, 406-07, 167 Cal. Rptr. 392, 397 (Cal Ct. App. 1980)*.

Finally, Lancaster failed to provide the required 100 day notice of its claim. *Cal. Gov't Code § 911.2* (West 1980). ***HN11***[] Failure to comply with this statute bars the claim. *Lutz v. Tri-City Hosp., 179 Cal. App. 3d 807, 224 Cal. Rptr. 787 (Cal. Ct. App. 1986)*. Plaintiff offers three reasons why the Court should ignore the notice requirements (1) AV had actual notice of the tort claims; (2) AV hospital did not raise the 100 day requirement in its Answer; (3) AV hospital has rejected a settlement offer from plaintiff. However, plaintiff offers no authority which allows a Court to set aside the 100 day limit let alone setting it aside for the reasons stated above.

Accordingly, the Court grants defendant's summary judgment motion with respect to plaintiff's state law tort claims.

III. CONCLUSION

Defendant's motion for summary judgment is granted in its entirety.

DATED: March 2, 1988

End of Document

United States v. Western Elec. Co.

United States District Court for the District of Columbia

March 7, 1988, Decided ; March 7, 1988, Filed

Civil Action No. 82-0192

Reporter

714 F. Supp. 1 *; 1988 U.S. Dist. LEXIS 3066 **; 1988-1 Trade Cas. (CCH) P67,918

United States of America, Plaintiff, v. Western Electric Company, Inc., et al., Defendants

Core Terms

information service, transmission, providers, storage, gateway, decree, electronic, consumers, telephone, directories, retrieval, Pages, users, videotex, capabilities, functions, network, generation, technology, manipulation, billing, parties, protocol, infrastructure, monopoly, restrictions, conversion, effective, markets, reasons

LexisNexis® Headnotes

Communications Law > ... > Regulated Entities > Telephone Services > General Overview

HN1[] **Regulated Entities, Telephone Services**

The employment of various infrastructure components is necessary to an effective information gateway.

Communications Law > ... > Regulated Practices > Content Regulation > General Overview

HN2[] **Regulated Practices, Content Regulation**

Service menus of the information providers are a matter of editorial control, closely interrelated with information content.

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

HN3[] **Regulated Industries, Communications**

It is of course a fundamental principle of jurisprudence that the antitrust laws protect competition, not competitors. These laws seek to foster competition by increasing the number of providers in the marketplace and thereby allowing the consumer, through demand for services, to select the winning firm.

Judges: Harold H. Greene, United States District Judge.

Opinion by: [1]** GREENE

Opinion

[*2] HAROLD H. GREENE, UNITED STATES DISTRICT JUDGE

Under the terms of the decree, [1] the Regional Companies are prohibited from providing "information services." *AT&T*, 552 F. Supp. at 227. An information service is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications." *Id.* at 229. On September 10, 1987, the Court stated that it was prepared to exempt from the information services restriction the transmission of information generated by others, and it invited the parties and intervenors to submit proposed orders and memoranda detailing with particularity the necessary ingredients of an information transmission system. *United States v. Western Electric Co., Inc., 673 F. Supp. 525, 597 (D.D.C. 1987)* (hereinafter referred to as "Opinion, 673 F. Supp."). A total of some 59 organizations and individuals have filed comments, a number of them several documents (including responses, replies, and the like).

[2]** As the Court has had occasion to indicate before, unlike the interexchange and manufacturing issues, which are largely open and shut, the information services questions are closer and more debatable. After carefully considering the matter once again, the Court, for the reasons elaborated on below, has made the following decisions, based upon competitive considerations and upon issues of public policy relating to the economic and social benefits that may be derived from a substantial expansion of information services.

First, the Regional Companies will be permitted to engage in the transmission of information, but the generation of information content, one of the core ingredients of the decree growing out of the *AT&T* case, will continue to be prohibited. Second, for the present, the transmission system to be used will be that delineated in the Court's September 10, 1987 Opinion; however, the Regional Companies may freely develop and use differing applications of that system. Third, the Regional Companies will be allowed to employ alternative transmission systems as and when they are able to propose methodology **[*3]** that will in practice preserve the content-transmission dichotomy. Fourth, **[**3]** the Regional Companies will be permitted to enter the voice storage and retrieval markets.

In brief, the Court's decision combines the grant of wide flexibility to the Regional Companies with respect to transmission systems and voice storage applications, with a continued prohibition on the generation and manipulation of information content. It is the Court's expectation that this easing of the information services restriction will avoid anticompetitive effects, and that it will at the same time bring this nation closer to the enjoyment of the full benefits of the information age.

I

Need for Retention of the Restriction on the Provision of Information Content

In the consideration of the papers filed with the Court, it is useful, first of all, to consider, most broadly (1) what it is that the Regional Companies must continue to be prohibited from doing and why, and (2) what segment of the information services market may now be opened to them.

The comments from several Regional Companies indicate that they may not have adequately understood the reasons for the line of business restrictions in the decree. Arguments are advanced again and again that, if only the companies were allowed **[**4]** to enter the markets forbidden to them under the decree, they would be able to innovate unlike independent corporations in the same markets, and that they would be able to improve America's

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[1] *United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982)*, *aff'd sub nom.* *Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983)* (hereinafter referred to as "*AT&T*, 552 F. Supp.").

foreign trade position, competing vigorously and effectively with foreign manufacturers and other providers. There are two major reasons why these recurring arguments are not well taken.

At the most elementary level, the Regional Company contentions are irrelevant: the decree provides in so many words that the restrictions [2] "shall not be removed unless any particular Regional Company makes a showing . . .. that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." Section VIII(C) of the decree.

In the context of the triennial review of the decree, [3] the Regional Companies supported the Department of Justice motion for, *inter alia*, a complete removal of the restriction on the provision of information services, without distinction between content and transmission. The Court found, however, that the Regional **[**5]** Companies continue to possess bottleneck control over the local exchange facilities, [4] and that information services are especially vulnerable to even slight manipulation and discrimination by the entity providing transmission. Opinion, 673 F. Supp. at 562-67. Because the requirements of section VIII(C) had not been met, the Court concluded that the restriction on the sale by the Regional Companies of information content must be maintained. *Id. at 567*. The situation is thus unchanged and, inasmuch as the Regional Companies are unable to make the requisite section VIII(C) showing, they continue as a matter of law to be bound by the section II(D)(1) restriction.

[6]** **[*4]** In any event, it is wholly unlikely that the removal of the restrictions would lead to a flowering of research and of more and better competition with foreign producers.

In the first place, the Regional Companies have no experience with the generation of information. The production of and changes in the form of information are the province of hundreds of professions, occupations, and trades, from book publishers to stock market analysts to the providers of theater and music admission tickets. Those involved in these businesses possess the necessary expertise; the Regional Companies do not. It would be absurd to lift the restriction on the provision of information content based on the theory that the Regional Companies know more about and are better able to capitalize on these businesses than those who have made these endeavors their lives' work.

Furthermore, the Regional Companies are not needed in these aspects of American business; they could flourish therein only if they used their telecommunication monopolies to disadvantage competitors in these markets; and their participation therein merely because they are in the business of transmission would be an aberration. [5]

[7]** Furthermore, an entry of the Regional Companies into the content-generation markets would be positively harmful. Experience has shown that there is less innovation and hence less effective competition with products manufactured abroad when the significant players in the American market are monopolists than when the

[2] This includes the restriction on the provision of information services in section II(D)(1) of the decree.

[3] At the time the decree was entered, the Department of Justice agreed to report to the Court every three years concerning the continuing need for the restrictions imposed by the decree. *See AT&T*, 552 F. Supp. at 195. The first such report was submitted on February 2, 1987. After consideration of that filing, the responses of parties and intervenors, and three days of oral argument, the Court issued the Opinion referred to at p. 2, *supra*, granting in part and denying in part the Department's motion.

[4] For example, the Court found, based on the studies of the Department of Justice's own expert, that only one-tenth of one percent of inter-LATA traffic volume, generated by one customer out of one million, is carried through non- Regional Company facilities to reach an interexchange carrier. Opinion, 673 F. Supp. at 540. The local monopolies in the various areas where the Regional Companies operate are thus virtually as tight as they were in 1982 when the decree was signed, when the restrictions were first imposed, and when the same bottleneck monopolies were controlled by the Bell System.

[5] Interestingly, the French Teletel (*see infra*) operates quite successfully as a transmission system that (1) transmits requests from subscribers for information and (2) furnishes requested material from independent information providers to the requesting parties. Teletel's absence from the information content market is not compelled, as here, by an antitrust judgment, but the French creators of their system must have known that to make the telephone company a potential competitor for every provider of information in France could only have had disastrous consequences.

participants are free of monopoly pressure and thus have the incentive that exists, in a market characterized by vigorous and broad competition, to lower price and to offer better products. [6]

[8]** The American economic system proceeds on the basis of the assumption -- closely related to the assumption underlying our political system -- that competition is far more likely to lead to the production of more and better products and their distribution to consumers at affordable prices than a market dominated by a monopoly, whether governmental or corporate. In fact, as the Court has previously noted, [7] more new and innovative telephone products have appeared on the shelves of this country's retailers in the four years since divestiture than in the preceding twenty. It is ironic that, at the very time that several of America's opponents -- *e.g.*, the Soviet Union and the Peoples Republic of China -- have finally learned and have begun to implement the lesson that competition is superior to monopoly, [8] **[**9]** some of the largest American corporations [9] have been **[*5]** successful in persuading the Department of Justice that a return to monopoly, their monopoly, is in the public interest.

In brief, even if the legal barrier of section II(D)(1) of the decree were not crystal clear, there would be no warrant for a removal of the restriction on the provision by the Regional Companies of the content of information services, one of the core restrictions of the decree. That restriction will accordingly remain.

II

Removal of the Restriction on Information Transmission

In its analysis of the restriction on information services, the Court recognized last fall that substantially different considerations govern Regional Company entry into the transmissions aspect of information services, also known as information gateway services, [10] than would their participation in the market for the compilation, origination, or manipulation of information. Opinion, 673 F. Supp. at 587-97. The potential for anticompetitive behavior by the Regional Companies with respect to transmission only is very much limited, if only because, in the absence of their participation in the generation **[**10]** or manipulation of content, these companies have little incentive for discrimination against competitors in the information market.

Moreover, broad public policies in addition to those stemming from ***antitrust law*** favor the elimination of the restriction on transmission. [11] The Court has previously found that the efficient, rapid, and inexpensive

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[6] For example, the Court found with respect to manufacturing, where there has been four years of experience in a competitive market to compare against the market dominated by the Bell System monopoly, that "there has been a flowering of research, development, innovation, introduction of new products, and quality assurance; new firms have entered the market; prices of equipment have declined dramatically (according to some by as much as fifty percent in some categories); and competition flourishes in a market that had seen relatively little of it before. The equipment market now consists of some six or eight very large firms, one to two hundred medium-sized firms, and hundreds of still smaller, vigorous and inventive firms, some of them in profitable relationships with one or more of the Regional Companies." Opinion, 673 F. Supp. at 560 (footnotes omitted).

[7] Opinion, 673 F. Supp. at 601 n.330.

[8] For reasons similar to those that led to the AT&T divestiture, other nations, *e.g.*, the French, British, and Japanese, have also begun the process of transforming their telecommunications industry into a competitive one on the American model. *See Washington Post*, "Japan's Phone Monopoly Goes Private," April 1, 1985, section A12; *CommunicationsWeek*, "New Initiatives in France, Germany May Open Telecom Markets," September 21, 1987, at 1.

[9] In terms of assets, seven out of twenty of the largest corporations in the United States are the regional telephone companies. In terms of sales, all seven Regional Companies rank in the Fortune 50.

[10] The networks in which these services are performed are also sometimes referred to as value-added networks (VANS).

[11] In its approval of the decree in this case, the Court took account of such public policies as the congressional expectation of universal telephone service and the desirability under the *First Amendment* of achieving diversity in the sources of public information. *AT&T*, 552 F. Supp. at 183, 191-94; *see also* Opinion, 673 F. Supp. at 583-87.

dissemination of specific information as called for by individuals in all segments of the population will benefit the nation and its economy. Opinion, 673 F. Supp. at 589-90. The Court now reaffirms and underlines that finding.

The videotex [12] industry, which has the potential for furnishing wide varieties of information, as needed or wanted, to large segments of the population, **[**11]** has grown only slowly. This is so particularly with respect to the home videotex market. The fact is that, unlike in some foreign countries, consumer-oriented videotex services on a substantial scale remain largely in the future in the United States. Opinion, 673 F. Supp. at 587-88. [13]

[12]** Yet if consumer-oriented videotex services were made available on a large scale, the economic and social welfare of the American people could be substantially advanced. It is difficult to overestimate the significance of this potential. Information services, as the experience of existing domestic providers and with the foreign systems has shown, can come in an amazing **[*6]** scope and variety. [14] If developed to their full potential, these services could in some ways revolutionize American intellectual, social, cultural, and economic life.

[13]** In a practical sense, the pervasive services network necessary to create a large and vigorous nationwide market is unlikely to develop without the participation of the Regional Companies. [15] Because of their presence everywhere and their relationship with every user of the telephone, only these companies would be able to furnish the necessary infrastructure components for the distribution of efficient videotex services on an integrated basis; at a minimum they could furnish these components more easily and at less cost than other potential suppliers. Opinion, 673 F. Supp. at 591.

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[12] The term "videotex" refers to a great variety of easy-to-use interactive data services. According to the Huber Report submitted by the Department of Justice in connection with the triennial review, "videotex arranges information in a text or graphic format on a video display with user input through a keyboard." P. Huber, "The Geodesic Network: 1987 Report on Competition in the Telephone Industry," (hereinafter referred to as the "Huber Report") at 1.29 n.46. The Department has asserted that the Huber Report formed the principal factual basis for its position in this Court on the decree restrictions.

[13] Indeed, several efforts to provide videotex services have failed. In March 1986, Knight-Ridder Newspaper Inc.'s viewtron service, which provided home subscribers in several markets with news, stock prices, and shopping information, folded without having made a profit. Around the same time, the Times Mirror Company's gateway videotex services closed down after losing approximately $ 30 million. *Washington Post*, "Videotex's Timing is Questioned," March 20, 1986, section E1. However, Compuserve, Inc., a videotex provider, claims to have 375,000 subscribers to its consumer information services at the present time, offering 1,100 consumer information services and data bases.

[14] The Court last fall listed some of the potential information services, as follows:

> Without attempting to be exhaustive, the following lists some of the more obvious videotex-related economic services that exist elsewhere and that might be made available in this country: (1) in banking, videotex could give customers direct and immediate account information and fund transfer capability; (2) in brokerage, there could be instant evaluation of current portfolios and access to alternative investment opportunities; (3) with respect to customer service by a variety of business enterprises, arrangements could be made for immediate access to information about outstanding balances, order fulfillment, accrued interest, and the like; and (4) with respect to shopping services, videotex could provide direct and immediate access to the prices and descriptions of a wide range of products and services that could be purchased electronically.
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> Outside the economic sphere, videotex is used in France, and could presumably be applied in the United States, for such services as (1) travel information, restaurant reviews and reservations, hotel and rental car information, and airline schedules; (2) instantaneous access to ticketing for sports, musical, cultural, and entertainment events; (3) information concerning meetings of associations, including schedules, performers, and speakers; (4) social messaging; (5) access to federal and local governmental information; (6) language instruction; (7) reprints of newspaper and magazine articles; and (8) employment services.

Opinion, 673 F. Supp. at 589-90 (footnotes omitted).

[15] In this respect, the transmission of information services is unlike the provision of information content, telecommunications manufacturing, and long distance services -- all of which can and do function exceedingly well without Regional Company participation.

To be sure, some of the requisite services can be and currently are being provided through the customer premises equipment market, [16] and through existing independent videotex suppliers. What is missing, however, is the easy access, both for the providers of information services and for consumers, to a vast, pervasive system that only the **[**14]** local telephone companies, operating in every state of the Union, can readily supply. It is only on that basis that the mass market can be created that will allow information services to become available and used on a truly national basis. [17]

Beyond that, while entry of the Regional Companies into information gateway services entails some risk to fair competition, such entry, by a group of companies which collectively serve practically every business and household in the country, may actually lead to an increase in competition, as awareness of the services and their potential grows, and as the customer base becomes much more widespread.

Having weighed the wide benefits potentially accruing to the American economy and its consumers against the narrow likelihood of monopolistic behavior on the part of the Regional Companies were they to be permitted to enter [18] the transmission market, the Court concluded on September 10, 1987, that a limited relaxation of **[**15]** the information services restriction was warranted. It is on this basis that the Court announced its intention to modify the decree pursuant to section VIII(C) so as to permit the Regional Companies to compete for the provision of transmission facilities to the information **[*7]** services industry, and that it invited comments from interested parties and intervenors with respect to modes of implementation. Opinion, 673 F. Supp. at 597. Having received and considered these comments, the Court sees no reason to alter its view on the fundamental question at issue.

The Court was and is an enthusiastic supporter of large-scale information services for the benefit particularly of individual consumers and small businesses. Members of these groups will be able to partake of these revolutionary new services only if a mass market therefor is established, while vast commercial enterprises generally have access to such services now.

The decree in this case has been responsible for a number of favorable developments: long distance rates have dropped substantially; **[**16]** [19] the price of telephone equipment has similarly been reduced; [20] innovations in telephone equipment available to the average person have appeared on retail shelves in astounding numbers and configurations; [21] and although the Regional Companies, which retain their local monopolies, initially raised local rates, that increase appears to have been largely halted during the current year.

[17]** Now would appear to be the time for adding to the achievements built on the competitive market established by the decree a system of broad-based, efficient, reasonably-priced information services available to all who want them. On this basis, the Court will rescind the restriction on the provision of information services in section II(D)(1) of the decree insofar as the transmission of such services is concerned. What remains to be discussed are the specific applications of this decision.

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[16] *See* Reply of Hayes Microcomputer Products, Inc., at 4.

[17] Whether such a mass market will actually be created will depend of course on the organizational, technical, and marketing skill of the Regional Companies.

[18] Under the decree as it now stands, the Regional Companies may not perform most of the "gateway" functions necessary to information transmission.

[19] The decrease in rates nationally is estimated at thirty-five percent since divestiture in 1984.

[20] Prior to the AT&T divestiture, the Bell System furnished telephones to subscribers only on the basis of an unending monthly rental, without any opportunity for purchase. Now telephone instruments are available for sale in all colors, shapes, and degrees of sophistication, at prices amounting to a small fraction of the total amount of the overall rental fees.

[21] To cite only the most obvious, features such as automatic call repetition; one-button calling for dozens, even hundreds, of numbers; cordless phones; phones that respond to verbal commands -- all of them non-existent or exceedingly rare just three or four years ago -- are now commonplace in many households. Mobile phones in automobiles and airplanes are fast coming to match the ubiquity of these features.

III

The Teletel System

In its September 10, 1987 Opinion, the Court relied heavily upon the description of the services provided by Teletel, the French videotex system, in reaching conclusions about the feasibility and the likely structure of information services in the United States. This was so largely because the French system was and is the best known, the most widespread, and the one technologically most advanced, at least on a large scale basis. Moreover, Teletel had been supported by various parties to this litigation as an example of the technological benefits the Regional Companies could supply if the decree restrictions were relaxed. U.S. West especially [22] called the Minitel network "the **[**18]** model upon which we would build" the American system. [23] That company also repeatedly touted the French experience as representing the cutting edge of the Information Age. [24]

However, the French experience is merely one of the possible permutations that a coherent information services network **[*8]** in this country might take. In the first place, the United States is not France. **[**19]** This country, unlike France, has a healthy and growing personal computer market with which direct interaction will be possible. Also, there has been here some movement into the information services field by non-telephone enterprises. [25] Most importantly, the French government's subsidization of millions of "dumb" terminals [26] would be difficult to duplicate in this country either on a government-subsidy or a telephone company-subsidy basis. [27]

[20]** It is obvious from this discussion that here the most effective method of interconnection between the information providers, through the Regional Companies, to the consumers could turn out to be different, at least in theory and in the longer run, from that employed in France, and so could the infrastructure.

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[22] The U.S. West proposal was advanced jointly with the Regional Companies' traditional opponent in this field, the American Newspaper Publishers Association. As such, it represented the most substantial and fully considered of the concrete submissions. The proposals of the other Regional Companies were far more diffuse. *See infra*.

[23] Hearing of July 1, 1987, Tr. at 362.

[24] In a characteristic reversal of position, U.S. West dismissed the French Teletel system as already obsolete and not particularly well suited to the American environment, just as soon as the Court appeared to have accepted the original U.S. West position in its September 10, 1987 Opinion, and as it might have appeared to that company that its demands could therefore be safely ratcheted upward. *See* U.S. West Memorandum at 2-3.

[25] Networks have been developed by entities such as CompuServe, The Source, Trinex, General Electric Information Services, Quantum Computer Services, and the two independent telephone companies, each with its own idiosyncracy and particular modes of technology.

[26] These terminals are relatively inexpensive and unsophisticated, but they are adequate as parts of an information system.

[27] Some commentators have suggested that information services will not survive in this country without such a program for the cost-free dissemination of dumb terminals. That may well be the case, but it is not an issue for the Court to decide. The United States government is unlikely to adopt such a policy, and the Court has neither reason nor power to require it or the Regional Companies to do so. This is, to be sure, an option that might be pursued by those interested in entering the market, but it involves a business decision unrelated to questions of ***antitrust law*** or enforcement.

In fact, the Court's influence in this matter is limited to resolution of the question whether the Regional Companies will be *permitted* to engage in the transmission of information services. Once such permission is granted, it is solely for the individual companies to determine whether their entry into that market would be economically feasible and otherwise desirable. *See also* note 17, *supra*.

Under the decree, the Regional Companies may not engage in the manufacture of consumer premises equipment, *see* section VIII(A), and dumb terminals fall within that prohibition. Opinion, 673 F. Supp. at 596. However, nothing in the decree would preclude the Regional Companies from providing such hardware to the consumers, if it were obtained from a third source.

Additionally, advances in the communications and computer fields are said to have occurred since the unveiling of the French system, and further and broader advances are likely to occur in the future. On that basis, too, the existing Teletel system should not be cast in concrete as the sole option available to United States providers of transmission services.

IV

Other Alternatives

It was with these considerations in mind that the Court requested the parties to make further submissions following the issuance of the September 10, 1987 Opinion, and it was on that basis that it expected to receive detailed contentions and recommendations both of a legal and a technical nature concerning the requirements of an effective infrastructure for the transmission of information services. Unfortunately, the response was disappointing.

In the first place, the Regional Companies by and **[**21]** large emphasized their determination to have the Court reconsider its September 10, 1987 ruling against removal of the entire restriction on information services, including content. A reprise of that controversy was clearly not the purpose of the post-September round of briefs and, to the extent that this concentration on what had by then become a moot subject consumed space and energy, it was of assistance neither to the authors of the submissions nor to the Court. [28]

[22]** **[*9]** Beyond that, the Regional Companies repeatedly expressed their need and desire for flexibility with regard to their construction of an infrastructure, and some of the companies' submissions begin and end with such a plea. Even memoranda which do provide details, however, do not demonstrate that the flexible authority sought therein would preclude the generation or manipulation of the content of information -- the key issue in view of the Court's previous rulings. [29] **[**23]** For obvious reasons, the Court may not, consistently with its obligations under the decree, rely for such preclusion on so important a subject on Regional Company self-restraint. [30] Authorizing

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[28] The Department of Justice likewise expended much effort on matters already decided. Thus, the Court was told once again that the Department would prefer a complete removal of the information services restriction as of all other restrictions on the Regional Companies; that the Court's imposition of restrictions to prevent anticompetitive activities would amount to an assumption of regulatory functions; that requirements of nondiscrimination or of structural separation to prevent cross-subsidies are beyond judicial authority, and the like. *See* Response of the Department of Justice, filed November 16, 1987. In what must be a unique occurrence, at least in this litigation, the Department of Justice actually found the proposal submitted by U.S. West, a Regional Company not known for the modesty of its ambitions, to be too restrictive. Response of the Department of Justice at 6-9. The Department's position becomes more understandable perhaps when it is considered that its officials met ex parte with Regional Company executives regarding the removal of the decree restrictions long before the triennial review (*see* note 3, *supra*) and even long before the Huber Report (*see* note 12, *supra*) was written and submitted.

[29] For example, NYNEX proposes that the Court expand permitted infrastructure components to include store and forward, navigation translation, custom screens, and transaction support. Its only justification for this expansion is that those features would "create a network environment that encourages the offering and use of a wide variety of information services." NYNEX Memorandum at 8. NYNEX neglects to explain, however, how the Regional Companies might offer these services without manipulating content. While some of these activities might be accomplished without interfering with content, there is no guarantee that it will be so. Take, for example, credit validation services, which NYNEX would seek to provide as a "transaction support." One method of validation involves the use of computer software to verify the identity of a merchant, route the query to a proper back-end network, log the response, record the data, and send confirmation to the merchant -- a clear manipulation of content. Huber Report at 12.7-12.8

[30] Some of the Regional Companies freely acknowledge that their proposals would cross the line between transmission and content. *See, e.g.*, Southwestern Bell's comment that "it is not enough that the telephone network be open only to the accurate transmission of information" (Memorandum at 18), and Pacific Telesis' observation that "some may claim that our proposed order goes beyond the intent of the Opinion in permitting Regional Company activities" (Memorandum at 1).

As explained in greater detail below, despite the Court's willingness to permit divergences from the Teletel model, it will not endorse Regional Company entry into transmission activities absent a showing that these activities will not involve content.

language with technologically amorphous descriptions of what will actually be done constitutes the equivalent of a carte blanche to depart from transmission into content, and such a departure, as indicated, cannot be approved. [31]

Having received no submissions that could be regarded as acceptable alternatives to the system tentatively approved last fall, the Court could have decided not to conduct any further inquiry **[**24]** of its own but simply to rest on its existing decision: to permit the use of the Teletel system as described on September 10, 1987, without exploration of other alternatives. However, as pointed out above, it is the Court's belief that information services have a very large potential value for the American public. In view of that consideration, and in view of the possibility that the transmission of such services could be achieved, either now or in the future, by means more advanced, more economical, or both, than those described on September 10, 1987, the Court decided to consider the various other alternatives that appear to exist.

A. *Prohibition of Content Generation*

One means of achieving the Court's objective of encouraging the broadest flowering of technology for the transmission of information would be simply to prohibit the generation and manipulation of the content of information, without further definition or explanation. This would authorize the Regional Companies to engage in transmission activities, again without bounds or boundaries, and it would leave completely open the means to be used for in the exercise of the transmission function. This, **[*10]** however, would be impractical **[**25]** for two interrelated reasons.

In the first place, such broad, and unbridled prohibitions and authorizations would almost inevitably lead to an incessant involvement of the Court with the industry. Either the Regional Companies would be flooding the Court with requests for construction of the decree prior to entering fields that could legitimately be regarded as being close to the line between transmission and content, [32] or the companies' competitors or potential competitors would be inundating the Court with requests for enforcement or sanctions based upon their perception that the Regional Companies had crossed the line from the permitted to the prohibited.

An alternative to that scenario, and one that likewise cannot be excluded based on past performance, would see the Regional Companies simply resolving all reasonable and unreasonable doubts in their own favor, [33] and entering the content-based information services market **[**26]** on a wholesale basis, leaving it to the Department of Justice and to the Court to initiate and pursue the enforcement actions necessary to rein these companies into what the decree actually allows. This kind of approach would thus have the perverse effect of substantially

[31] It may be that some of the parties' submissions are deliberately vague to achieve a quick entry into content, or it may be, on the other hand, that it is not possible to describe the ingredients of an as yet unknown and untried system that is limited to transmission.

[32] As indicated *infra*, some transmission activities necessitate relatively slight changes in content. For that reason, among others, the line between permissible transmission and impermissible generation or manipulation of content is not always obvious.

[33] For example, following the Court's decision with respect to the manufacturing restriction, some of the Regional Companies claimed that they had made elaborate plans regarding research and development preparatory to fabrication, on the theory that this was clearly permitted to them, although the trial record and the Court's Opinion which described that record clearly showed that research and development had been the facet of manufacturing that was the primary means for Bell System discrimination. *United States v. Western Electric Co., 675 F. Supp. 655, 662-63 (D.D.C. 1987)*. One of the Regional Companies, Bell Atlantic, actually claimed that the "decision unlawfully expands the scope of the manufacturing prohibition" and another, Bell South, expressed "utter frustration at a ruling which goes far beyond clarifying any ambiguity . . . ." *Telecommunications Reports*, December 7, 1987, at 2. Even the Department of Justice, otherwise entirely in agreement with the Regional Companies, concluded, based on the record, that "manufacturing" includes research and development for purposes of the decree. Opinion, 675 F. Supp. at 664-65.

At least one Regional Company, Southwestern Bell, was found to have engaged in activity which violated the manufacturing restriction when it acquired Tsunami Technologies Corporation. *See* Report of the United States Concerning Southwestern Bell Corporation's Violations of the Modification of Final Judgment, February 12, 1988.

increasing rather than decreasing detailed judicial involvement with the telecommunications industry -- an obviously undesirable development.

[27]** In short, while a simple prohibition on content generation, with an equally simple authorization to engage in transmission, would have the virtue of making the Court's task easier today, for the long run it would sow the seeds of enormous difficulties and disputes, harmful to the parties, to the Court, and to the industry.

B. *Electronic Publishing*

A somewhat similar approach -- one that was suggested by a number of parties, including some Regional Companies [34] -- would be to make the decree's electronic publishing definition the benchmark of information content. Electronic publishing is defined in section VIII(D) of the decree as:

> the provision of any information which AT&T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means. [35]

[28]** The suggestion is made that the information services restriction of section II(D)(1) be amended to provide that only the activities **[*11]** encompassed under section VIII(D) remain prohibited. In the eyes of some commentators, this definitional approach will "avoid[] dragging the Court into the endless task of listing the technical capabilities needed for an effective gateway." [36] These commentators also emphasize the rapid pace of market and technological change in the industry, and they suggest that unless this method of proceeding is adopted, the Court will be inundated with requests for rulings on a function-to-function basis.

There is some merit to this argument. Simplicity is always a virtue, especially in a case as complex as this. Beyond that, the Court has no desire, nor reason, to become the arbiter of disputes over the merits of the details of particular technologies, nor does it have an interest in establishing a waiver process that would delay the implementation of advances in infrastructure technology.

However, while the proposed definition is simple, it is also inexact and underinclusive. "Electronic publishing" **[**29]** is not all that must continue to be prohibited to the Regional Companies, for information content is a wider concept than that. For example, if a Regional Company were prohibited only from entering the electronic publishing business, it could validly offer such services as timesharing, credit checking, and electronic mail, although each of these services involves the generation or manipulation of content and for that reason should remain prohibited to the Regional Companies under any general restriction on content. [37] Thus, wholesale adoption of the electronic publishing definition does not constitute an appropriate alternative any more than does the straight prohibition on content.

Moreover, the electronic publishing proposal suffers from the same vice as that discussed under Subpart A, *supra* -- it leaves too large a scope for interpretation and hence evasion. It is the Court's experience that, regardless of the level at which a line is drawn between the permissible and the impermissible, the Regional Companies **[**30]** will challenge that line, and either turn to the Court for a ruling or enter the field and await enforcement proceedings, if any. The electronic publishing alternative is therefore rejected.

C. *Detailed Approvals*

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[34] *See, e.g.*, Bell Atlantic Memorandum at 1-2, 3-6; Southwestern Bell Memorandum at 4.

[35] Under the decree, the section VIII(D) electronic publishing restriction reins in AT&T. The suggestion presently made is that this restriction be extended to the Regional Companies in lieu of the section II(D)(1) information restriction. *See* note 39, *infra*.

[36] Bell Atlantic Memorandum at 4.

[37] The Court today approves Regional Company entry into the electronic mail market, but this is done after a separate evaluation of that market in a concrete setting.

For obvious reasons, the Court will not establish a procedure that would avoid altogether the adoption of a definition either of transmission of information or of information content. The adoption of this alternative would require the Regional Companies to apply to the Court, again and again, for a function-by-function approval of relevant technology as such technology may occur to a Regional Company and as its installation may seem to be called for.

Such an approach would be a certain prescription for paralysis in the information services market. No responsible company would venture to expend capital on the design and installation of a technology if permission for proceeding with various facets was entirely uncertain but had to be applied for and secured some time in the future. Such a micromanagement approach by the Court would also be undesirable from the point of view of the Court and from that of certainty and stability in the industry as a whole.

V

Permitted and ***[**31]*** *Prohibited Transmission Services*

Having found unsatisfactory the various alternatives discussed *supra*, the Court will now describe what it is the Regional Companies may and may not do under the newly liberalized information services restriction on the basis of the fundamental decisions made herein.

First. To the extent that the Court has already determined in the September 10, 1987 Opinion that ***HN1***[] the employment of various infrastructure components is necessary **[*12]** to an effective information gateway, *see* Opinion, 673 F. Supp. at 592-95, these components are conclusively presumed to constitute transmission functions that the Regional Companies will be hereafter permitted to perform. No useful purpose would be served by repeating in this Opinion the parameters of these components or functions, [38] and the Court hereby adopts their description in the September 10, 1987 Opinion, as modified in Part VI, *infra*.

Second. The Regional Companies are being granted flexibility **[**32]** also to develop applications of these five components that differ in technology or detail from the Teletel system or the Court's September 10, 1987 description. However, such latitude is only permitted to the extent that (1) all specific restrictions and conditions laid down in the September 10, 1987 Opinion and this Opinion as to scope of the particular categories are observed; (2) no application of these categories involves entry into content-based functions; and (3) the services provided via these five categories of gateway functions are restricted to the transmission of information generated by others.

Third. At the other end of the spectrum, a categoric restriction is being maintained on those aspects of information services that are plainly content-based. These are, at a minimum, the kinds of services that are described in the decree as electronic publishing, [39] **[**33]** *see* Part IV-B, *supra*, but they extend, of course, beyond that. *See* slip op. at pp. 28-29, *supra*. [40]

Fourth. It may be that the function of transmitting information without infringing on the content prohibition can be achieved by means of a system or systems using components other than those listed above. The Regional

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[38] The five functions referred to in the September 10, 1987 Opinion are (1) data transmission, (2) address translation, (3) protocol conversion, (4) billing management, and (5) introductory information content.

[39] Naturally, the text of this definition will have to be changed slightly to accommodate the present problem, so that the minimum prohibition will read as follows:

> . . . the provision by a Regional Company of any information which that Regional Company or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through telecommunications.

[40] Among other services that are also clearly outside the transmission function are the maintenance of user profiles and their sale or release to others. *See* U.S. West Memorandum at 12-14; PacTel Memorandum at 16. Such profiles typically contain detailed information on users' favorite services, times of use, monthly expenditures, and usage habits, which would provide the Regional Companies with an almost insuperable advantage vis-a-vis other providers as a marketing tool. Regional Company control of such data would also raise very sensitive privacy questions. *See* Response of CompuServe at 14-15.

Companies have not suggested any such system or systems thus far, [41] and there is thus nothing before the Court in that regard. However, should such entirely new means to transmit information services without trenching on content be proposed in the future, the Court will consider such proposals sympathetically, in line with its general view of the importance to **[**34]** the public of advanced, broadly-available information services, and its general approach to refrain from straightjacketing the fledgling information services industry by imposing an unnecessarily rigid structure [42] through which it must develop. [43] Such proposals must of **[*13]** course respect the no-content prohibition, and they should not merely constitute rearguments of issues previously rejected by this Court.

[35]** VI

Components of Transmission System

As indicated *supra*, the Court is authorizing use by the Regional Companies of a system for the transmission of information generated by others that consists of the five components referred to in the September 10, 1987 Opinion, either in their present form or as appropriately modified. In this part of the Opinion, the Court discusses various questions that have been briefed by the parties regarding the configuration of these components, as well as several ancillary issues.

A. *Audiotex and Videotex*

In its September 10, 1987 Opinion, the Court focused its analysis of transmission functions on those currently performed by Teletel, since it was that system which had been touted by various Regional Companies as the model through which the United States could enter the Information Age. The French system, however, is limited to videotex -- it does not offer the wide range of services that would be available through the complimentary audiotex format. [44] The Court sees no reason to create a competitive imbalance between voice and other services, and for that reason it will permit the Regional Companies to engage in the transmission of audiotex **[**36]** on the same basis as they may transmit videotex.

Audiotex services are available through ordinary touchtone telephones, and they therefore have the potential to become the largest and fastest growing segment of the information services market. To date, the widespread application of audiotex has been largely limited to time-of-day information and "976" services, [45] **[**37]** but

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[41] It is possible that no transmission functions other than those so described are conceptually or technologically feasible. *See also* note 31, *supra*.

[42] The direction of technology and the molding of the network must be informed by the whims of the consumer and the state of scientific experience. In order for the United States to develop a vigorous information services network, and to establish and maintain a leadership position in the world market, the Regional Companies should have available the means to design and administer a networking facility. Insofar as this goal is attainable without interfering with the core decree restrictions (*e.g.*, the generation and manipulation of content), the Court will not seek to introduce any artificial hurdles.

[43] In this respect, proposals with the imprimatur of the Federal Communications Commission will be considered to be prima facie valid, as the Court recognizes that that body, through its studies in *Computer III* and enhanced services, has experience in this field.

[44] Audiotex allows consumer access to information through a regular telephone line and the use of a touchtone keypad. Huber Report at 6.3 n.8. Unlike in videotex, the information is not received in written form either on a video display screen or on paper. Huber Report at 1.29.

[45] "976" services are public announcement services, accessed through the local exchange companies, which provide short, uncomplicated, low-value, mass market information. Information flow is one way -- to the user. To encourage frequent, impulse usage, billing is direct to the telephone number, on a per-call basis, without prior subscription. The access lines linking the switches of the information services providers to the public network have a 976 dial code that engages special telephone company billing services. The user is billed an additional per-call amount on his monthly telephone bill; the revenue from that extra charge is divided between the Regional Company and the information service provider. *See* Huber Report at 8.1, 8.3, 8.6.

expansion of the technical infrastructure could spur a radical transformation in that industry. Many of the services cited in the September 10, 1987 Opinion as ripe for provision over the information services network can easily be provided via vehicles other than videotex, [46] vehicles that may be equally valuable to a broad range of consumers, if not more so. [47]

Consistent with the goal of making "possible the transmission, on a massive scale, of information services originated by others, directly to the ultimate consumer," Opinion, 673 F. Supp. at 603, then, the Court will make no distinction between videotex and audiotex with respect to Regional Company involvement in the transmission of information services. [48] Any and **[*14]** all references to videotex, either in this Opinion or the September 10, 1987 Opinion, may be construed to include audiotex applications.

[38]** B. *Electronic Directory Service*

On September 10, 1987, the Court stated that it would not remove the prohibition against Regional Company provision of electronic "Yellow Pages" directory services because such removal would give the companies the incentive and ability to discriminate against competing providers of directory services and against competing providers of directory services and against the publishers of classified and other advertisements. Opinion, 673 F. Supp. at 596. On the other hand, the Court decided that the Regional Companies would be allowed to offer electronic "White Pages" directories with respect to which such an anticompetitive potential did not exist. *Id.* From those simple declarations several Regional Companies have parsed an invitation to engage in the broadest possible electronic directory services, some so broad as to subsume almost all distinctions between White and Yellow pages.

These Regional Companies have interpreted the Court's statements regarding electronic directories as vesting in them the authority to provide electronic directory services that list general product and business categories, the service or product providers under those categories, **[**39]** the names, telephone numbers, and addresses of these providers, as well as services that allow customers to search the directory through the use of any of those categories. [49] BellSouth would add to these assumed grants of authority the capability to search by geographic location, and it would provide hours of operation, alternative phone numbers, and similar information for business and government listings. [50] And Bell Atlantic carries these misinterpretations to their ultimate logical conclusion: it suggests that everything except display advertising could be provided under the rubric of "White Pages". [51]

Section VIII(B) of the decree grants to the Regional Companies the authority to produce, publish, and distribute printed "Yellow Pages" directories. Yellow Pages are described therein as "directories **[**40]** which contain

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[46] Home banking, brokerage, retail services information, messaging, bulletin boards, and other such services are particularly adaptable to audiotex. *See* Opinion, 673 F. Supp. at 589-90.

[47] Most American consumers already own or rent the access device required by audiotex -- the telephone. Thus, audiotex could be enjoyed without the additional expense and bother of obtaining a separate terminal. *See* Response of Public Utilities Commission of California at 3-4.

[48] Limited objections to this expansion have been expressed by some competing audiotex providers. *See* Phonequest, et al., Response at 3-4. The primary objection of the opponents appears to be that "there is no possible way in which the independents could compete with the [Regional Companies]." *Id.* at 4. These competitors fail to explain, however, why the potential for anticompetitive behavior is stronger in the audiotex field than in videotex. The mere fact that entry of the Regional Companies into the field will provide stiffer competition is not grounds for excluding them from the market. *See* note 88, *infra*.

[49] *See, e.g.*, Pacific Telesis Memorandum at 19; Bell Atlantic Memorandum at 18; BellSouth Memorandum at 18.

[50] BellSouth Memorandum at 18.

[51] Bell Atlantic Reply at 10. These bizarre interpretations of the scope of "White Pages" directories are yet another example of how the Regional Companies, or some of them, would abuse any flexibility that might be afforded to them.

advertisements and which list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses." As the above discussion indicates, some Regional Companies now expect to have the right to provide electronic directories of that same nature under the label of electronic "White Pages," although they are not permitted to produce electronic Yellow Pages under the decree itself. *AT&T*, 552 F. Supp. at 194. That attempted usurpation of authority was rejected once before, and it is now again rejected. [52]

The provision of electronic "White Pages" directories encompasses only a listing of telephone subscribers, arranged in alphabetical order by name, with address and telephone number appended. No discrete directory of businesses, products, or services is allowed under the "White Pages" exception, nor is searching by **[**41]** any of those categories.

A reading of the draft orders and explanatory memoranda submitted on this particular issue indicates that some parties may have confused the Court's ruling in regard to the "White" and "Yellow Pages" directories with that on introductory information content as a gateway component. For example, U.S. West argues that electronic White Pages services should not be artificially restricted because "[a] purely alphabetical **[*15]** listing would not attract users to the gateway and would not serve to familiarize users with the use of information services." [53] Familiarization with information services is not the purpose of White Pages; that purpose is effected by gateway introductory information. The two types of services are completely unrelated in function and design: to be listed in electronic "White Pages" directories an individual or a business needs no more than a telephone number; by contrast, gateway introductory information serves as a guide only to those individuals and businesses who are information services providers accessible through the gateway.

The Court has endorsed the provision of welcoming pages and provider listings in the **[**42]** gateway context. Opinion, 673 F. Supp. at 594-95. In the Regional Companies' role as the providers of gateways to information services, they may list names, addresses, service and business categories, and other information which would assist the user in identifying a service provider, as long as such information is not offered in a way so as to discriminate among providers. The gateway should allow the customer without much difficulty to search the data base in any of these categories. This service does not, however, extend beyond the group of entities that provides services through the gateway; those who merely have a telephone and a telephone number are not in that category.

To the extent that use of the gateway can be made user friendly, the Regional Companies should be encouraged to assist novice and veteran users alike. Therefore, in addition to those items previously identified as appropriate introductory information content, the Regional Companies may provide a "help" capability and directions for navigating within their gateway. Information as to how to locate different providers, how to use the listing of providers, how to select an information service, how to exit the network, **[**43]** and the like would be appropriate subjects of a gateway "help" function. [54] Once again, however, this capability will be limited to information about using the gateway -- it will not extend to information about an individual service provider's own system. [55] The information service provider may of course make such assistance to navigation available to its subscribers as part of its menu, but that would be a function under its control, not that of the Regional Company.

C. *Kiosk and Revenue Sharing*

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[52] By the same token, the Court hereby denies requests by competitors of the Regional Companies for a reexamination of its decision to allow Regional Companies to provide "White Pages" electronic directories. *See, e.g.*, Digital Directory Assistance, Inc., Memorandum at 3.

[53] U.S. West Reply at 7.

[54] *See* National Consumers League, et al., Memorandum at 7-8.

[55] As the Court has previously noted, ***HN2***[] service menus of the information providers are a matter of editorial control, closely interrelated with information content. Opinion, 673 F. Supp. at 595. Menu service may not be provided as part of gateway introductory information.

The Court has previously indicated that any type of consolidated billing system will be permitted as long as it does not provide for the sharing of revenue. Opinion, 673 F. Supp. at 594. Because the "kiosk" billing system used by the French Teletel, in which the telephone company bills the consumer on a flat-rate-per-service basis, appeared to **[**44]** be a form of revenue sharing, the Court indicated that it would preclude the Regional Companies from adopting a similar system. Opinion, 673 F. Supp. at 594 n.310. Subsequent to that determination, the Court has analyzed further the kiosk billing arrangement, and it has now become persuaded that it should rescind that categoric preclusion.

The French kiosk system appears to have been a key factor in the growth and expansion of Teletel by simplifying consumer access to and use of the network. Users pay for Teletel calls on their regular telephone bills, and the French telephone company in turn transfers a prearranged portion of the collected sums to remunerate the individual information service providers. These payments are based on traffic statistics: the more popular a service, the greater the service provider's income. [56]

Because a simple, constant price is charged for a wide variety of services, consumers **[*16]** are encouraged to browse in the system. This facilitates their familiarity with the various information providers and increases the competitiveness of services offered. The French telephone company's **[**45]** only interest, as it relates to billing, is in collecting a flat fee for each time increment that the system is accessed by a particular consumer. [57] It is apparently largely because of the practical simplicity of the kiosk system that Teletel has become widely used in France. [58]

Technically speaking, this type of billing arrangement involves a measure of revenue sharing; as service providers' revenue increases, the telephone company's income from the network rises. However, this cooperative arrangement benefits everyone **[**46]** -- service provider, gateway provider, and consumer alike -- by lowering administrative costs and establishing a uniform billing mechanism which can easily be understood by the novice user.

There is little, if any, offsetting potential for discriminatory behavior, since the network has no incentive to prefer one provider over another. In fact, the kiosk system is in many ways comparable to billing arrangements currently used by the Regional Companies for "976" services. In that market, telephone company charges are based on a percentage of the information provider's revenue. [59] **[**47]** The Court has not been apprised of any negative effects this arrangement has had on competition in the industry; and the French kiosk billing system, or any other billing mechanism which charges on a flat rate, per call, or per minute basis, would seem to fall in that same category. [60] Therefore, the Court will withdraw its prior conclusion that kiosk-type billing arrangements would necessarily involve harmful revenue sharing agreements, and it will allow the Regional Companies to bill on any basis, provided, of course, that the billing method is not discriminatory in any way.

D. *Protocol Conversion*

Businesses and consumers in this country are already using a broad and disparate array of computer terminals with a wide variety of operating characteristics. An effective gateway, to be fully useful, should be able to communicate

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[56] "Keys of success," *Teletel Newsletter*, Special Issue No. 2, 1987, at 5.

[57] As the Teletel network has become more sophisticated, the French telephone company has refined the kiosk system. Initially, a single charging rate was in effect for all services. To boost growth in kiosk services for businesses and professional users, which may cost more to develop but often receive fewer calls than services aimed at the general public, Teletel introduced multirate kiosk charging in the summer of 1987. Accessing services in the higher billing category is thus more expensive for users, but in return, the service providers receive a larger payment for each call.

[58] "Keys of Success," *Teletel Newsletter*, Special Issue No. 2, 1987, at 5.

[59] Department of Justice Memorandum at 18-19.

[60] *See, e.g.*, Department of Justice Response at 13; Ameritech Response at 13-14.

readily with all these terminals, and it would therefore be advantageous if it were more sophisticated than the French model (which needs to communicate only with dumb terminals).

The Court has previously ratified the use of one particular type of protocol conversion, asynchronous-to-X.25 packet signals. However, it does not follow from the fact that this is the Teletel protocol conversion mechanism, as well as the most prevalently used conversion mode today, that the Regional Companies should be restricted to this technology. Other types of protocol conversion are in effect even now, each with a particular application. For example, a gateway which provides electronic mail would have to be able to convert individual users' protocols to X.400 protocols, the international standard for electronic mail; [61] similarly, synchronous, [62] rather than **[**48]** asynchronous **[*17]** protocols, are widely used by hospitals and state governments in data communication. [63]

The Court has concluded that the correct approach to this question is one which allows flexibility for change and choice, and which encourages innovation. To the extent that protocol conversion methods exist or are developed other than asynchronous-to-X.25 which do not involve the manipulation of content, their use is permitted without further specific sanction from the Court. [64]

[49]** E. *Procedural Requirements*

Many commenters argue that transmission of information services should be allowed only in tandem with tailored provisions of a procedural nature. [65] **[**50]** While the interests to be protected by such provisions are important, it is also true that the imposition of many new procedural requirements, willy-nilly, would seriously impair the development of a healthy and vigorous information services market. The Court is particularly reluctant to duplicate on the judicial level a vast and complex scheme of procedures where regulation exists on the federal and state regulatory commission levels having similar purposes. [66] This is not to say, however, that the objectives of the commenters, to the extent that they are substantial, cannot and should not be attained, either through the requested requirements or by alternative means.

Two issues predominate: discrimination and cross-subsidization.

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[61] Bell Atlantic Memorandum at 15 n.18.

[62] Synchronous data transmission differs from asynchronous data transmission in that the transmitting and receiving devices can have character synchronization for a significant period of time. During the time that the devices are synchronized, it is possible to transfer data without marking the extremes of each character. This makes it possible to omit stop and start bits and increase transmission efficiency and speed. J. Hammond & P. O'Reilly, *Performance Analysis of Local Computer Networks* at 38 (1986).

[63] Ameritech Reply at 4.

[64] However, it appears that the Regional Companies have requested the FCC only for authority to perform async./X.25 and async./X.75 protocol conversion services. Tynmet-McDonnell Douglas Memorandum at 11. If the FCC adopts that standard, the Regional Companies will of course not be free to exceed the limits set by that body.

[65] Among the safeguards advocated are provisions requiring non-discriminatory disclosure of network interface changes, *see* Hayes Microcomputer Products, Inc., Reply at 12-14, provisions against cross-subsidization, *see* Consumer Federation of America Memorandum at 4-6; Computer and Business Manufacturer's Association Response at 11-12, equal access, *see* Information Industry Association Memorandum at 13-17; ADAPSO Memorandum at 3-4, non-discrimination safeguards, *see* Electronic Yellow Pages and Information Association Memorandum at 3, 11-13; TRINITEX Reply at 6-8, requirements regarding colocation, *see* Dun & Bradstreet Memorandum at 12, and operation through separate subsidiaries, *see*, U.S. Sprint Memorandum at 18.

[66] The Court sees no reason, at this stage of the AT&T case, to endorse a return to the detailed and complicated framework considered and rejected by the parties as a possible means of settlement in that suit. As might be inferred from the names by which those negotiations have become known, Quagmire I & II, the entire subject became a hopeless web of intricate, issue-by-issue micromanagement that was destined for failure. *See*, generally, S. Coll, *The Deal of the Century: The Breakup of AT&T*, at 252-56; 297-301.

The decree in its present form already sets out in general and broad terms restrictions against discriminatory behavior. Thus, section II(B) provides that "no [Regional Company] shall discriminate between AT&T and its affiliates and their products and services and other persons and their products and services in the . . . interconnection and use of the [Regional Company's] telecommunications service and facilities or in the charges for each element of service." *See also* § II(A). These restrictions will continue to govern the Regional Companies in their provision of information gateway services, **[**51]** [67] and the Court sees no reason to add yet another requirement of this nature to the safeguards already in place.

Moreover, the Federal Communications Commission is apparently establishing mechanisms to address both the discrimination issue and the issue of cross-subsidization. For example, in the Async/X.25 Proceedings and the Third Computer Inquiry, the FCC has established a number of competitive safeguards to govern the provision of enhanced information services -- including **[*18]** protocol conversion -- by the Regional Companies. [68] The efficacy of these safeguards is of course still uncertain. *See* Opinion, 673 F. Supp. at 576. The Court retains jurisdiction over this question, however, and if it appears that the Regional Companies are abusing the authority granted herein, and that FCC regulatory control is insufficient **[**52]** to curb violations, the Court will take the requisite enforcement action.

Today's ruling will allow the Regional Companies to strike out into new and uncharted waters. In an effort to grant sufficient flexibility to build a workable network, the Court has resisted tying the companies' entry into the field to a host of strict new procedural requirements. That approach may increase the potential for unfair practices; certainly it places initial responsibility for complying with the decree in the hands of the Regional Companies themselves.

In the exercise of the Court's continuing jurisdiction over the decree, however, as well as pursuant to the Department of Justice enforcement authority, **[**53]** Regional Company behavior in the information services field will be closely monitored. Should it become apparent that the flexibility granted herein is being abused, that local bottlenecks are being used to discriminate against competitors in the information services market, or that the information services are being subsidized by funds contributed by the ratepayers, the Court will take appropriate enforcement action. In fact, if the behavior of a particular Regional Company proves particularly egregious, the Court will not hesitate to rescind that violator's authority to engage in information transmission services altogether. [69]

VII

Voice Storage and Retrieval

Although not discussed in substance in the September 10, 1987 Opinion, Regional Company participation in the voice storage and retrieval market generated substantial debate in the most recent round of comments. [70]

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[67] In the Order appended hereto, the decree will be amended to except from the prohibition of section II(D)(1) Regional Company provision of certain "transmission" functions as they relate to information services. Concurrently, the amendment makes clear that the Regional Companies' non-discrimination obligations are to continue in the face of that relaxation.

[68] Async/X.25 Order, 100 F.C.C.2d at 1104-12; *Computer III Phase II Order*, 2 FCC Rcd. at 3078-82. The fundamental precepts underlying the safeguards adopted by the FCC are that: (1) transparent transmission services should continue to be available to the public; (2) the Regional Companies should not be allowed to discriminate against competing information service vendors or their customers; and (3) the Regional Companies' monopoly ratepayers should not bear the costs of these competitive services.

[69] The announcement of the possible use of this sanction, while severe, is intended to place the Regional Companies on notice that the Court expects their complete fidelity to the decree in entering this new market.

[70] Since the Court did not discuss this topic in its September 10, 1987 Opinion, somewhat greater elaboration is necessary here than with respect to the "transmission" discussion, *supra*.

[54]** The positions taken on this issue, as on many others, are in diametric opposition to each other. A number of parties, including both the Regional Companies and others [71] see no barrier to entry into this market, arguing that no manipulation of content is involved in the service. [72] Other parties and intervenors postulate that, due to the Regional Company monopoly of the local switching services, a competitive market for the delivery of these services to consumers is likely to develop only if the Regional Companies remain prohibited [73] **[**55]** from providing them. [74] Yet other parties support **[*19]** Regional Company provision of certain storage and messaging capabilities, but only if limitations are clearly defined by the Court. [75]

There are three quite distinct settings in which storage capabilities of the Regional Companies could be used in the information services market.

First, and most basic, is very short **[**56]** term storage. This transient storage and retrieval of information is an integral part of the transmission of communications and is currently being performed within the network in a variety of ways. Data is routinely stored each time a telephone call is made; the network stores the digits dialed by the calling party until a sufficient number of digits are input to allow direction of the call to its destination. [76] In the context of speed calling and call forwarding, storage of user-identified numbers occurs over time, not merely during the course of the transmission of a telephone call. Even the basic packet switching function, performed on an intra-LATA basis by Regional Companies, involves the breakdown of data or voice communications into small bits of information that are then collected and transmitted between nodes. These bits of data are subject to constant storage, error checking, and retransmission, as required for accurate transmission.

The information services gateway as contemplated by the September 10, 1987 Opinion will also necessarily require some storage capability to house the welcoming message, the Information Service Provider **[**57]** (ISP) directory, and information for the provision of billing services. At least at this elementary level, the Regional Companies must plainly be and will be permitted to engage in storage and retrieval functions. [77]

Second, the Regional Companies might provide storage space in their gateways for databases created by others and lease that space to information service providers and end users. Making storage facilities available at the gateway level will make communication more efficient by moving information closer to the end user, thereby

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[71] *E.g.*, National Consumers League Memorandum at 14-15; Voice Message Desk Systems, Inc., Memorandum at 2-6; MessagePhone, Inc., Memorandum at 3-11; Florida Public Service Commission Memorandum at 11-12; Michigan Public Service Commission Memorandum at 4.

[72] *E.g.*, NYNEX Memorandum at 8-9; Ameritech Memorandum at 7-10; BellSouth Reply at 8.

[73] The decree prohibits the Regional Companies, *inter alia*, from "storing" and "retrieving" information. Sections II(D)(1), IV(J). Of course, like all restrictions, they are subject to removal pursuant to section VIII(C).

[74] Enhanced Service Providers Memorandum at 4-5; MCI Memorandum at 2; Compuserve Memorandum at 8; Consumer Federation of America Memorandum at 3. It is also argued that the Regional Companies would possess "substantial potential" to subsidize these services illegally and to discriminate in providing competitors access to essential facilities. Compuserve Memorandum at 9-10; Committee of Corporate Telecommunications Users Response at 8.

[75] *E.g.*, Information Industry Association Response at 4-11; Committee of Corporate Telecommunications Users Response at 7-9. One draft order, submitted jointly by U.S. West and the ANPA, proposes that the Regional Companies be permitted to provide storage on a wholesale basis to information providers, but prohibited from such provision on a retail basis to end users. U.S. West Memorandum at 14-16; ANPA Memorandum at 15. The Court rejects this distinction as being too difficult to administer in practice without the endless submission of requests for construction.

[76] Southwestern Bell Memorandum at 9.

[77] There is little dispute as to the desirability of allowing the Regional Companies to engage in storage to this limited extent. *See, e.g.*, Consumer Federation of America Reply at 5, "The only storage and messaging functions in which the Regional Companies should engage are those internal network functions which are fundamental to prompt, high-quality interconnection between ISPs and end-users."

reducing transmission costs. [78] **[**58]** It is also possible that gateway storage would reduce entry costs to the information providers by obviating the need for their purchase of their own storage hardware. [79]

This use of storage capabilities, while not technically necessary to an information infrastructure, would substantially assist in attracting to the system providers of information services, and it consequently would help to ensure that a "critical mass" of services would be available through the network. There is no significant potential for discriminatory behavior in this market, and this use of storage capabilities will also be permitted.

The third, and most encompassing use of storage capabilities would be in the provision **[*20]** of services such as voice messaging, [80] **[**60]** voice storage and retrieval (VSR), [81] and electronic mail. [82] Provision of these services would not involve **[**59]** the Regional Company in the generation or manipulation of information content [83] for provision to the public. [84]

Although there is some dispute **[**61]** on this issue, the Court is persuaded that voice information services are likely to become much more affordable and much more widely used in this country [85] if the Regional Companies

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[78] Ameritech Memorandum at 8; Bell Atlantic Memorandum at 8.

[79] *See* Ameritech Memorandum at 9; Bell Atlantic Memorandum at 8. It may be true that some information providers would choose to obtain storage capabilities from the Regional Companies should that service be available through the gateway. However, this service, like many others relating to computer technology, is also available through independent providers, and it is therefore neither necessary that the gateway furnish this facility, nor will the gateway necessarily provide the most cost efficient storage.

[80] The term "voice messaging" encompasses a wide assortment of caller-directed, transient storage, limited-duration exchange telecommunications services.

The technology allows a caller, in response to a busy signal or no answer, to record a brief message and then provide the calling instrument, the originating PBX, or the local exchange central office with routing instructions and a limited duration during which the system will attempt to complete the call and let the called party accept the recorded message at his discretion. In the event of an interexchange call, the originating caller rather than the local carrier selects the interexchange carrier. Because the caller must identify himself, the called party can accept the message or merely hang up; by agreeing to receive the message the called party becomes liable for the cost of the service. MessagePhone Memorandum at 3-4.

Voice messaging is thus a purely unidirectional transmission. It is strictly caller-directed and can be initiated with as little as a single digit or character code. There is little to differentiate voice messaging from a standard telephone call other than by the incorporation of a short time delay for message delivery.

[81] Voice storage and retrieval systems, in generic terms, act as sophisticated versions of an answering machine. Typically, incoming calls are intercepted by equipment which acquires analog speech, converts it to digital forms, and stores the digital version until it is required for retrieval in analog form. Huber Report at 10.1.

[82] VSR and electronic mail services are much alike, except in the form of the information content: in VSR, the information is stored as a voice message, in electronic mail services, it is stored as a printed message.

[83] In the simplest sense, such use of storage capability allows for time-delay services, that is, messages from an information provider or a user are stored until the particular telephone line is available or the called person or machine becomes free.

[84] The fact that content might be converted to digital form for storage, and then returned to analog form for retrieval and transmission to the called party does not place it within the realm of content manipulation. For practical purposes, the stored information reaches the intended recipient in the same content form as it was in when it was delivered.

[85] The experience of foreign telephone companies shows that these services are an important gateway function. Although the French Teletel system does not provide electronic mail now, it is installing that capability. In Japan, Canada, West Germany, Ireland, Denmark, Belgium, and Holland, the telephone companies all provide this service. Bell Atlantic Memorandum at 11. Voice messaging has become so popular in Japan that consumers send 60,000 voice messages each day. *See* Communications Week, September 28, 1987, at 56; *How Tokyo Is Turning Telephones Into Answering Machines*, Business Week, February 16, 1987 at 104C.

were permitted to provide storage to accommodate messages and other information until the intended recipient was ready to receive the transmission. [86]

Objections to a wholesale Regional Company entry into markets requiring storage capabilities fall generally into two categories: first, that these are not functions "necessary" to a gateway, **[**62]** and for that reason were not contemplated by the September 10, 1987 Opinion; and second, that there has been no showing under section VIII(C) of the decree as to lack of competitive harm.

To the extent that objections to Regional Company entry into this market depend on a finding that storage is not a function "necessary" to the provision of transmission services, the argument succeeds in part and fails in part. As indicated *supra*, some amount of storage is necessary to any transmission activity over the local exchange network, be it in the context of information services or in routine telephone communication. These types of storage functions are therefore "necessary" to the gateway infrastructure in the narrowest sense of the word. It is, however, debatable whether the broader and more sophisticated storage functions briefly described above are necessary to transmission. Although the Regional Companies could transmit information without having the **[*21]** ability to perform these functions, the functions are certainly helpful to transmission. [87]

[63]** In any event, however, whether or not the provision of such services is necessary to the performance of the functions of a transmission gateway, the Court may remove the restriction if it concludes that the section VIII(C) test has been met. In this regard, the opponents of Regional Company entry into the voice storage and retrieval markets contend that such entry would result in the displacement of independent firms. [88]

[64]** It may safely be assumed that a large potential market exists for voice storage and retrieval services, far beyond the relatively meager market that is serviced by the existing providers. Entry of the Regional Companies into this market would be bound to enlarge it manifold, and new economic opportunities would be created for many new providers as well as for those who now supply the market. What has until now been a relatively quiescent market is likely to become a broad, vigorous, and competitive one. On the other hand, it may well be that the Regional Companies, not satisfied with the market share they are likely to acquire, would attempt also to drive out, or reduce the opportunities for, those who independently service that market, either as voice storage providers or as manufacturers or sellers of answering machines.

The issue as to the potential for anticompetitive activity is thus a close one; valid arguments can be made to support either outcome, and the Court is not convinced that a showing has been made to militate in either direction.

In the Court's opinion, several factors tip the balance in favor of Regional Company entry.

First. In view of the fact that the core violations **[**65]** that were the subject of proof during the AT&T trial did not involve this market at all, there is less reason to believe that Regional Company involvement in this industry will lead to anticompetitive behavior than would, for example, its involvement in long distance, provision of information content, or manufacture of telecommunications products.

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[86] *See, e.g.*, OCTEL Memorandum at 12.

[87] In one sense, call answering, voice mail, and electronic mail offerings are independent services for which competitive markets currently exist. *See, e.g.*, MCI Memorandum at 3. In this view, the question simply is whether Regional Company entry into these markets would have positive or negative competitive effects.

[88] ***HN3***[] It is of course a fundamental principle of jurisprudence that the antitrust laws protect competition, not competitors. *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. These laws seek to foster competition by increasing the number of providers in the marketplace and thereby allowing the consumer, through demand for services, to select the winning firm. It is likewise the purpose of the decree to allow consumers to reap the benefits of competition in telecommunications. The Regional Companies should not be excluded from this market simply because, due to their size and interest in the communications field, they would likely be formidable competitors therein. To decide otherwise would be in effect to grant exclusive franchises to the current providers. *See also* note 48, *supra*.

Second. Due to the subtle competitive pressure exerted on this market by the presence of service bureaus, answering services, and particularly home answering machines, the ability to control prices and otherwise to operate monopolistically will be substantially diluted.

Answering machines are used by about ten percent of American households. [89] The consumer's choice between answering machines and Regional Company sponsored voice storage and retrieval will most likely be cost-sensitive -- should the price of automated services greatly exceed the amortized cost of an answering machine, few individuals are apt to subscribe. This economic impetus will, to a large extent, remove the ability of Regional Companies to raise prices unreasonably.

Third. In view of the largely inconclusive **[**66]** and speculative nature of the competitive considerations, other public policy **[*22]** factors should also be considered. [90] In this context, the public interest heavily tips the balance in favor of the requests of the Regional Companies.

[67]** The likelihood is that truly ubiquitous access to these services will not be had by the residential and small business consumer in the absence of Regional Company involvement. [91] Despite the emergence of several independent providers, the market for voice storage services, particularly for the occasional user, has not developed in this country to anywhere near its potential. As a practical matter, small and medium-sized businesses as well as consumers have to date had very limited opportunity to enjoy the benefits of these services, for reasons very much like those that explain the limited development of videotex itself in the United States. *See* Opinion, 673 F. Supp. at 590-91.

[68]** In-house voice information systems require large up-front investments that are cost-effective only when spread over a large number of users, and only large businesses are therefore willing to make this capital investment. Further, high start-up and operating costs have limited the emergence of individual service providers, and where such providers do exist, economic factors have generally required them to deploy large, centralized facilities that, in order to serve broad areas, depend upon expensive long-haul transmission capabilities. To minimize their transmission costs, existing providers of voice information services have, once again, focused their business on service to larger business users, especially those located near the provider's own facility. [92] More generally, consumer and small business awareness has been low, and the need for presubscription has kept potential users from joining the system.

Given these conditions and limitations, it is appropriate for the Court to take into account values in addition to those stemming exclusively from an environment free of anticompetitive activity. In this case, such values revolve largely around the **[**69]** interest of providers and potential consumers to attain the widest possible availability of voice

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[89] Voice Message Desk Systems, Inc., Memorandum at 5.

[90] As indicated above (p. 5 n.11, *supra*), this is not the first time that the Court has weighed matters of public import in ruling on questions of interpretation under the decree. The earliest such consideration occurred when the decree itself was modified and approved six years ago, in part because of public policy considerations which extended beyond the category of antitrust violations. At that time, the Court noted that the interests of universal service, for example, strongly supported entry of the decree, as well as the adoption of changes that allowed the Regional Companies to market customer premises equipment and Yellow Pages directories. The most recent such consideration occurred only last month, when the Court approved waivers of the terms of the decree, the public interest in receiving a particular service being at issue. *See, e.g., United States v. Western Electric Co.*, C.A. No. 82-0192, slip op. *1988 U.S. Dist. LEXIS 13536 (D.D.C. Feb. 8, 1988)* (time and weather information).

[91] *See, e.g.*, National Consumers League Memorandum at 14-15; MessagePhone Memorandum at 5; Voice Message Desk Systems, Inc., Memorandum at 3-6. This conclusion is disputed by AMVOX, a recently formed provider of telephone answering and voice messaging, which claims to have targeted the small business and residential customer as its prime service audience. AMVOX Memoranda at 4. This news is encouraging, and it is to be hoped that this trend will continue. However, the fact that this independent company has entered the market and seeks to reach all small business and residential customers is of course not a guarantee that this objective will be met.

[92] OCTEL Memorandum at 3-4.

storage and retrieval services to all segments of American society. As indicated, this objective can most readily be achieved by allowing Regional Company participation in the market for voice storage and retrieval type services. On this basis, and since the risk of anticompetitive activity is small, the Court will allow such participation. The Regional Companies will accordingly be authorized to enter the markets for voice storage and retrieval, voice messaging, and electronic mail. [93]

[*23] VIII

Order

For the reasons and on the bases described above, it is this 7th day of March, 1988

ORDERED that the decree entered herein on August 24, 1982, be and it is hereby amended by the addition of the following new subsection of section VIII:

K. Notwithstanding the provisions of section IV(J):

1. The separated BOCs shall be permitted to engage in the transmission of information as part **[**70]** of a gateway to an information service, but not in the generation or manipulation of the content of information. "Transmission" shall mean the performance of the following functions: data transmission, address translation, protocol conversion, billing management, and introductory information content.
2. The separated BOCs shall be permitted to engage in voice storage and retrieval services, including voice messaging and electronic mail services.
3. In the performance of the services authorized herein, no BOC shall discriminate between and among providers of information or against other providers of information services or of voice storage and retrieval services.

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[93] This ruling in no way exempts the Regional Companies from complying with the more general ban against engaging in information services activities which involve the manipulation or generation of content.

State v. Thompson

Court of Appeals of Utah

March 9, 1988, Filed

No. 860357-CA

Reporter

751 P.2d 805 *; 1988 Utah App. LEXIS 32 **; 77 Utah Adv. Rep. 34; 1988-1 Trade Cas. (CCH) P67,925

STATE of Utah, Plaintiff and Respondent, v. L. Brent Fletcher, Michael C. THOMPSON, Bruce A. Conklin and Michael Ziemski, Defendants and Appellants

Core Terms

group boycott, defendants', Antitrust, trial court, bribes, commercial bribery, convictions, specific intent, racketeering, bribery, pattern of racketeering activity, Sherman Act, federal court, RICE Act, anticompetitive, conspiracy, restraint of trade, competitors, episodes, counts, rule of reason, instant case, security guard, violations, bid, good faith, enterprise, subpoenas, vertical, boycott

LexisNexis® Headnotes

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Probable Cause

Criminal Law & Procedure > Search & Seizure > Seizure of Persons

HN1[] **Arrests, Probable Cause**

An illegal arrest or detention does not void a subsequent conviction under Utah law.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

Criminal Law & Procedure > ... > Witnesses > Subpoenas > General Overview

HN2[] **Search & Seizure, Warrants**

The enforcement of a subpoena duces tecum is subject to *U.S. Const. amend. IV* restrictions against unreasonable searches and seizures, although not to the extent of a search warrant.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN3[] **Pretrial Motions & Procedures, Suppression of Evidence**

Evidence is suppressed or excluded only if the same was obtained by a violation of *U.S. Const. amend. IV*, designed to protect a person's right to privacy and property.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > General Overview

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Reasonable Reliance Upon Warrant

HN4[] **Exceptions to Exclusionary Rule, Good Faith**

Where an officer acts in objectively reasonable reliance on a subsequently invalidated warrant, the exclusionary rule does not apply.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN5[] **Appeals, Standards of Review**

A reviewing court may affirm a trial court's decision to admit evidence on any proper ground, even though a trial court assigned another reason for its ruling.

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

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN6[] **US Department of Justice Actions, Criminal Actions**

See Utah Code Ann. § 76-10-926.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Antitrust & Trade Law, Sherman Act**

See Utah Code Ann. § 76-10-914(1).

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

See Utah Code Ann. § 76-10-920.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

HN9[] **Sherman Act, Claims**

While it is true that commercial bribery alone is not conduct in violation of federal ***antitrust law***, when the bribery is coupled with other acts tending to restrain trade, a claim under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, may be established.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

Whether a particular action or agreement violates the Sherman Act, *15 U.S.C.S. § 1 et seq.*, depends on whether it is an unreasonable restraint on trade.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN11[] **Antitrust & Trade Law, Sherman Act**

To determine whether a restraint is unreasonable, the factfinder must decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.

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

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

HN12[] **Practices Governed by Per Se Rule, Boycotts**

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. These per se practices include price fixing, division of markets, group boycotts, and tying arrangements.

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

HN13[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A classic per se group boycott exists where two or more competitors on the same level of the market structure agree to eliminate a target horizontal competitor by combining to deny the target of elements needed in order to compete.

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

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

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

HN14[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Vertical nonprice restraints, i.e., combinations of persons at different levels of the market structure, are generally not treated under the per se doctrine but are examined under the rule of reason standard.

Antitrust & Trade Law > Clayton Act > Penalties

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

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

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

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

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN15[] **Clayton Act, Penalties**

Utah Code Ann. § 76-10-920 of the Utah Antitrust Act criminalizes only the four types of conduct that have been clearly labeled as per se violations of the Sherman Act, *15 U.S.C.S. § 1 et seq.*

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

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

Evidence > Burdens of Proof > General Overview

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

HN16[] **Horizontal Refusals to Deal, Boycotts**

Under Utah Code Ann. § 76-10-920, the prosecution is required to prove a defendant engaged in a group boycott with the specific intent of eliminating competition.

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

HN17[] **Mens Rea, Specific Intent**

When the specific intent of a defendant is an element of the criminal offense charged, the intent may be inferred from the defendant's conduct and surrounding circumstances.

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

HN18[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See *Utah Code Ann. § 76-10-1603(1)*.

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

HN19[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See *Utah Code Ann. § 76-10-1602(4)*.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

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

HN20[] Procedural Due Process, Scope of Protection

The Utah Racketeering Influences and Criminal Enterprise Act, *Utah Code Ann. §§ 76-10-1601* through 1608, is not limited in application to persons affiliated with organized crime.

Criminal Law & Procedure > Sentencing > Fines

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Penalties

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

Governments > Legislation > Vagueness

HN21[] Sentencing, Fines

The Utah Racketeering Influences and Criminal Enterprise Act, *Utah Code Ann. §§76-10-1601* through 1608, is sufficiently explicit to inform the ordinary reader what conduct is prohibited, and is therefore not unconstitutionally vague.

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

HN22[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

The definition of pattern under the Utah Racketeering Influences and Criminal Enterprise Act, *Utah Code Ann. §§ 76-10-1601* through 1608, requires separate but related criminal episodes as the basis for a pattern.

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

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

HN23[] Sales of Goods, Output, Exclusive & Requirements Agreements

Determining the existence of a single offense or multiple offenses is a question of intent to be determined by the particular facts and circumstances of each case.

Civil Procedure > Trials > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > Trials > Motions for Mistrial

HN24[] **Civil Procedure, Trials**

With regard to motions for mistrial, the Utah Supreme Court has stated that the critical inquiry should be whether there is a reasonable likelihood that the incident so prejudiced the jury that in its absence there might have been a different result. Due to his advantaged position and consistent with his responsibilities as the authority in charge of the trial, the inquiry is necessarily addressed to the sound discretion of the trial court. He should view such an episode in the light of the total proceeding, and if he thinks that there has been such prejudice that there is a reasonable probability that the defendant cannot have a fair and impartial determination of his guilt or innocence, he should of course grant a mistrial.

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David L. Wilkinson, State Attorney General, Stephen J. Sorenson, Chief, Litigation Division, Richard M. Hagstrom (argued), David J. Schwendiman (argued), Robert N. Parrish, Stanley H. Olsen, Assistant Attorneys General, Attorneys for Plaintiff and Respondent.

Judges: Judges Bench, Davidson and Orme. I concur: Richard C. Davidson, Judge. Orme Judge: dissenting in part.

Opinion by: BENCH

Opinion

[*807] Defendants appeal their convictions on several counts of bribery, antitrust, and racketeering. This appeal was initially filed with the Utah Supreme Court and was transferred to this Court pursuant to R. Utah S. Ct. 4A. We affirm the convictions.

Facts

Between 1976 and early 1984, L. Brent Fletcher was employed as security officer for Utah Power and Light Company (UP & L). As security officer, Fletcher's duties were to determine the security needs of the company, make recommendations to management, and act as coordinator between management and the security guard services. In 1978, UP & L decided to hire the services of a security guard company on a full-time basis. On Fletcher's recommendation, UP & L executed a contract with defendant **[**2]** Michael Thompson's company, Mike Thompson Associates (MTA), in February 1978. This contract was not competitively bid.

In 1979, Jack Wall, Fletcher's brother-in-law, was hired by MTA. At Fletcher's request, Wall opened a bank account in the name of Security Management Consultant Services. Between January and June 1979, Wall deposited approximately $ 23,000 in checks from MTA into this account. In June 1979, Wall turned over the account and its records to Fletcher at his request. UP & L and MTA renewed their contract in March 1981.

Thompson left MTA in 1982 and formed Information Associates, a security consulting firm, with defendant Bruce Conklin, a former employee of MTA. Defendant Michael Ziemski, also a former employee, took control of MTA and signed a new contract with UP & L in October 1982. Ziemski later changed the name of MTA to Vanguard International Associates, Inc. In 1983, Ziemski transferred control of Vanguard to Conklin. An assignment of the UP & L contract was executed in March 1984.

During the spring of 1983, Information Associates deposited approximately $ 25,000, in seven separate payments, into the account of Augie Investments, also owned by Fletcher. Meanwhile, Vanguard **[**3]** deposited about $ 163,000 into the account of Information Associates.

The State of Utah, alleging these multiple payments to Fletcher were bribes as part of a scheme to eliminate competition for the UP & L security contract, charged Thompson with seven counts of commercial bribery, each a class B misdemeanor in violation of *Utah Code Ann. § 76-6-508(b)* (1978), one count of antitrust group boycott, a second degree felony in violation of Utah Code Ann. §§ 76-10-914 and -920 (1979), and two counts of racketeering, second degree felonies in violation of *Utah Code Ann. § 76-10-1603* (1981). Ziemski and Conklin were each charged with seven counts of bribery, one count of antitrust group boycott, and one count of racketeering. Fletcher, also a defendant, was charged with counts similar to Thompson. Fletcher was tried separately and convicted prior to defendants' trial. His appeal is also decided this date. *See* *State v. Fletcher, 751 P.2d 822 (Utah App. 1988)*.

Pretrial motions to dismiss all counts were denied. Defendants' motion to suppress evidence obtained pursuant to a secret investigation in Emery County was also denied. The case was tried to a jury on July 18 through August **[**4]** 1, 1985, the Honorable Judith M. Billings presiding. The jury found each defendant guilty of five counts of bribery and of all racketeering and antitrust counts. Motions for mistrial were denied. Thompson was sentenced to serve not less than one nor more than fifteen years in the Utah State Prison. Conklin and Ziemski were each sentenced to serve one year in the Salt Lake County Jail on work release. Each defendant was fined $ 25,000 for the antitrust violations. Based on the racketeering convictions, the court also ordered forfeiture of all business interests of defendants in the guard companies involved in the case. The sentences were all stayed pending appeal.

[*808] On appeal, defendants challenge the jurisdiction of the trial court and the court's denial of their motion to suppress certain evidence. Defendants also challenge specific jury instructions, each of their convictions, and the trial court's denial of their motion for a mistrial.

Jurisdiction and Probable Cause for Arrest

Defendants first argue the affidavit upon which their arrest warrants were based failed to establish probable cause. The arrest warrants were therefore allegedly invalid, and the trial court was deprived **[**5]** of jurisdiction over defendants. The Utah Supreme Court has "reject[ed] the position that the probable cause requirement for arrest warrants is jurisdictional." *State v. Schreuder, 712 P.2d 264, 272 (Utah 1985)*. In *Schreuder,* the defendant challenged her conviction on the ground that the statement presented in support of the arrest warrant failed to establish the requisite probable cause. The Court, assuming lack of probable cause for the purposes of discussion, adopted the majority rule that ***HN1***[] an "illegal arrest or detention does not void a subsequent conviction." *Id. at 271* (quoting *Gerstein v. Pugh, 420 U.S. 103, 119, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975))*. The Court explained:

> [The] probable cause requirement for an arrest warrant becomes moot by the time a defendant has been convicted because the much more stringent requirements of proof at trial have been employed to protect the defendant.

712 P.2d at 272. In light of *Schreuder,* we hold defendants' challenge to the trial court's jurisdiction is moot.

Admissibility of Evidence

Defendants next argue the trial court erred in denying their motion to suppress certain evidence. The instant case began with a secret investigation conducted **[**6]** in Emery County under the authority of Judge Boyd Bunnell, Seventh District Court, and pursuant to *Utah Code Annotated §§ 77-22-1 through -3* (1982), commonly referred to as the Subpoena Powers Act or the Utah Mini-Grand Jury Act. During the investigation, the prosecution used subpoenas duces tecum to accumulate most of the evidence used at trial, including tax and bank records from defendants' accountants and banks. Upon a motion by defendants challenging the constitutionality of the Act, Judge Bunnell concluded the Act had been abused and was subject to continual abuse due to its broad terms and provisions. Judge Bunnell declared the Act unconstitutional, dismissed the investigation, and quashed all outstanding subpoenas. The prosecution's appeal of that ruling is now pending before the Utah Supreme Court. *In the Matter of a Criminal Investigation,* No. 20268 (Utah filed Oct. 25, 1984).

Based on Judge Bunnell's ruling, defendants filed a motion to suppress all evidence seized pursuant to the investigation. After a hearing on December 27, 1984, Judge Billings held Judge Bunnell's ruling to be the law of the case. However, in a memorandum decision dated January 10, 1985, Judge **[**7]** Billings denied defendants' motion to suppress. The evidence was subsequently admitted to prove the substance of the crimes charged.

The basis for the trial court's denial of defendants' motion to suppress was as follows:

> The appropriate standard for suppression of the evidence acquired under the "Subpoena Powers Act" in this case requires that the defendants show, as the State contends, a "substantial violation" of defendants' constitutional rights and that the violation was "not committed in good faith," as required by *Rule 12(g), Utah Rules of Criminal Procedure* (Section 77-35-12(g)). Defendants have neither acknowledged this Rule, nor attempted to meet the required showing for suppression of evidence.

On appeal, defendants claim the evidence in the instant case was obtained without legal process and should therefore be suppressed. Defendants contend the government's actions were in violation of their individual rights to and expectations of privacy.

HN2[] The enforcement of a subpoena duces tecum is subject to fourth amendment **[*809]** restrictions against unreasonable searches and seizures, although not to the extent of a search warrant. *Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 90 L. Ed. 614, 66 S. Ct. 494* ***[**8]*** *(1946)*. Defendants' claims to an expectation of privacy are rights protected under the fourth amendment. *Rakas v. Illinois, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978)*. Furthermore, ***HN3***[] "evidence is suppressed or excluded only if the same was obtained by a violation of the Fourth Amendment, designed to protect a person's right to privacy and property." *State v. Montayne, 18 Utah 2d 38, 41, 414 P.2d 958, 960 (1966)*.

In *United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984)*, the United States Supreme Court created the good faith exception to the exclusionary rule: ***HN4***[] where an officer acts in objectively reasonable reliance on a subsequently invalidated warrant, the exclusionary rule does not apply. The Utah state legislature codified the *Leon* good faith exception in Utah Code Ann. § 77-35-12(g) (1982). As previously discussed, the trial court denied defendants' motion to suppress for failure to meet the requirements of section 77-35-12(g).

However, the Utah Supreme Court recently invalidated section 77-35-12(g). In *State v. Mendoza, 748 P.2d 181 (Utah 1987)*, the Court rejected the prosecution's argument that the good faith exception should apply to an invalid, warrantless stop and search of a vehicle. The **[**9]** Court explained that because "no outside authority on which the officers could reasonably rely expressly authorized the search . . . ., the policy foundations of the *Leon* exception do not appear in searches of [this kind]." *Id. at 185*. Furthermore, section 77-35-12(g) went beyond the scope of the good faith exception in requiring defendants to prove a substantial violation of their fourth amendment rights. Since section 77-35-12(g) purported to create a good faith exception to an investigatory stop and search and because it improperly shifted the burden of proof, the Court found the statute violated the *fourth amendment of the United States Constitution*.

Although section 77-35-12(g) is now invalid, the good faith exception to the exclusionary rule under *Leon* is still valid.

Defendants argue the good faith exception applicable to search warrants does not apply to the execution of subpoenas issued pursuant to a statute subsequently declared unconstitutional. This position is contrary to *Illinois v. Krull, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987)*. In *Krull,* the Court granted certiorari to determine whether the good faith exception to the exclusionary rule should be recognized when officers **[**10]** act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches where the statute is ultimately found to be unconstitutional. An Illinois statute permitted government officers to conduct warrantless searches of the records of dealers in automobiles and automobile parts. Such a search showed Krull to be in possession of stolen automobiles. Subsequent to the search, a federal court in an unrelated matter held the Illinois law to be unconstitutionally broad. Upon motion by defendant, the trial court suppressed the evidence based on the federal court ruling. The Illinois Supreme Court affirmed, rejecting the state's good faith exception argument.

The United States Supreme Court reversed. The Court explained the good faith exception was established because the deterrent effect and remedial purpose of the exclusionary rule are not served where an officer acts in objectively reasonable reliance on a search warrant issued by a neutral magistrate. Likewise, the Court held, "if [a] statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations **[**11]** by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id. at 1167*. In *Mendoza,* the Utah Supreme Court noted, *"Krull* does not affect our characterization of *Leon.* In both cases, the officers conducting the searches did so in objectively reasonable reliance on prior, external authorization." *748 P.2d at 185 n.3*. Likewise, in the instant case, the subpoenas duces tecum were executed in **[*810]** objectively reasonable reliance on prior, external authorization.

This Court ***HN5***[] may affirm a trial court's decision to admit evidence on any proper ground, even though the trial court assigned another reason for its ruling. *State v. Barber, 747 P.2d 436 (Utah App. 1987)*. Regardless of the decision of the Utah Supreme Court on the constitutionality of the Utah Mini-Grand Jury Act, we hold the evidence obtained pursuant to the subpoenas duces tecum was admissible under the principle set forth in *Krull.* The trial court's denial of defendants' motion to suppress is affirmed.

Antitrust and "Group Boycott"

Defendants contend they were improperly charged with and convicted of conduct in violation of the Utah Antitrust Act, Utah Code Ann. §§ 76-10-911 **[**12]** through -926 (1979). This is the first criminal prosecution under the Utah Antitrust Act and is thus a case of first impression. The general provisions of the Utah Antitrust Act are similar in many respects to their federal counterparts in the Sherman Act, *15 U.S.C. §§ 1 through 7 (1987)*. ***HN6***[] Section 76-10-926 provides, "The legislature intends that the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes."

Section 76-10-914(1) of the Utah Antitrust Act, like *section 1* of the Sherman Act, states, ***HN7***[] "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal." Section 76-10-920 further provides:

> ***HN8***[] Any person who violates section 76-10-914 by price fixing, bid rigging, agreeing among competitors to divide customers or territories, or by engaging in a group boycott with specific intent of eliminating competition shall be punished, if an individual, by a fine not to exceed $ 50,000 or by imprisonment for an indeterminate time not to exceed one year, or both or, if by a **[**13]** person other than an individual, a fine not to exceed $ 100,000.

Defendants point out there are three elements to the offense charged in the instant case: (A) a contract, combination, or conspiracy in restraint of trade in violation of section 76-10-914; (B) in the form of a group boycott; and (C) with specific intent to eliminate competition.

(A)

Defendants argue federal courts uniformly have refused to find commercial bribery to be a contract, combination, or conspiracy in violation of *section 1* of the Sherman Act. Commercial bribery is defined in *Utah Code Ann. § 76-6-508(b)* (1978) as follows:

> A person . . . . without the consent of the employer or principal, contrary to the interests of the employer or principal . . . . confers, offers, or agrees to confer upon the employee, agent, or fiduciary of an employer or principal any benefit with the purpose of influencing the conduct of the employee, agent, or fiduciary in relating to his employer's or principal's affairs[.]

In *United States v. Boston and Maine Railroad, 380 U.S. 157, 162, 13 L. Ed. 2d 728, 85 S. Ct. 868 (1965)*, the United States Supreme Court held, "It is doubtful that this indictment . . . . alleges anything more in substance than a bribe. Bribery **[**14]** might well be in the family of offenses covered under a conflict of interest statute. But it is more remote from an antitrust frame of reference." In *Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 687 (9th Cir. 1976)*, *cert. denied, 429 U.S. 940, 50 L. Ed. 2d 309, 97 S. Ct. 355 (1976)*, the Ninth Circuit Court of Appeals held, "Commercial bribery, standing alone, does not constitute a violation of the Sherman Act." And in *Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 645 (D. Alaska 1982)*, the court held, "Commercial bribery does not in itself constitute a violation of the Sherman Act."

HN9[] While it is true that commercial bribery alone is not conduct in violation of federal ***antitrust law***, "when the bribery is coupled with other acts tending to restrain trade, a claim under the Sherman Act may **[*811]** be established." *Hitachi, 547 F. Supp. at 645*; *see also* *Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980)*. In the cases cited by defendants, there was no evidence of any affirmative acts, coupled with the bribery, to restrain trade. In the instant case, however, the prosecution presented substantial evidence of other affirmative acts in restraint **[**15]** of trade, e.g., Fletcher's refusal to accept proposals from other security guard companies.

The dissent suggests that, under the majority opinion's view, every commercial bribery in which the payee performs his end of the bargain would be an antitrust violation. Such is not the case. Commercial bribes paid to an employee, agent, or fiduciary of UP & L could be for other purposes, including rate adjustments, waiver of service fees, and waiver of safety requirements. Such purposes are clearly not in restraint of trade or anticompetitive. Furthermore, had defendants paid Fletcher the bribes in order to influence him to deal exclusively with them only after he had received other bids, their actions arguably would not have been a conspiracy entered into primarily to eliminate competition or restrain trade. However, in the instant case, the primary purpose of the bribes was to restrain trade by eliminating all competition for the UP & L security contract. The first element of the offense was therefore established.

(B)

Defendants next argue their alleged agreement with Fletcher did not constitute a group boycott, and, therefore, the prosecution failed to establish the second element of the offense. **[**16]** Federal courts have long held that ***HN10***[] whether a particular action or agreement violates the Sherman Act depends on whether it is an unreasonable restraint on trade. *Board of Trade of City of Chicago v. United States, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*. In *Chicago Board of Trade,* the United States Supreme Court established the "rule of reason" standard to determine whether a restraint was unreasonable. "

> To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238. In other words, ***HN11***[] "the factfinder [must] decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." **[**17]** *Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 343, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*.

While federal courts have utilized the rule of reason in determining the legality of most restraints alleged to be in violation of the Sherman Act, they have also, by experience, been able to categorize certain business practices or relationships as per se unreasonable. In *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d*

545, 78 S. Ct. 514 (1958), the United States Supreme Court held, **HN12**[] "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." These per se practices include price fixing, division of markets, group boycotts, and tying arrangements. *Id.* Recognition of the per se rule obviates the costly and complex litigation a complete rule of reason inquiry entails. *Id.; see also* *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*.

[*812] Although there is a "marked lack of uniformity" [1] among the federal courts in defining the **[**18]** term group boycott, **HN13**[] a classic per se group boycott exists where two or more competitors on the same level of the market structure agree to eliminate a target horizontal competitor by combining to deny the target of elements needed in order to compete. *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 250, 19 L. Ed. 2d 1071, 88 S. Ct. 1005 (1968)*; *United States v. General Motors Corp., 384 U.S. 127, 140, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*. *See also* L. Sullivan, *Handbook of the Law of Antitrust* 230 (1977). The restraining agreement need not "entirely exclude its victims from the market," but only "[prevent them] from making free choices between market alternatives . . . ." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 528, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. It is the horizontal effect of a group boycott, a "naked [restraint] of trade with no purpose except stifling of competition," which typically warrants application of per se illegality. *White Motor Co. v. United States, 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*.

HN14[] Vertical nonprice **[**19]** restraints, i.e., combinations of persons at different levels of the market structure, are generally not treated under the per se doctrine but are examined under the rule of reason standard. *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. As the United States Supreme Court has explained:

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business and within the "rule of reason." We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . . any redeeming virtue."

White Motor Co., 372 U.S. at 263 (quoting *Northern Pacific, 356 U.S. at 5*) (citations omitted). In *Continental T.V.,* the Court further explains that while "vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers . . . ., [they **[**20]** also] promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *433 U.S. at 54*.

Under the Sherman Act, both classic group boycotts and vertical restraints determined unreasonable are subject to criminal penalties. *Section 1* of the Sherman Act provides:

> 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.

HN15[] Section 76-10-920 of the Utah Antitrust Act, however, criminalizes only the four types of conduct that have been clearly labeled as per se violations of the Sherman Act. [2] The rule of reason analysis has no part in the

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[1] *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 543, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)*.

[2] In contrast to the Sherman Act, the Utah Antitrust Act "attempts to provide both the prosecutor and the community at large with a clear definition of what conduct is criminally proscribed." J. Dibble & J. Jardine, *The Utah Antitrust Act of 1979: Getting Into The State Antitrust Business,* 1980 Utah L. Rev. 73, 83.

criminal provisions of the Utah Antitrust Act. Therefore, unless defendants' conduct was in the form of a **[*813]** group boycott, it was not criminal under Utah law.

[21]** The instant case is not a classic group boycott. The prosecution claims this is an arrangement between a group of horizontal competitors, i.e., the three defendants. At no time, however, did any two of defendants co-exist as competitors. Rather, they were successive owners of the same security guard company, albeit the company had different names under different owners. Therefore, the alleged agreement between defendants and Fletcher did not constitute a classic group boycott under the federal definition.

However, the group boycott specified in section 76-10-920 is not the classic group boycott recognized by federal courts. Under the classic (per se) group boycott definition, proof of intent and/or effect is not required, but it is conclusively presumed the boycott is anticompetitive and in violation of antitrust laws. *Northern Pacific, 356 U.S. at 5*. ***HN16***[] Under section 76-10-920, the prosecution is required to prove a defendant engaged in a group boycott *"with [the] specific intent of eliminating competition."* When interpreting a statute, we assume the legislature used each term advisedly and in its proper sense. *Horne v. Horne, 737 P.2d 244, 247 (Utah App. 1987)*; *State v.* ***[**22]*** *735 P.2d 34, 37 (Utah 1987)*. We construe the statute "on the assumption . . . . that the intent of the Legislature is revealed in the use of the term in the context and structure in which it is placed." *Ward v. Richfield City, 716 P.2d 265, 266 (Utah 1984)*. By requiring a separate element of "specific intent of eliminating competition," the legislature clearly did not adopt the classic group boycott definition formulated by the federal courts.

The term group boycott as used by the Utah state legislature more closely resembles the general definition of boycott: "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, 438 U.S. 531, 541, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)*. In the instant case, defendants, through bribes, enlisted Fletcher to refuse any bids from their competitors, the targets of the boycott. A group boycott under the Utah Antitrust Act requires at least two conspirators, but neither the number of boycotters nor their market relationship with the target is determinative of criminal liability. Rather, the intent of the contract, combination, or conspiracy **[**23]** is the deciding element.

The dissent proposes an alternative interpretation of section 76-10-920, suggesting the specific anticompetitive intent element is intended to narrow the scope of the federal definition of a classic group boycott. The dissent also suggests the majority opinion fails to consider the anticompetitive effect of defendants' actions in the relevant marketplace. In essence, the dissent suggests we adopt the classic per se definition of group boycott but that we use the rule of reason in evaluating the elements of proof. Federal courts have consistently held that classic group boycotts include, by definition, the elements of anticompetitive intent and effect in the relevant marketplace. *See National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 103, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* *("Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."). It makes no sense to adopt the classic per se definition of group boycott and then to require proof of anticompetitive intent and market effect. We therefore cannot accept the dissent's **[**24]** interpretation of section 76-10-920.

Our interpretation of the Utah Antitrust Act is in line with a current trend in federal case law to focus not on the form of the conspiracy, but on the intent of the conspirators. In *Continental T.V.,* the United States Supreme Court, after establishing the rule of reason analysis as the general standard for vertical restraints, stated "we do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition." **[*814]** *433 U.S. at 58*. Increasingly, federal courts are recognizing per se group boycotts between a single horizontal competitor and a vertically related company. *See Cascade Cabinet Co. v. Western Cabinet and Millwork, 710 F.2d 1366 (9th Cir. 1983)*; *Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982)*; *Corey v. Look, 641 F.2d 32 (1st Cir. 1981)*. *See also* Sullivan, *Antitrust,* at 231 n.1; Decker, *The Numerosity Requirement For Group Boycotts: Toward a Horizontal Benefit Analysis,* 18 U.S.F.L. Rev. 577 (1984); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination,* 79 Colum. L. Rev. 689 (1979). These cases and commentators urge **[**25]** that when applying the per se rule to a group boycott, the key inquiries should not be the number or nature of the conspirators, but their intent and/or the effect of the restraint on competition. No logic supports ignoring defendants' anticompetitive conduct in the instant case solely because they failed to recruit a second horizontal competitor into their conspiracy. *See* Decker, *The Numerosity Requirement,* 18 U.S.F.L. Rev. at 587 ("If a single firm has the necessary influence to effectuate an exclusionary boycott with a supplier or customer, such conduct should not escape the *per se* rule simply because that firm did not combine with others at its own market level to exert its influence."). Although the coercive pressure was applied vertically, the stifling of competition was horizontal. *Com-Tel, Inc., 669 F.2d at 409*. A conspiracy in the form of a group boycott was therefore established.

(C)

Under our interpretation of sections 76-10-914 and -920, therefore, the group boycott involving defendants and Fletcher would be criminal upon a proper showing of a specific intent to eliminate competition. ***HN17***[] When the specific intent of a defendant is an element of the criminal offense **[**26]** charged, the intent may be inferred from the defendant's conduct and surrounding circumstances. *State v. Fowler, 745 P.2d 472, 475 (Utah App. 1987)*; *State v. Kennedy, 616 P.2d 594, 598 (Utah 1980)*. In the instant case, not one of the contracts between UP & L and defendants was competitively bid. Representatives of other large companies testified the usual course of action when selecting a security guard company is open bidding. Several representatives of other security guard companies testified their attempts to submit bid proposals to Fletcher were either refused or ignored. Sufficient evidence was presented to the jury to infer a specific intent of eliminating competition on the part of defendants. The third element of the offense was clearly established.

We hold defendants were properly charged with engaging in a criminal group boycott under sections 76-10-914 and -920. Under our interpretation of the Utah Antitrust Act, an individual is clearly on notice that if he (or she) engages in a contract, combination, or conspiracy in restraint of trade, *with the specific intent of eliminating competition,* regardless of who his co-conspirators are, he will be criminally liable.

[27]** Because there is some evidence, including reasonable inferences, to support every element of the jury's verdict, we will not disturb it on appeal. *State v. Garcia, 744 P.2d 1029 (Utah App. 1987)*. Defendants' convictions on the antitrust counts are affirmed.

Racketeering and "Pattern" of Activity

Defendants argue they were improperly charged with and convicted of conduct in violation of the Utah Racketeering Influences and Criminal Enterprise Act, *Utah Code Ann. §§ 76-10-1601 through -1608* (1981) (the RICE Act). When this case was tried, *section 76-10-1603(1)* provided:

> ***HN18***[] It shall be unlawful for any person who has received any proceeds derived, whether directly or indirectly, from a pattern of racketeering activity in which such person has participated, as a principal, to use or invest, directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any interest in, or the establishment or operation of, any enterprise.

[*815] A "pattern of racketeering activity" was defined in *section 76-10-1602(4)* as:

> ***HN19***[] engaging in at least two episodes of racketeering conduct which have the same or similar objectives, results, **[**28]** participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events, provided at least one of such episodes occurred after the effective date of this part and the last of which occurred within five years after the commission of a prior episode of racketeering conduct. [3]

Violation of the RICE Act is a second degree felony punishable by up to 15 years imprisonment, a fine of $ 10,000, and forfeiture of all property associated with the racketeering enterprise.

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[3] In 1987, the state legislature substantially revised the RICE Act and renamed it the "Pattern of Unlawful Activity Act." After the 1987 revision, "at least three episodes of unlawful activity" are now required.

Defendants first contend the RICE Act, patterned after the federal Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. §§ 1961 through 1968 (1984)* (the RICO Act), was enacted to prevent the infiltration of organized crime into Utah. Therefore, defendants argue, the RICE Act should extend only to cases involving offenses committed by organized crime.

Although the legislative histories of both the RICE and RICO Acts suggest they were **[**29]** intended to apply to persons engaged in acts traditionally associated with organized crime, a nexus to organized crime was not included as an element of the offense. The United States Supreme Court concluded that the RICO Act applies to "any person" who engages in conduct the Act forbids. *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985)*. Similarly, we hold ***HN20***[] Utah's RICE Act is not limited in application to persons affiliated with organized crime.

Defendants contend that not limiting application of the RICE Act to serious and aggravated offenses by organized crime renders the Act unconstitutionally vague. Vagueness is a question of procedural due process, namely "whether the statute adequately notices the proscribed conduct." *State v. Frampton, 737 P.2d 183, 192 (Utah 1987)*. Defendants claim without requiring that the conduct proscribed demonstrate characteristics traditionally associated with organized crime, the RICE Act does not specifically define for persons of ordinary intelligence the outer perimeter of acceptable conduct. *State v. Owens, 638 P.2d 1182, 1183 (Utah 1981)*. The RICE Act proscribes the use of proceeds derived from a pattern **[**30]** of racketeering activity in an enterprise. Under the statute, "enterprise," "racketeering activity," and "pattern of racketeering activity" are all clearly defined. "Episode" is defined in *Utah Code Ann. § 76-1-401* (1978). We hold that ***HN21***[] the RICE Act is "sufficiently explicit to inform the ordinary reader what conduct is prohibited," and is therefore not unconstitutionally vague. *State v. Theobald, 645 P.2d 50, 51 (Utah 1982)*.

Under *section 76-10-1602(1)(h)*, bribery was included as an act of racketeering, sometimes referred to as a predicate act. [4] Defendants argue that using commercial bribery, a class B misdemeanor punishable by up to six months in jail and a fine of up to $ 299, to satisfy the RICE Act requirement of predicate offenses violates the constitutional restraint against disproportionate punishment. In reviewing a claim of disproportionate punishment, the question is "whether the sentence imposed in proportion to the offense committed is such as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances." *State v. Hanson, 627 P.2d 53, 56 (Utah 1981)* (quoting *State v. Nance, 20 Utah 2d 372, 438 P.2d 542, 544 (1968))*. **[**31]**

Defendants' argument ignores the additional elements required under the RICE Act, i.e., a pattern of racketeering activity, existence of an enterprise, and use **[*816]** of proceeds derived from the racketeering activity to establish, acquire, or operate the enterprise. Defendants claim these elements are illusory. We disagree. It is not the commercial briberies that are being punished in the present case, but the broader conduct which is forbidden by the RICE Act. *Cf.* *United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977)*, *aff'd* *578 F.2d. 1371 (2nd Cir. 1978)*, *cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978)* (Congress entitled to make pattern of racketeering an independent criminal offense punishable more severely than simply twice the penalty for each constituent offense). We do not find defendants' sentences for the RICE violations unconstitutionally "shocking."

Defendants also argue the use of misdemeanors as predicate acts under the RICE Act is inconsistent with Utah's habitual criminal statute, *Utah Code Ann. § 76-8-1001* **[**32]** (1978), and the enhancement provision of the Utah Controlled Substances Act, *Utah Code Ann. § 58-37-8(1)(b)(iii)* (1987). Under *section 76-8-1001*, upon proof that a person has been twice convicted, sentenced, and committed for a felony, one of which is at least of the second degree, the person may be sentenced as a habitual criminal for a period of five years to life. Under *section 58-37-8(1)(b)(iii)*, upon a second conviction for production or distribution of a controlled substance, a class A misdemeanor, a person is guilty of a third degree felony.

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[4] After the 1987 revision, *section 76-10-1602* now lists the several statutory types of bribery individually, including commercial bribery under *section 76-6-508*.

The RICE Act is not inconsistent with these criminal provisions. The RICE Act does not simply punish multiple violations of statutes prohibiting the acts enumerated in section 76-10-1602(1). Instead, the RICE Act punishes participation in a pattern of racketeering activity bearing the required relationship to an enterprise. *See* subsections 76-10-1603(1) through (4).

Finally, defendants argue the evidence at trial failed to establish a pattern of racketeering activity. "Pattern of racketeering activity" was defined in section 76-10-1602(4) as "at least two episodes of racketeering conduct which have the same or similar objectives, results, **[**33]** participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events . . . ." Defendants claim the several counts of bribery of which they were convicted were, as a matter of law, part of only a single episode of racketeering conduct and thus cannot establish a pattern. In support of their argument, defendants cite several federal cases involving civil claims under the RICO Act. The federal definition of a pattern of racketeering activity differs significantly from the definition of the same term in section 76-10-1602(4). [5] Federal cases which elaborate on the federal definition of "pattern of racketeering activity" are, however, helpful in our analysis.

[34]** Federal case law after *Sedima* has attempted judicially to refine the definition of "pattern of racketeering activity" of the RICO Act. Those cases have emphasized the concepts of "continuity plus relatedness" discussed in *Sedima.* Against this backdrop, some federal courts have fashioned requirements that there be "multiple **[*817]** schemes" or "multiple criminal episodes" rather than several acts to accomplish a single criminal objective in order to establish a pattern of racketeering activity.

The case of *Torwest DBC, Inc. v. Dick, 628 F. Supp. 163 (D. Colo. 1986)*, cited by defendants, alleged multiple acts of mail/wire fraud in connection with a single scheme to defraud. The district court held that no pattern existed where the defendants' conduct had a single purpose, a single result, one set of participants, a single victim, and one method of commission. The district court thus concluded there was "no continuity and, therefore, no patter of racketeering activity." *Id. at 166*. The Tenth Circuit Court of Appeals affirmed, but differentiated the case from one where "the RICO claim is based on one scheme involving one victim, but the plan contemplates open-ended fraudulent activity **[**35]** and does not have a single goal that, when achieved, will bring the activity to an end." *Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987)*. Other federal courts have noted that an ongoing scheme involving the same perpetrators, victims, and method of commission may in itself demonstrate a sufficient pattern of racketeering activity. See *Thompson v. Wyoming Alaska, Inc., 652 F. Supp. 1222, 1227-28 (D. Utah 1987)*; *Temporaries, Inc. v. Maryland National Bank, 638 F. Supp. 118, 123 (D. Md. 1986)* ("A more flexible and accurate approach to identifying patterns may be to require either 1) more than one scheme or 2) an open-ended continuous scheme which contains a multiplicity of predicate acts.").

We conclude ***HN22***[] the RICE Act's definition of pattern requires separate but related criminal episodes as the basis for a pattern. We also conclude that the facts of the case before us satisfy the requirement of separate but related criminal episodes suggested by the federal cases and implicit in the definition of pattern of racketeering activity contained in section 76-10-1602(4). Defendants were each charged with seven different bribes paid in

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[5] *18 U.S.C. § 1961(5)* defines "pattern of racketeering activity" as "at least two *acts* of racketeering activity . . . ." This definition has been the subject of considerable judicial attention following the landmark United States Supreme Court decision in *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. In its now famous footnote 14, the Court noted the lack of specificity in the federal definition of pattern of racketeering activity. After a brief discussion of suggestions in the legislative history that "pattern" connotes "continuity plus relationship" rather than merely an enumeration of acts, the Court observed:

> Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act.

105 S. Ct. at 3285. The pattern definition noted by the Supreme Court is substantially identical to the definition contained in the RICE Act. Thus, the pattern analysis under the RICE Act does not operate from the same sparse language of the RICO Act.

approximately two week intervals **[**36]** between February and May 1983. An episode is defined in *section 76-1-401* as "all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective." The trial court instructed the jury as follows:

> If you should find one or more of the defendants guilty of bribery, you must then determine whether the seven identified payments constitute seven separate bribes, or a series of payments on a single bribe. If you find beyond a reasonable doubt that each of the payments was made with a distinct and separate purpose, then there are separate bribes. On the other hand, if the evidence does not convince you beyond a reasonable doubt that the payments were made with different purposes, then such payments constitute one bribe.

Defendants argue the seven payments were in furtherance of a single criminal objective and therefore constituted a single episode. ***HN23***[] Determining the existence of a single offense or multiple offenses is a question of intent to be determined by the particular facts and circumstances of each case. *State v. Kimbel, 620 P.2d 515, 518 (Utah 1980)*. Although the overall scheme was to maintain defendants' exclusive contract **[**37]** with UP & L, there was evidence to support the jury's finding a separate purpose for each bribe, i.e., Fletcher's hiring of defendants' company before execution of a contract, his recommendations to UP & L management, and his refusal to consider other bids. The fact the jury convicted defendants on only five of the seven bribery counts indicates they considered the facts and circumstances of each payment individually and made a determination as to each. As there is evidence to support the jury's findings, we will not disturb them on appeal. *Garcia, 744 P.2d at 1030*.

Defendants' convictions of violations of the RICE Act are affirmed.

Miscellaneous Issues

Defendants also argue their bribery convictions should be reversed because the trial court erred in not instructing the jury that an illegal bribe must be paid with criminal intent. The trial court instructed the jury as follows:

> **[*818]** Before you can convict any defendant for bribery you must find beyond a reasonable doubt each and every one of the following elements:
> (1) That the defendant or defendants in Salt Lake County, State of Utah;
> (2) On or about the date or dates alleged in the Information;
>
> (3) That the defendant or defendants **[**38]** conferred, offered or agreed to confer upon L. Brent Fletcher a benefit;
> (4) That this benefit was conferred or offered with the purpose of influencing the conduct of Mr. Fletcher in relating to the affairs of Utah Power and Light contrary to the interests of Utah Power and Light and without its consent;
> (5) That the defendant or defendants offered or conferred or agreed to confer the benefits, if any, knowingly, intentionally or willfully as those terms are defined in these instructions.

We believe the instruction sufficiently advised the jury on the law. Both the statute and the instruction implicitly require a criminal intent by requiring a showing of conduct contrary to the interests of and without the consent of the employer or principal. *See* *State v. O'Neill, 103 Wash.2d 853, 700 P.2d 711 (1985)*. Defendants' convictions of bribery are affirmed.

Defendants next argue the trial court made prejudicial errors in the admission of certain evidence. Even assuming the trial court did err, defendants have failed to show the challenged evidence had a substantial influence in bringing about the verdict. Therefore, the errors, if any, were not prejudicial. *Utah R. Evid. 103*; *State **[**39]** 734 P.2d 440, 448 (Utah 1986)*.

Finally, defendants argue the trial court erred in not granting a mistrial after two witnesses mentioned the Fletcher trial and one juror told the court she had read of Fletcher's conviction in the newspaper during the trial. ***HN24***[] With regard to motions for mistrial, the Utah Supreme Court has stated:

> The critical inquiry should be whether there is a reasonable likelihood that the incident so prejudiced the jury that in its absence there might have been a different result. Due to his advantaged position and consistent with his responsibilities as the authority in charge of the trial, the inquiry is necessarily addressed to the sound discretion of the trial court. He should view such an episode in the light of the total proceeding, and if he thinks that there has been such prejudice that there is a reasonable probability that the defendant cannot have a fair and impartial determination of his guilt or innocence, he should of course grant a mistrial. But inasmuch as this is his primary responsibility, when he has given due consideration and ruled upon the matter, this court on review should not upset his ruling unless it clearly appears that **[**40]** he has abused his discretion.

State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322, 1324 (Utah 1974) (footnote omitted).

Defendants have failed to show any clear abuse of the trial court's discretion. The trial court and counsel both questioned the juror. The juror indicated the fact of Fletcher's conviction had no impact on her deliberations and was not discussed with the other jury members. Furthermore, the trial court adequately instructed the jury to only consider the evidence introduced at trial. The denial of defendants' motion for a mistrial is affirmed.

The jury verdict on all counts is affirmed.

I CONCUR: Richard C. Davidson, Judge.

Dissent by: ORME (In Part)

Dissent

ORME, Judge: (Dissenting in part)

While I otherwise fully concur in the majority opinion, I disagree with the result reached and portions of the analysis in the section entitled "Antitrust and 'Group Boycott'."

As the majority states, there are three elements of the antitrust offense as charged in this case: (1) a contract, combination or conspiracy in restraint of trade; (2) in the form of a group boycott; and (3) with specific intent to eliminate competition. I simply do not believe that these elements have been met. My disagreement **[**41]** **[*819]** with my colleagues is quite complete. I believe defendants' conduct constituted simple commercial bribery. I believe their conduct can in no way be properly characterized as a group boycott. I believe the evidence shows defendants' intent was strictly to line their own pockets and not, in any sense, to eliminate competition.

COMMERCIAL BRIBERY

I do not view Utah's antitrust statute as the appropriate vehicle for bringing commercial bribery charges. In addressing this issue, the trial court properly recognized the Robinson-Patman Act as the vehicle under which federal commercial bribery charges are typically brought. [1] The court interpreted the Legislature's failure to incorporate a Robinson-Patman Act as evidencing an intent to make Utah's antitrust statute the appropriate vehicle for charging commercial bribery. I believe the fairer interpretation is that the Legislature deliberately failed to incorporate the Robinson-Patman-type act into our antitrust statute because it recognized that Utah already has a specific vehicle for prosecuting commercial bribery, namely the commercial bribery statute. *Utah Code Ann. § 76-6-508* (1978).

[42]** Even assuming that commercial bribery is properly charged under the Utah antitrust statute, the majority concedes the bribery must be coupled with other acts intended to restrain trade in order to establish a violation.

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[1] Section 2(c) of the Robinson-Patman Act, *15 U.S.C.A. § 13(c) (1973)*, expressly makes accepting a "commission" without performing real work in connection with a sale of goods illegal under federal law.

While the majority recognizes the principle that commercial bribery, without more, does not violate the antitrust laws, it only offers Fletcher's unilateral refusal to accept proposals from other security companies as the "more" which is necessary to turn an otherwise garden-variety bribe into an antitrust violation. However, any agreement to deal exclusively with one party necessarily involves a refusal to deal with other parties. *See, e.g., Construction Aggregate Trans. v. Florida Rock Ind. Inc., 710 F.2d 752, 776 (11th Cir. 1983)* (every exclusive dealing arrangement necessarily involves the exclusion of an entity which operates on the same market level). At least absent evidence of other illegal conduct, the defendants' payment of bribes did not constitute a contract, combination, or conspiracy in violation of the antitrust statute. Fletcher's refusal to engage the services of defendants' competitors was merely the bargained for object of the bribes in question. Under **[**43]** the majority's view -- notwithstanding the claim that more than a typical commercial bribe is required -- essentially every commercial bribe would be an antitrust violation if only the payee performed his or her end of the bargain.

GROUP BOYCOTT

As the majority observes, under § 76-10-920 of the Utah Antitrust Act, only four specific antitrust violations, "clearly labeled as per se violations of the Sherman Act," are criminal offenses in Utah. Defendants in this case were charged with having committed only one such violation, namely a group boycott. As the majority states, the Legislature intended that federal interpretations be considered in construing the Utah statute where appropriate. However, unlike the Sherman Act, the Utah statute was designed to unambiguously define antitrust violations which will give rise to criminal sanctions in this state. *See* Dibble & Jardine, *The Utah Antitrust Act of 1979: Getting Into the State Antitrust Business,* 1980 Utah L. Rev. 73, 83. The majority concedes that the agreement between defendants and Fletcher did not constitute a classic group boycott under the federal definition and that "unless defendants' conduct was in the form **[**44]** of a group boycott, it was not criminal under Utah law."

Notwithstanding the specific language of the statute dictating the use of federal interpretations and the objective of clearly delineating proscribed conduct, the majority suggests that the Utah statute rejects the traditional federal definition of the **[*820]** term "group boycott" in favor of the "general definition of boycott." [2] This concept, according to the majority, 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." [3] Even under this definition, it is difficult to imagine how the behavior of these defendants constitutes any kind of boycott with antitrust implications. Fletcher accepted bribes from the defendants in this case so that they would receive the UP & L security contracts. There was no dispute, no pressure, no enlistment of others to withhold services, and no target for elimination. It is clear to me that even if the Legislature meant to have the term "group boycott" construed in a less rigid way than might characterize the traditional federal view, it nonetheless intended to have the term mean something reasonably **[**45]** concrete. Minimally, the behavior sought to be proscribed by the statute is behavior which can fairly be described as a group boycott.

In my view, what defendants did cannot **[**46]** be characterized as a group boycott in any sense. Defendants' excursion into the realm of antitrust was, at most, in the form of an exclusive dealing arrangement. An exclusive dealing arrangement is a contract which involves a commitment by a buyer to deal only with a particular seller. L. Sullivan, *Handbook of the Law of Antitrust* 471 (1977). However, such an arrangement does not constitute a per se violation of *section 1* of the Sherman Act, *see, e.g., Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676*

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[2] The majority relies on federal cases rejecting the "numerosity" requirement of group boycott for the view that something less is now needed to constitute a group boycott. While it is true that these cases have dropped the "numerosity" requirement, i.e., concern about the number of conspirators in a horizontal relationship, they nonetheless still require the other elements of a group boycott: concerted refusal to deal, enlistment of others, and a target. *See, e.g., Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404, 414 (6th Cir. 1982)*.

[3] The majority suggests that a boycott under their "general definition" differs from the term group boycott as it evolved under the per se doctrine. Ironically, their definition was taken from one of the landmark cases defining a per se illegal group boycott. The definition extracted from the Supreme Court's opinion was one which the Court offered to explain the term "boycott" in common parlance. *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 545-46, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)*.

F.2d 1291, 1304 n.9 (9th Cir. 1982) (explaining Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)), nor does it constitute a violation of § 76-10-920 of the Utah Antitrust Act.

The trial court accurately categorized the arrangement between Fletcher and the defendants in this case as one of "exclusive dealing," while at the same time stating that application of "rule of reason" analysis [4] **[**47]** "would result in an unconstitutional deprivation of defendant's rights to due process of law." [5] The majority likewise **[*821]** admits that "the rule of reason has no part in the criminal provisions of the Utah Antitrust Act."

[48]** The majority, however, largely avoids the implications of this conclusion by minimizing the nature of defendants' *behavior* and instead emphasizing their perceived state of mind in doing what they did. According to the majority, "the intent of the contract, combination or conspiracy is the deciding element" of criminality. Under this reasoning, even a purely vertical exclusive dealing contract -- which both the majority and the trial court acknowledge is not a "group boycott" in the usual sense -- can be miraculously converted into a group boycott, at least of the Utah variety, by proof of an anticompetitive intent. That is, as the trial court held, "an otherwise legal business decision can become an unlawful group boycott under the Utah Antitrust Act."

The effect of this approach is to render totally ineffectual the Legislature's effort to particularize but four familiar, per se antitrust violations as unlawful under § 76-10-920, so that "both the prosecutor and the community at large" will clearly know "what *conduct* is criminally proscribed." Dibble & Jardine, *The Utah Antitrust Act of 1979: Getting Into the State Antitrust Business,* 1980 Utah L. Rev. 73, 83 (emphasis **[**49]** added).

But why else, the logic goes, would the Legislature inject a specific intent requirement into an offense which has historically been though so bad that criminal intent can simply be presumed? It is obvious to me that by coupling an anticompetitive specific intent requirement with the group boycott aspect of § 76-10-920, the Legislature did not mean to obscure the issue of what kinds of behavior were proscribed. Rather, the Legislature meant to avoid the "confusion over the illegality of group boycotts and the governing standards," *id.,* by requiring that a readily identifiable group boycott be accompanied by an actual intent to eliminate competition. *See id.* The specific intent requirement was added to eliminate "the potentially problematic situation where a group boycott exists but an anticompetitive motive does not." *Id.* The requirement was not added to allow for a criminal conviction whenever there is an anticompetitive motive regardless of whether there is really a group boycott. I believe by adding a specific intent requirement the Legislature meant to narrow, not expand, the scope of the group boycott crime in this state.

SPECIFIC INTENT

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[4] Whereas group boycotts are subject to a per se rule of illegality, exclusive dealing arrangements are tested by a "rule of reason" standard. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d at 1302. The focus of this test is to first find a relevant market and then assess whether competition has been foreclosed in a substantial share of the relevant market. Antitrust liability is not imposed without proof of actual harm to competition. The purpose of this test is to determine the anticompetitive "effects" of the exclusive contract, *id.,* rather than the anticompetitive "intent" as required by the Utah statute.

[5] The memorandum decision is reprinted at Note, *Criminal Antitrust Action in Utah: State v. Fletcher,* 1 B.Y.U. J. Pub. L. 229, 251-55 (1986). The decision was written in the context of a denial of a motion to dismiss. While the decision simply permitted the state to proceed to try its case before a jury, the trial court shared the majority's view that intent is the controlling element of a "group boycott" charge.

> The theme of the cases cited by both parties is that the mere existence of an exclusive vertical contract is not a "group boycott" prohibited by the antitrust laws. However, the State has alleged and should be allowed to prove that the defendants had specific anticompetitive intent. This can not be inferred from the mere existence of an exclusive vertical deal, but by anticompetitive, illegal behavior an otherwise legal business decision can become an unlawful group boycott under the Utah Antitrust Act. The State should have the opportunity to establish that the defendants had a specific intent to eliminate access to the security guard market as the goal of their exclusive dealing and that no legitimate business purpose or result was intended.

Id. at 254-55.

Even if the defendants **[**50]** engaged in conduct which might arguably constitute a group boycott in some broad sense, I do not believe they did so with the specific intent to eliminate competition as required by the statute nor do I agree with the majority that such intent can be inferred from the evidence.

According to the majority, anticompetitive intent "may be inferred from the defendant's conduct and circumstances." The majority points to the fact that the contracts between UP & L and defendants were not competitively bid as is the usual practice in selecting security companies. This leads my colleagues to the conclusion that the intent of these defendants was none other than to eliminate "competition."

If one looks at what defendants did and considers the market in which they did it, [6] it is obvious they had no intent to eliminate competition. The trial court, in instructing the jury, narrowly defined the relevant market in this case as "among vendors of security guard services to Utah Power and Light," notwithstanding the fact that other security guard companies competing for **[*822]** the UP & L contract were also competing for contracts throughout the state, or even worldwide. However, there was no evidence that the **[**51]** security needs of UP & L were somehow so unique that guard service vendors competing for UP & L's business were necessarily different -- and fewer -- than guard service vendors generally, who of course are able to provide security services for everything from large utilities to retail stores, apartments, warehouses, churches, banks, and so on. Nor was there evidence to show that UP & L was such a major purchaser in the local security service market that failure to secure that contract would necessarily imperil any of defendants' competitors.

While it can perhaps be inferred that the defendants intended **[**52]** to eliminate other security companies from competition for the UP & L contract, it simply cannot be inferred that they intended to eliminate these companies from competition in any meaningful marketplace, which is what the antitrust laws are designed to prevent. "The Sherman Act was enacted to protect competition in the marketplace. It was not designed, and has never been interpreted, to reach all business practices, unfair or otherwise, damaging to individual companies." *Cascade Cabinet Co. v. Western Cabinet & Millwork, 710 F.2d 1366, 1374 (9th Cir. 1983)*. Other security companies were not hindered by defendants in competing for security guard contracts. They were merely deprived of the UP & L contract. While this conduct is certainly not commendable, [7] "the use of unfair means resulting in the substitution of one competitor for another without more does not violate the antitrust laws." *Manufacturing Research Corp. v. Greenlee Tool Co., 693 F.2d 1037, 1043 (11th Cir. 1982)*.

[53]** CONCLUSION

Commercial bribery does not criminally violate the Utah antitrust laws. Defendants' conduct does not constitute a group boycott. Even if defendants' conduct can somehow be shoehorned into the "group boycott" pigeonhole, there was no evidence to prove a specific intent to eliminate competition, and the fair inferences point the other way. I would reverse the antitrust convictions and remand for resentencing on the other crimes for which defendants were properly convicted.

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[6] "An antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Contrary to the majority's characterization, I have not urged full-blown market analysis of the sort typical when applying the rule of reason. Such analysis is indeed unnecessary where an antitrust violation of the per se variety is at issue. However, I think a cursory peek at the relevant market is instructive in evaluating the likelihood that defendants had as their intent the elimination of competition.

[7] Fortunately, such objectionable conduct is readily punished under our commercial bribery statute. Where the conduct is especially egregious, it can also, as in this case, be reached under the racketeering statute. Defendants did a bad thing and they should suffer the consequences. Their punishment, however, should be for the crimes they committed, not those they might have committed had the Legislature chosen a different approach to antitrust criminality.

LexisNexis®

United States Football League v. National Football League

United States Court of Appeals for the Second Circuit

June 22, 1987, Argued ; March 10, 1988, Decided

Docket Nos. 87-7137, 87-7271

Reporter

842 F.2d 1335 *; 1988 U.S. App. LEXIS 19313 **; 1988-1 Trade Cas. (CCH) P67,930

UNITED STATES FOOTBALL LEAGUE, ARIZONA OUTLAWS, BALTIMORE STARS FOOTBALL ASSOCIATES, BIRMINGHAM STALLIONS, LTD., CHICAGO USFL LIMITED PARTNERSHIP, CHICAGO FOOTBALL FRANCHISE LIMITED PARTNERSHIP, DENVER GOLD SPORTS, INC., HOUSTON GAMBLERS LTD., IMI EXPRESS, INC., JAX PROFESSIONALS, INC., LAEFC, LTD., MEMPHIS SHOWBOATS, LTD., FOOTBALL GENERALS, INC., BAY AREA FOOTBALL PARTNERS LTD., BREAKERS LIMITED PARTNERSHIP, SOUTH TEXAS SPORTS, INC., and ORLANDO FOOTBALL PARTNERS, INC., Plaintiffs-Appellants, Cross-Appellees, v. NATIONAL FOOTBALL LEAGUE, THE FIVE SMITHS, INC., INDIANAPOLIS COLTS, INC., BUFFALO BILLS, INC., CHICAGO BEARS FOOTBALL CLUB, INC., CINCINNATI BENGALS, INC., CLEVELAND BROWNS, INC., DALLAS COWBOYS FOOTBALL CLUB, INC., ROCKY MOUNTAIN EMPIRE SPORTS, INC., THE DETROIT LIONS, INC., GREEN BAY PACKERS, INC., HOUSTON OILERS INC., LOS ANGELES RAMS FOOTBALL COMPANY, MINNESOTA VIKINGS FOOTBALL CLUB, INC., NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP, NEW YORK FOOTBALL GIANTS, INC., NEW YORK JETS FOOTBALL CLUB INC., THE PHILADELPHIA EAGLES FOOTBALL CLUB, PITTSBURGH STEELERS SPORTS, INC., ST. LOUIS FOOTBALL CARDINALS CO., CHARGERS FOOTBALL COMPANY, SAN FRANCISCO FORTY-NINERS, LTD., TAMPA BAY AREA NFL FOOTBALL, INC., PRO-FOOTBALL INC., KANSAS CITY CHIEFS FOOTBALL CLUB, INC., MIAMI DOLPHINS, LTD., SEATTLE PROFESSIONAL FOOTBALL and ALVIN R. ROZELLE, individually and as Commissioner of the National Football League, Defendants-Appellees, Cross-Appellants

Subsequent History: **[**1]** March 28, 1988, Amended

Prior History: Appeal from a judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), entered after a jury trial, finding that defendants had unlawfully monopolized major-league professional football in the United States and awarding plaintiffs $ 1.00 in damages to be trebled; from an order denying plaintiffs' motion for judgment notwithstanding the verdict on their other antitrust claims, and for a new trial on damages on the monopolization of professional football claim, or in the alternative for a new trial; and from a judgment denying plaintiffs' request for injunctive relief. Defendants have filed a conditional cross-appeal.

Disposition: Affirmed.

Core Terms

network, television, league, broadcasting, teams, submarket, games, rights, contracts, professional football, damages, antitrust, merger, season, football, monopolization, franchise, players, district court, dilution, Sports, spring, monopoly power, competitors, markets, instructions, unambiguous, cable, relevant market, anti trust law

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Sports > Football

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Sports Broadcasting Act

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

Antitrust & Trade Law > Regulated Industries > Sports > Sports Broadcasting Act

HN1[] **Sports, Football**

See the Sports Broadcasting Act, *15 U.S.C.S. § 1291*.

Antitrust & Trade Law > Regulated Industries > Sports > Football

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Sports Broadcasting Act

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

Antitrust & Trade Law > Regulated Industries > Sports > Sports Broadcasting Act

HN2[] **Sports, Football**

The statutory language of the Sports Broadcasting Act, *15 U.S.C.S. § 1291*, neither states nor implies that the antitrust exemption limits a football league to a contract with only one network.

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

HN3[] **Monopolies & Monopolization, Actual Monopolization**

Monopolization is the willful acquisition or maintenance of monopoly power. The willfulness element certainly requires proof of intent. Proof of effect is required by definition alone to satisfy the acquisition or maintenance requirement.

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**

Unlike a per se price-fixing case, a rule-of-reason case requires the fact finder to balance the procompetitive and anticompetitive effects of any restraint.

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**

An anticompetitive effect must be shown to make out a rule-of-reason violation under *§ 1* of the Sherman Anti-Trust Act, *15 U.S.C.S. § 1*.

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

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

HN6[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches. A monopolist may not, of course, use its market power, whether obtained lawfully or not, to prevent or impede competition in the relevant market.

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

HN7[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive.

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

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

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

An unambiguous evidence instruction regarding the power to control prices or to exclude competition is appropriate where market share data for the relevant market is lacking. Absent market share data, definite evidence of monopoly power is needed lest profitability alone provide a basis for antitrust liability.

Civil Procedure > Attorneys > General Overview

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

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN9[] **Civil Procedure, Attorneys**

Counsel must state to a district court distinctly the matter objected to in a jury instruction and the grounds of objection.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN10[] **Reviewability of Lower Court Decisions, Preservation for Review**

A party's failure to bring alleged inconsistencies in the verdict sheet to the court's attention before the jury has been discharged waives the right to have the alleged inconsistencies remedied by a new trial.

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

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

An inquiry into consumer preference is obviously relevant to a determination of whether a monopolist has engaged in predatory conduct.

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

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

HN12[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The requirement that the defendant control access to the facility is established in the caselaw and is necessary because an essential-facilities claim must be brought against the party that can provide access to the facility.

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

HN13[] **Price Discrimination, Defenses**

A plaintiff's own anticompetitive conduct generally cannot be raised as a defense to liability in an antitrust action. The defense may be available, however, when the plaintiff was present at the creation and had a complete and continuing involvement in the monopolization scheme.

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

Evidence > ... > Competency > Jurors > General Overview

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN14[] **Jurors, Misconduct**

Fed. R. Evid. 606(b) prohibits the use of extrajudicial statements by jurors to impeach a verdict.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN15[] **Conduct Evidence, Prior Acts, Crimes & Wrongs**

Evidence of a prior antitrust judgment is irrelevant unless plaintiff introduces evidence that the practices complained of in the prior case had an injurious effect upon the plaintiff.

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

Evidence > Admissibility > Conduct Evidence > Habit & Routine Practices

HN16[] **Regulated Industries, Sports**

Under *Fed. R. Evid. 406*, testimony as to three or four episodes over a 20-year period is hardly sufficient to conclude that a pattern of behavior exists with respect to conduct at issue.

Evidence > ... > Testimony > Examination > General Overview

HN17[] **Testimony, Examination**

There is no abuse of discretion in refusing to permit the cross-examination of a witness that would lead to a mini-trial.

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

Education Law > Faculty & Staff > Freedom of Speech > Freedom to Petition

HN18[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Legislative lobbying efforts cannot of course be the basis of antitrust liability.

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

HN19[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Efforts to persuade government officials simply by appealing to their political interests have Noerr-Pennington protection.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Types of Evidence > Documentary Evidence > Completeness

HN20[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

The doctrine of completeness, under *Fed. R. Evid. 106*, does not compel admission of otherwise inadmissible hearsay evidence.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN21[] **Clayton Act, Claims**

To recover treble damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, an antitrust plaintiff must prove that its injury was, in fact, caused by the defendant's violation of the antitrust laws.

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

Torts > Remedies > Damages > General Overview

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

HN22[] **Private Actions, Remedies**

Once proof of injury causation has been established, courts have allowed antitrust plaintiffs considerable latitude in proving the amount of damages. Proof of the amount of damages thus need not conform to a particular theory or model. An antitrust plaintiff must thus provide only sufficient evidence to support a just and reasonable estimate of damages.

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

HN23[] **Private Actions, Remedies**

Where damages have been shown to be attributable to the defendant's wrongful conduct, but are uncertain in amount, the defendant bears the risk of those uncertainties.

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Judges: Cardamone, Pierce and Winter, Circuit Judges.

Opinion by: WINTER

Opinion

[*1340] WINTER, Circuit Judge:

This appeal follows a highly publicized trial and jury verdict of $ 1.00. The plaintiff is a now-defunct professional football league that began play in this decade; the defendant is a football league founded nearly seventy years ago. The older of the two leagues, the National Football League, is a highly successful entertainment product. So many Americans watched NFL games between 1982 and 1986 that its twenty-eight teams shared $ 2.1 billion in rights fees from the three major television networks, and perhaps as much as $ 1 billion in gate receipts. The newer league, the United States Football League, began play in March 1983 with twelve teams and network and cable television contracts with the American Broadcasting Company ("ABC") and **[**3]** the Entertainment and Sports Programming Network ("ESPN"). After three seasons and losses in the neighborhood of $ 200 million, the USFL played its last game in July 1985. Meanwhile, in October, 1984, blaming its older competitor for its difficulties, the USFL instituted this litigation. Plans to play in the fall of 1986 were abandoned after the jury's verdict that is the principal subject of this appeal.

The USFL and certain of its member clubs [1] **[**4]** brought this suit in the Southern District of New York against the NFL, its **[*1341]** commissioner, Alvin R. "Pete" Rozelle, and twenty-seven of its twenty-eight member clubs. [2] Seeking damages of $ 1.701 billion [3] and appropriate injunctive relief, the USFL alleged that the NFL violated *Sections 1* and *2* of the Sherman Anti-Trust Act, *15 U.S.C. §§ 1* and *2 (1982)*, and the common law. Forty-eight days of trial before Judge Leisure produced a trial transcript of nearly 7100 pages and thousands of additional pages in exhibits.

After five days of deliberations, the jury found that the NFL had willfully acquired or maintained monopoly power in a market consisting of major-league professional football in the United States. The jury also found that the NFL's unlawful monopolization of professional football had injured the USFL. [4] The jury awarded the USFL only $ 1.00 in damages, however, an amount that, even when trebled, was no consolation for the USFL.

[5]** The jury rejected the remainder of the USFL's claims. It found that the NFL had neither monopolized a relevant television submarket nor attempted to do so; that the NFL did not commit any overt act in furtherance of a conspiracy to monopolize; that the NFL did not engage in a conspiracy in restraint of trade; that the NFL's television contracts were not unreasonable restraints of trade; that the NFL did not control access to the three major television networks; and that the NFL did not interfere either with the USFL's ability to obtain a fall television contract or with its spring television contracts. The USFL's common law claims were also rejected.

Judge Leisure denied the USFL's motions for judgment notwithstanding the verdict on its claims of monopolization of the television submarket, attempted monopolization, unreasonable restraint of trade by means of the network television contracts and essential facilities, and for a new trial on damages on the monopolization of professional football claim, or in the alternative for a new trial. *United States Football League v. National Football League, 644 F. Supp. 1040 (S.D.N.Y. 1986)* ("*Opinion No. 16* "). The **[**6]** district court also denied the USFL's request for injunctive relief.

On this appeal, the USFL claims that a "litany of erroneous opinions, rulings and instructions" by Judge Leisure resulted in a "verdict of confusion" that "sent one of the most egregious violators in the history of the federal antitrust laws on its way with a pat on the back." USFL Br. at 3-4. Specifically, the USFL contends that the NFL could not legally enter into a pooled-rights agreement with all three networks; that Judge Leisure's jury instructions "destroyed" the effectiveness of the USFL's proof of its television claims and set improperly high standards of liability; that he improperly allowed the NFL to introduce evidence that the USFL was mismanaged; that he

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[1] The Tampa Bay franchise withdrew as a plaintiff at the time of the filing of the First Amended Complaint. The Arizona Outlaws have withdrawn their appeal.

[2] The Los Angeles Raiders, Ltd., were not named as defendants in this action.

[3] The complaint requested that "the Court award the plaintiffs threefold the amount of actual damages, not less than $ 440,000,000 in the aggregate ($ 1,320,000,000 when trebled)"; in the joint pretrial order, plaintiffs sought "threefold the amount of actual damages in excess of $ 567,000,000 in the aggregate (in excess of $ 1,700,000,000 when trebled)."

[4] NFL Commissioner Rozelle was not found personally liable on the USFL's monopolization claim.

excluded other evidence critical to establishing the USFL's claims; and that his incorrect rulings and instructions on damages prevented the USFL from receiving appropriate relief. We affirm.

SUMMARY

We briefly summarize our principal rulings. The jury's finding of illegal monopolization of a market of major-league professional football was based upon evidence of NFL attempts to co-opt USFL owners, an NFL Supplemental Draft of USFL players, **[**7]** an NFL roster increase, and NFL conduct directed at particular USFL franchises. These activities, however, were hardly of sufficient impact to support a large damages verdict or to justify sweeping injunctive relief. For that reason, the USFL candidly admits that "at the heart of this case" are its claims that the NFL, by contracting **[*1342]** with the three major networks and by acting coercively toward them, prevented the USFL from acquiring a network television contract indispensable to its survival. The jury expressly rejected the television claims.

The jury was clearly entitled by the evidence to find that the NFL's fall contracts with the three networks were not an anticompetitive barrier to the USFL's bidding against the NFL to acquire a network contract. Moreover, there was ample evidence that the USFL failed because it did not make the painstaking investment and patient efforts that bring credibility, stability and public recognition to a sports league. In particular, there was evidence that the USFL abandoned its original strategy of patiently building up fan loyalty and public recognition by playing in the spring. The original plan to contain costs by adherence to **[**8]** team salary guidelines was discarded from the start. Faced with rising costs and some new team owners impatient for immediate parity with the NFL, the idea of spring play itself was abandoned even though network and cable contracts were available. Plans for a fall season were therefore announced, thereby making 1985 spring play a "lame-duck" season. These actions were taken in the hope of forcing a merger with the NFL through the threat of competition and this litigation. The merger strategy, however, required that USFL franchises move out of large television markets and into likely NFL expansion cities. Because these moves further eroded fan loyalty and reduced the value of USFL games to television, the USFL thereby ended by its own hand any chance of a network contract.

Notwithstanding the jury's evident conclusions that the USFL's product was not appealing largely for reasons of the USFL's own doing and that the networks chose freely not to purchase it, the USFL asks us to grant sweeping injunctive relief that will reward its impatience and self-destructive conduct with a fall network contract. It thus seeks through court decree the success it failed to achieve among football **[**9]** fans. Absent a showing of some unlawful harm to competition, we cannot prevent a network from showing NFL games, in the hope that the network and fans will turn to the USFL. The Sherman Act does not outlaw an industry structure simply because it prevents competitors from achieving immediate parity. This is particularly so in the case of major-league professional football because Congress authorized a merger of the two leagues existing in 1966 and thus created the industry structure in question.

THE TRIAL

1. *The Parties' Contentions*

The USFL contended at trial that the NFL maintained a monopoly in the market for major league professional football and in a submarket for the network broadcasting rights to such football by the following allegedly predatory tactics:

a. Signing multiyear contracts with the three major television networks;

b. Pressuring the major networks to abstain from televising USFL games in the spring or fall, and successfully preventing any network telecasts of the USFL in the fall, by threatening not to renew NFL contracts or by assigning unattractive NFL games under existing contracts;

c. Establishing contracts with the networks for artifically **[**10]** high rights fees that, because of the so-called "dilution effect" on demand for advertising during NFL games, precluded network broadcasts of the USFL;

d. Seeking to prevent any of the three major networks from signing a contract for the USFL's initial 1983 spring playing season;

e. Rotating the Super Bowl among the three networks and not submitting the Super Bowl, playoff and even regular-season television rights to competitive bidding;

f. Pursuing a strategy outlined in the so-called "Porter Presentation" to "conquer" and bankrupt the USFL, including: co-opting powerful USFL owners, such as Donald Trump and Alfred Taubman, by offering them **[*1343]** NFL franchises; encouraging ABC not to continue USFL broadcasts; pressuring ABC by giving it an unattractive schedule for its *Monday Night Football* program in 1984; targeting important USFL players for signing with the NFL through means such as the NFL's Supplemental Draft and expanded roster; and attempting to bankrupt the weakest USFL teams by driving up USFL player salaries in order to diminish the USFL's size and credibility;

g. Collaborating with the City of Oakland to destroy the Oakland Invaders of the USFL in **[**11]** order to hurt the credibility and image of the Invaders and the entire USFL;

h. Threatening to move an existing NFL franchise or to create a new NFL franchise solely to injure the USFL franchise in Oakland; and

i. Attempting to preclude the USFL's New Jersey Generals from moving to New York City.

The NFL contended that the relevant television submarket included entertainment broadcasting generally and that it had not monopolized either the market for major league professional football or the television submarket because:

a. Its contracts with the three major networks were not exclusionary;

b. The USFL's failure to secure a fall network contract was the result of the independent judgment of each network that the USFL was an inferior product, and of the USFL's self-destructive strategy of forcing a merger with the NFL;

c. It never pressured a network by threatening non-renewal or by assigning a schedule of unattractive games;

d. It never undertook the strategy outlined in the Porter Presentation;

e. It never sought to injure the USFL's Oakland franchise or to preclude the New Jersey Generals from playing in New York City; and

f. The losses suffered **[**12]** by the USFL were due to its own mismanagement.

2. *The History of Major-League Professional Football*

The NFL is an unincorporated association presently consisting of twenty-eight independent, for-profit football clubs. It was founded in 1920 in a Canton, Ohio Hupmobile showroom under the name American Professional Football Association. In 1922, it changed its name to the National Football League. The original teams were the Akron Pros, the Canton Bulldogs, the Cleveland Indians, the Dayton Triangles, the Decatur Staleys, the Hammond Pros, the Massillon Tigers, the Muncie Flyers, the Rock Island Independents and the Rochester Jeffersons, although Massillon and Muncie never played any games. By 1926, the NFL had grown to twenty-two franchises. By 1931, it had shrunk back to ten. The first championship game was not played until 1933. The first NFL draft of college players took place in 1935. All NFL teams played the same number of games for the first time in 1936. As late as 1952, NFL teams encountered bankruptcy. Indeed, NFL Commissioner Rozelle once testified that "41 franchises failed in the first 41 years of the League's existence." Transcript of Proceedings **[**13]** at 55, *United States v. National Football League*, No. 12808 (E.D. Pa. July 27, 1961).

A competing league, the All-America Football Conference ("AAFC"), was organized in 1945 and operated for four seasons with teams in Brooklyn, Buffalo, Chicago, Cleveland, Los Angeles, Miami, New York and San Francisco. *American Football League v. National Football League, 205 F. Supp. 60, 65 (D. Md. 1962)* ("*AFL v. NFL"), aff'd*, *323 F.2d 124 (4th Cir. 1963)*. Baltimore replaced Miami in 1947, and after the 1948 season, the Brooklyn team merged with the New York team. *Id.* The AAFC ceased operations in 1949 when the Baltimore, Cleveland and San Francisco teams were absorbed by the NFL, raising the number of its teams to thirteen. *Id.* Shortly thereafter, that number was reduced to twelve, where it remained until 1960. *Id.* The NFL's twelve teams were **[*1344]** the Baltimore Colts, Chicago Bears, Chicago (later St. Louis) Cardinals, Cleveland Browns, Detroit Lions, Green Bay Packers, Los Angeles Rams, New York Giants, Philadelphia Eagles, Pittsburgh Steelers, San Francisco Forty-Niners and Washington Redskins. *Id. at 62*. **[**14]** The Dallas Cowboys, Minnesota Vikings, Atlanta Falcons and

New Orleans Saints were added as expansion teams in 1960, 1961, 1966 and 1967, respectively. Joint Pretrial Order at 14, para. 28.

The American Football League ("AFL") was founded in late 1959 by Lamar Hunt, a scion of a Texas oil family, and began play in the fall of 1960. The demand for professional football was then sufficiently great to enable the AFL to obtain a contract with ABC for the years 1960-63. The new league was fueled in part by the NFL's cautious approach toward expansion; many of the AFL's original owners had unsuccessfully sought NFL franchises, and the majority of the AFL teams were located in cities without an NFL team. *See generally AFL v. NFL*, 205 F. Supp. at 66-75. The original eight teams were the Boston Patriots, Buffalo Bills, Dallas Texans, Denver Broncos, Houston Oilers, Los Angeles (San Diego after the 1960 season) Chargers, New York Titans, and Oakland Raiders. *Id. at 62*. The Miami Dolphins joined the AFL in 1960, the Cincinnati Bengals in 1968. Joint Pretrial Order at 14, para. 28. The AFL brought an unsuccessful antitrust suit against the NFL in 1962. **[**15]** *See AFL v. NFL, 323 F.2d 124 (4th Cir. 1963)*, *aff'g* *205 F. Supp. 60*.

In 1966, the NFL and the AFL agreed to merge, largely because the competition for players had sharply increased salaries. Congress exempted this merger from the antitrust laws by legislation discussed *infra*. The merger became fully effective when a twenty-six-team NFL began play in 1970 with two conferences, the National Football Conference and American Football Conference. The NFL reached its present size of twenty-eight teams when expansion teams began play in Seattle and Tampa in 1976.

In 1974, the World Football League ("WFL") was founded. The WFL lasted for one-and-one-half seasons before disbanding. Its teams were underfinanced and played in mostly smaller markets. The WFL never obtained a television contract with a major network, although its games were televised by a syndicated network. At least one of the league's teams tried unsuccessfully to enter the NFL through litigation. *See Mid-South Grizzlies v. National Football League, 720 F.2d 772 (3d Cir. 1983)* (rejecting antitrust claim by WFL team denied admission to NFL).

The USFL was founded **[**16]** in May 1982 by David Dixon as a league that would play spring football. The league began play in March 1983 with teams in Birmingham, Boston, Chicago, Denver, Los Angeles, Michigan, New Jersey, Oakland, Philadelphia, Phoenix, Tampa and Washington. In part because of the location of its teams in major television markets, the USFL was able to obtain multimillion dollar network and cable television contracts with ABC and ESPN. Nevertheless, for reasons explored in detail *infra*, the USFL demonstrated little stability. Over its three seasons of spring football (one of which was a "lame-duck" season commenced after an announced decision to shift to fall play), the USFL clubs played in twenty-two cities, [5] **[**17]** **[*1345]** and had thirty-nine principal

[5] The USFL teams played in the following cities/states:

1986

1983

1984

1985

(proposed)

Birmingham

Birmingham

Baltimore

Baltimore

Boston

Chicago

Birmingham

owners. [6] None of the majority owners of an original USFL team was a majority owner by 1986 when a planned fall

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Birmingham

Chicago

Denver

Denver

Jacksonville

Denver

Houston

Houston

Memphis

Los Angeles

Jacksonville

Jacksonville

New Jersey

Michigan

Los Angeles

Los Angeles

Orlando

New Jersey

Memphis

Memphis

Phoenix

Oakland

Michigan

New Jersey

Tampa

Philadelphia

New Jersey

Oakland

Phoenix

New Orleans

Orlando

Tampa

Philadelphia

Phoenix

Washington, D.C.

Phoenix

Portland

schedule was aborted by the $ 1.00 verdict.

Pittsburgh

San Antonio

San Antonio

Tampa

Tampa

Tulsa

Washington, D.C.

[6] The principal owners of USFL teams during 1983-85 were as follows:

Team

1983

1984

1985

Arizona

Jim Joseph

Edward Diethrich

William Tatham, Sr.

Bill Harris

George Allen

[18] [*1346]** 3. *The NFL's Television Contracts*

Baltimore

NA

NA

Myles Tanenbaum

Birmingham

Marvin Warner

Marvin Warner

Marvin Warner *

Boston

George Matthews

NA

NA

Randy Vataha

Chicago

Edward Diethrich

James Hoffman **

Eddie Einhorn

Bill Harris

George Allen

Denver

Ron Blanding

Doug Spedding

Doug Spedding

Houston

NA

Jerry Argovitz

Jerry Argovitz

Jay Lerner

Alvin Lubetkin

Alvin Lubetkin

Jay Roulier

Jay Roulier ***

Jacksonville

NA

Fred Bullard

Fred Bullard

The growth of the NFL was closely related to the growth of television. Beginning in 1951, the Dumont network

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Los Angeles

Bill Daniels

William Oldenburg ****

Alan Harmon

Memphis

NA

Logan Young

William Dunavent

William Dunavent

Michigan

Alfred Taubman

Alfred Taubman

NA

Max Fisher

Max Fisher

Peter Spivak

New Jersey

J. Walter

Donald Trump

Donald Trump

Duncan

New Orleans

NA

Joseph Canizaro

NA

Oakland

Tad Taube

Tad Taube

Alfred Taubman

Tad Taube

Oklahoma

NA

William Tatham, Sr.

NA

Orlando

NA

NA

televised five regular season games (twelve by 1954), as well as the championship game each year. In the mid-

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Donald Dizney

Jim English

John Day

Phila.

Myles

Myles Tanenbaum

NA

Tanenbaum

Pittsburgh

NA

Edward J.

NA

DeBartolo, Sr.

Portland

NA

NA

Joseph Canizaro

San Antonio

NA

Clinton Manges

Clinton Manges

Tampa Bay

John Bassett

John Bassett

John Bassett

Steve Arky

Steve Arky

Steve Arky

Washington

Berl Bernhard

Berl Bernhard

NA

Bob Linowes

Bob Linowes

1950's, the Columbia Broadcasting System ("CBS") began broadcasting certain NFL regular season games for $ 1.8 million per year, and the National Broadcasting Company ("NBC") acquired the right to televise the NFL

* Mr. Warner surrendered his interest in the Birmingham franchise in April, 1985.

championship game. The broadcast rights to games were controlled by individual teams during the 1950's, however.

In 1961, the NFL teams agreed to sell their collective television rights as a single package and to share broadcast revenues equally among all franchises. This decision was in response to arguments by Commissioner Rozelle that the league's competitive balance on the field would eventually be destroyed if teams in major television markets continued to sell their broadcast rights individually. In the long run, he believed, great differentials in television revenues among teams would lead to a competitive imbalance that would diminish the overall attractiveness of the NFL's product. *See* **[**19]** Transcript of Proceedings at 67-68, *United States v. National Football League*, No. 12808 (E.D. Pa. July 27, 1961) (testimony of Commissioner Rozelle); *see also United States Football League v. National Football League, 634 F. Supp. 1155, 1161 & n.2 (S.D.N.Y. 1986)* ("*Opinion No. 2*"). Rozelle's arguments were bolstered by the policy of the recently organized AFL to pool television rights and revenues in its first broadcast contract with ABC.

Before the NFL could enter a pooled-rights television contract, however, it had to overcome several legal obstacles. An earlier attempt by the NFL to control the sale of television rights by its teams had been deemed a violation of *Section 1* of the Sherman Act in *United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953)*. In that case, the government sought to enjoin the enforcement of Article X of the NFL's by-laws, which regulated the broadcast of distant games into the home territories of other teams. [7] Applying Rule-of-Reason analysis, Judge Grim held that the restriction on the broadcast of outside games when home teams were playing away was an impermissible restraint of trade. **[**20]** *Id. at 327*. The Final Judgment provided that:

> The defendants are jointly and severally . . . enjoined . . . from directly or indirectly entering into . . . any contract, agreement or understanding with the league defendant or any member club of the league defendant, . . . having the purpose or effect of restricting the areas within which broadcasts or telecasts of games . . . may be made.

United States v. National Football League, No. 12808, Final Judgment § V (E.D. Pa. Dec. 28, 1953), *quoted in Opinion No. 2*, *634 F. Supp. at 1159*.

[21]** In 1961, the NFL brought a pooled-rights agreement with CBS before Judge Grim for a determination as to whether the **[*1347]** agreement violated the 1953 Final Judgment. This contract provided that CBS would have the "right to determine, entirely within its own discretion . . . which games shall be televised and where such games be televised." *United States v. National Football League, 196 F. Supp. 445, 447 (E.D. Pa. 1961)*. Judge Grim held that CBS's authority to determine when and where games would be broadcast violated Section V of the Final Judgment. *Id.* A subsequent motion by the NFL for a modification or suspension of the Final Judgment was denied. Judge Grim accordingly enjoined the execution and performance of the pooled-rights contract between the NFL and CBS, and further enjoined the NFL from entering into "any other contract and agreement having similar purpose or

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** Dr. Hoffman surrendered his interest in the Chicago franchise in January, 1984. Thereafter, it was operated by a corporation, CPHFC, Inc., until July 2, 1984, when a new franchise for Chicago was granted to Edjer Corp.

*** Mr. Roulier became a principal owner in June, 1984, replacing Mr. Lerner.

**** Mr. Oldenburg surrendered his interest in the Los Angeles franchise in June, 1984. The franchise was operated by a USFL corporation for the balance of the 1984 season. In November, 1984, a new franchise for the Los Angeles area was acquired by LAEFC, Ltd., a Colorado limited partnership. From November 1984 until January 30, 1985, Jay Roulier owned the stock of Express Football Club, Inc., the general partner of LAEFC, Ltd. As of January 30, 1985, the stock of Express Football Club, Inc. was acquired by USFL Holdings, Inc., the stock of which is wholly owned by the USFL.

[7] Article X provided that "no club shall cause or permit a game in which it is engaged, to be telecast or broadcast into any area included within the home territory of any other club, without the consent of such other club" on a day on which the other club was either playing or broadcasting one of its games at home. *116 F. Supp. at 329*. The government contended that this provision restricted competition among clubs in the sale of broadcast rights.

effect." *United States v. National Football League*, No. 12808 (E.D. Pa. July 28, 1961) (order construing 1953 Final Judgment).

Specifically intending to alter Judge Grim's order, *see* S. Rep. No. 1087, 87th Cong., 1st Sess. 1, *reprinted in* 1961 U.S. Code Cong. & Admin. **[**22]** News 3042, 3042, Congress enacted the Sports Broadcasting Act of 1961, which exempted from the antitrust laws pooled-rights agreements entered into by professional sports leagues. Pub. L. No. 87-331, *§ 1*, *1961* U.S. Code Cong. & Admin. News 822, 75 Stat. 732 (codified as amended at *15 U.S.C. § 1291*) (Supp. IV 1986). In order to protect college games from competition with pro football telecasts, the exemption did not apply to the broadcast of professional football games on Friday nights and Saturdays during the college football season. *Id.* *§ 2* (codified as amended at *15 U.S.C. § 1293 (1982)*).

The first NFL pooled-rights contract was with CBS. For the 1962 and 1963 seasons, CBS was the only network permitted to bid for this contract because it had individual rights contracts running through 1963 with nine teams. The NFL received $ 4,650,000 per season from CBS during these two seasons. For the 1964-65 NFL contract, CBS outbid NBC and ABC with an offer of $ 14,100,000 per season. In 1964, the AFL, which had had a contract with ABC, entered into a five-year, $ 36 million contract with NBC.

In 1966, Congress amended the Sports **[**23]** Broadcasting Act specifically to confer antitrust immunity on the NFL-AFL merger. Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1515 (codified as amended at *15 U.S.C. § 1291*). At the same time, the restriction on Friday night and Saturday telecasts was expanded to include protection for high school football. *Id.* § 6(b)(3). In passing this legislation, Congress was plainly informed that, upon consolidation of the two leagues, the NFL would have broadcast contracts with at least two networks. *Professional Football League Merger: Hearings on S. 3817 Before Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 64, 66, 119 (1966).

In 1970, the NFL entered into a contract with ABC to televise a game nationally on Monday nights. Since then, all three major television networks have broadcast NFL games, [8] and the NFL's annual revenues from television have increased by more than 800 percent. The NFL teams received approximately $ 186 million for the 1970-73 seasons; $ 268 million for the 1974-77 seasons; $ 646 million for the 1978-81 seasons; and $ 2.1 billion over the five-year period 1982-86.

[24]** The ABC, CBS and NBC contracts from 1970 onward have given each network rights of first negotiation and first refusal **[*1348]** to decide whether to continue its NFL contract for subsequent years. The NFL's 1982-86 contracts were nonexclusive and did not forbid a network from televising another football league's games at any time when it was not broadcasting NFL games. NBC was thus legally free to televise to a particular city another league's games on Sunday afternoons directly opposite NFL games on CBS when there was no NFL game scheduled for NBC to be televised to that city. CBS had a similar option. ABC was legally free to televise another league's games all afternoon each Sunday. All three networks were legally free to telecast another league's games in prime time. Because the NFL was forbidden by its network contracts to televise games on cable, cable television contracts were open to a competing league, although such contracts are less lucrative than network contracts. When the NFL's network contracts expired in 1981 and 1986, the networks were free to contract with a competing league's games for all time slots.

The NFL's three-network "tie-up" was a central issue **[**25]** at trial. The USFL claimed that the NFL intentionally set out to tie up the three networks as a means of excluding competitors. In support of its theory, the USFL introduced

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[8] ABC now televises Monday night games and certain prime-time games. CBS televises National Football Conference ("NFC") games throughout the season, on Thanksgiving Day, and on Saturdays in December. NBC televises American Football Conference ("AFC") games throughout the season, Thanksgiving Day, and on Saturdays in December. Interconference games are televised by the network with the rights to the conference of the visiting team. CBS televises NFC playoff games, and NBC televises AFC playoff games. The first Super Bowl, held in 1967, was broadcast by both CBS and NBC. Since 1967, CBS and NBC have alternated telecasts of the Super Bowl, except that pursuant to its 1982-86 contract with the NFL, ABC televised the Super Bowl played in January 1985. Broadcasting rights to Super Bowl games are not bid for separately but are rotated among the networks.

a memorandum from NFL general counsel Jay Moyer written during the NFL's 1973 network contract negotiations stating that "an open network may well be an open invitation to formation of a new league." Commissioner Rozelle testified, however, that in 1970, before contacting ABC and signing the Monday night football contract with it, he unsuccessfully approached CBS and NBC, both of which already televised NFL games, about their interest in prime-time football. The USFL also emphasized at trial a June 1984 CBS business study suggesting that the fall broadcast of USFL games on Sundays would reduce the network's advertising revenues from NFL games by $ 49 million to $ 53 million over three years. This "dilution effect," the USFL argued, created a $ 50 million barrier to entry by a new league.

The USFL also sought to show that the NFL had placed unlawful pressure on the networks to prevent the broadcast of USFL games. Much of this evidence consisted of statements by USFL representatives and hearsay and speculation **[**26]** by third parties. [9] **[**27]** Officials from the three networks and one cable network testified that the NFL had not exerted any pressure on them regarding the broadcast of USFL games. [10] Several network officials did testify, however, that they feared that televising the USFL in the fall might jeopardize their NFL relationships [11] -- a fear somewhat at odds with the USFL claim that the NFL needed three network contracts to produce the "dilution effect." Executives from all three major networks also testified that by 1986, after the USFL had left several large television markets and was encountering financial and other difficulties, the USFL was not an attractive entertainment product. [12]

[*1349] 4. "*Conquering the USFL": Predatory Tactics*

[28]** The USFL also sought to prove monopolization by the NFL through predatory tactics unrelated to television. It thus introduced a memorandum prepared by NFL labor negotiator Jack Donlan entitled "Spending the USFL dollar," which urged NFL owners to bid for USFL players to drive up USFL costs. The USFL's proof of predatory behavior, however, consisted primarily of allegations concerning the recommendations of the so-called "Porter Presentation," and of the so-called Oakland and New York "conspiracies."

The Porter Presentation was a two-and-one-half hour presentation, entitled *USFL v. NFL*, by Harvard Business School Professor Michael Porter to sixty-five NFL executives attending a multiday seminar on labor negotiations. Porter's presentation, which was not previewed by anyone in the NFL, set out a strategy for the NFL to "conquer the USFL."

The USFL claimed that the NFL implemented a recommendation of the Porter Presentation by attempting to "co-opt" USFL owners with promises of an NFL franchise. Donald Trump, owner of the USFL's New Jersey Generals, testified that he was offered an NFL franchise by Commissioner Rozelle in exchange for his blocking the USFL's proposed move **[**29]** to the fall and his preventing the league from filing the instant action. Rozelle denied that he

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[9] USFL Commissioner Harry Usher testified that he was told by Roone Arledge, the president of ABC Sports, that Arledge "had had negative reaction from the NFL for putting the USFL on initially." ABC sportscaster Howard Cosell testified that he was told by Arledge that Commissioner Rozelle was "all over" Arledge because ABC was televising the USFL in the spring. (Arledge testified unequivocally that he had never made such a statement to Cosell.) Jim Spence, a senior vice-president at ABC, testified that he believed that the NFL was "less than enamoured" of the network's dealings with the USFL, although he did not recall that any NFL official had directly expressed any displeasure to him.

[10] For example, Jim Spence, former senior vice-president of ABC Sports; Frederick Pierce, former president of ABC; Roone Arledge, group president of ABC News and Sports, former president of ABC Sports; Neil Pilson, president CBS Sports, executive vice-president of CBS, former president of CBS Sports; Arthur Watson, president of NBC Sports; William Grimes, president of ESPN.

[11] For example, CBS Sports President Neil Pilson testified that he would consider televising the USFL in the fall only if another network was involved. This double exposure would increase the USFL's value and also not leave CBS in a position that would induce the NFL to give the other networks better treatment, including a better schedule of games.

[12] NBC Sports President Watson testified that his network did not conduct a business study concerning the feasibility of broadcasting USFL games on Saturday in the fall because of the network's commitments to other sporting events, including baseball, college basketball, golf, and thoroughbred racing.

made such an offer to Trump. In addition, hearsay testimony by Al Davis, owner of the NFL's Los Angeles Raiders, a team not sued by the USFL, indicated an attempt to co-opt Alfred Taubman of the Michigan Panthers. Taubman, however, denied that he was offered an NFL team.

The USFL also claimed that the NFL followed Professor Porter's recommendation to "dissuade" ABC from continuing its USFL contract. Supporting evidence consisted largely of hearsay introduced to show the state of mind of the networks. The declarants denied making any such statements. Jim Spence of ABC did testify, however, that the NFL informed him that the NFL owners were "not enamored" with the network's USFL contract. Nevertheless, ABC subsequently offered the USFL a four-year, $ 175 million contract for spring football beginning in 1986. The USFL also claimed that the NFL used a method recommended by Porter to pressure ABC by offering it unattractive Monday night games that would and did earn low ratings in 1984. In response, NFL officials testified that the 1984 *Monday Night Football* schedule was settled **[**30]** before the Porter Presentation, that "weak" teams such as Buffalo and Cincinnati appeared on that schedule fewer times than in prior years, and that any change in ABC's ratings was due to economic conditions that affected the entire sports television marketplace.

Finally, the USFL claimed that the NFL followed Porter's recommendations for competing for players. This evidence consisted of the NFL's decision to conduct a supplemental draft of players still under USFL contract in March 1984, an increase in NFL roster size from forty-five to forty-nine, conversations between the Dallas Cowboys and USFL star Herschel Walker, and NFL salary offers to relatively unknown USFL players such as Todd Fowler.

The USFL also contended that the NFL and the City of Oakland conspired to destroy the USFL's Oakland Invaders in return for an NFL promise that Oakland would receive an NFL team. This so-called "Oakland conspiracy" was based on the testimony of Al Davis that he "sensed" that the NFL wanted to "destroy" the Invaders and on Commissioner Rozelle's public statement that Oakland, having lost the Raiders, would be considered for an NFL expansion franchise.

The "New York conspiracy" involved **[**31]** a claim that the NFL and the NFL's New York Jets conspired to mislead New York City and State officials into believing that the Jets were willing to return from New **[*1350]** Jersey to New York. The purpose of this conspiracy was to block the USFL's New Jersey team from moving to a new domed stadium in New York. Proof of this conspiracy consisted of testimony by Senator Alphonse D'Amato and Vincent Tese, Chairman and Chief Executive Officer of the New York State Urban Development Corporation, that Leon Hess, owner of the Jets, had promised to return his team to New York. In addition, Al Davis testified that there was an "understanding" reached at a 1983 NFL owners' meeting to keep a USFL team out of New York. Other participants in this meeting denied any such understanding or agreement.

5. *Damages*

The USFL's evidence of damages consisted of the testimony of economist Nina Cornell, who sought to estimate the league's losses by two methods. Method A was based on the assumption that the gate and television revenues of an unhindered USFL could be estimated by using the gate receipts and television revenues of the old AFL. Dr. Cornell estimated the USFL's damages under **[**32]** this method at $ 565 million. Method B was based on the June 1984 CBS business study examining the fall broadcast of USFL games. She estimated the USFL's damages under this method at $ 301 million.

Dr. Cornell's damage calculations rested on several other assumptions. First, of course, she assumed that illegal NFL conduct was the cause of the USFL's failure to obtain a network contract. Second, Dr. Cornell assumed that the NFL could lawfully contract with only one network. Third, her calculations attributed the USFL's damages entirely to illegal NFL conduct and not at all to the USFL's own mismanagement.

Finally, she assumed that there would be no increased player costs to the USFL resulting from the shift to fall play and that salaries would remain stable from 1986 to 1992. Tension existed between her assumption of stable salaries and her projections of large increases in USFL revenues as a result of playing in the fall during the 1986 to 1992 seasons. Player salaries had already increased dramatically because of the two leagues' competition for players, even when they were playing in different seasons. No reason was given to expect a stabilization of wages when the leagues **[**33]** would play in the same season and the USFL would have substantially greater revenues to compete for players. Moreover, a cornerstone of the USFL's television claim was that a network contract was essential so that it could compete for quality players, a position that is hardly consistent with stability in player salaries.

6. *Management of the USFL*

The USFL was conceived and organized in 1981 to play in the spring rather than the fall. Its founders believed that public demand for football was not satisfied by the NFL's and the colleges' fall seasons; that cable television, which could not televise NFL games under the existing NFL-network contracts, would offer unique opportunities for television revenues and exposure; that a spring football league would face limited competition; that there was a sufficient supply of football players for two leagues; and that a spring league could draft college players and put them on the field even before the NFL draft.

The USFL's founders placed a high priority on the fans' perception of the quality of play. They intended to use major stadiums [13] and to hire well-known coaches. [14] **[*1351]** At the same time, they wanted the league **[**34]** to control costs. For its first season, therefore, the USFL established budget guidelines for player salaries of between $ 1.3 and $ 1.5 million per team.

[35]** The USFL's founders did not seek to obtain a television contract for fall play. Before fielding a team, however, the USFL received bids for a spring television contract from ABC and NBC and from two cable networks, ESPN and the Turner Broadcasting System. The league entered a four-year contract with ABC, and a two-year contract with ESPN. The ABC agreement provided for ABC to pay the USFL $ 18 million for the 1983 and 1984 seasons, with options exercisable by ABC at $ 14 million for 1985 and at $ 18 million for 1986. [15] ESPN contracted to televise USFL games for two years at rights fees of $ 4 million for 1983 and $ 7 million for 1984. The USFL began with eight of its twelve teams in the nation's top ten television markets. The ABC contract required the USFL to field teams in the three largest television markets (New York, Los Angeles and Chicago) and in at least four of the five other top-ten television markets in which teams were originally located (Philadelphia, Boston, Detroit, San Francisco/Oakland and Washington).

[36]** The USFL's first year of play, 1983, was a mixed success. The league received extensive media exposure when it signed Heisman Trophy winner Herschel Walker to a three-year, $ 3,250,000 contract. The Nielsen television rating for the first week of games was 14.2, a figure comparable to NFL ratings. As the season went on, however, the USFL's television ratings declined; average television ratings for the year were 6.23 on ABC and 3.28 on ESPN. Average attendance for the year was approximately 25,000. Nevertheless, these figures were consistent with the league's and networks' preseason projections.

On the financial side, the picture was not as bright. The USFL lost a total of almost $ 40 million, or an average of $ 3.3 million per team. The league had projected losses of only about $ 2 million per year for each team over the first three years. The unanticipated financial losses were chiefly the result of the failure to stay within the original salary guidelines. Indeed, in a November 1983 letter to other owners, Tad Taube of the Oakland team warned that: "If we are not successful in establishing player [salary] caps I can guarantee you that there will not be a USFL

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[13] Included were such prominent NFL stadiums as Soldier Field in Chicago (capacity 65,793); the New Orleans Superdome (72,675); Giants Stadium in New Jersey (76,891); the Houston Astrodome (47,965); the Silverdome in metropolitan Detroit (72,675); and RFK Stadium in Washington, D.C. (54,794). Before trial, Judge Leisure granted summary judgment in favor of the NFL on the USFL's stadium-related claims on *Noerr-Pennington* grounds. ***United States Football League v. National Football League, 634 F. Supp. 1155, 1179-80 (S.D.N.Y. 1986)*** ("*Opinion No. 4*"). This ruling has not been appealed.

[14] A number of the USFL's coaches had coached in the NFL: George Allen (Redskins and Rams); Chuck Fairbanks (Patriots); Frank Kush (Colts); Walt Michaels (Jets); Red Miller (Broncos); and John Ralston (Bills). Several had been successful NFL players: John Hadl, Craig Morton, Jack Pardee and Steve Spurrier.

[15] The ABC agreement provided for additional payments for the telecast of more than twenty USFL games per season as well as for the shifting of daytime telecasts into prime time.

within **[**37]** three years, irrespective of improved revenue [from] television. . . . We have sighted the enemy and they are us!"

The USFL's second year was marked by change. Four teams shifted locations. For example, the owner of the Chicago franchise exchanged that franchise for the Phoenix franchise, taking his winning Chicago coach and players while the original Phoenix team moved to Chicago under a new owner. The league, over the objection of some owners, expanded from twelve teams to eighteen. Five of the original owners left the league. Some of the new owners, notably Donald Trump of the New Jersey Generals, believed that the USFL ought to play in the fall. Thereafter, the issue of when to play became divisive, and several owners came to believe that Trump was trying to bring about a merger with the NFL that would include only some USFL teams. [16]

[38]** The NFL introduced extensive evidence designed to prove that the USFL followed Trump's merger strategy, and that this strategy ultimately caused the USFL's downfall. The merger strategy, the NFL argued, involved escalating financial competition for players as a means of putting pressure on NFL expenses, playing in the fall to impair NFL television revenues, shifting USFL franchises out of cities **[*1352]** where NFL teams played into cities thought to be logical expansion (through merger) cities for the NFL, and, finally, bringing the antitrust litigation now before us.

Throughout the second half of 1983 and early 1984, several USFL owners escalated spending on player salaries. USFL teams, for example, signed established NFL players such as running back Joe Cribbs and defensive back Gary Barbaro. Trump, in particular, signed a number of players who were still under contract with the NFL to future contracts, including superstar Lawrence Taylor of the New York Giants. USFL owners also signed many top players coming out of college, for example, wide receiver Anthony Carter and quarterback Jim Kelly. The USFL's spending on players greatly outpaced its revenues. The owner of **[**39]** the Los Angeles team, for example, committed the team to $ 13.1 million in salaries and bonuses for just one season. He even entered into a multiyear, $ 40 million contract with just one player, Steve Young of Brigham Young University.

By the end of the 1984 season, USFL franchises in two of the top three television markets, Chicago and Los Angeles, had failed, and only four of the original owners remained in the league. The league was not a failure as entertainment, however. Despite a decline in the USFL's television ratings to 5.7 on ABC and 2.8 on ESPN, ABC exercised its option to carry the USFL in the spring of 1985 at $ 14 million and offered a new contract worth $ 175 million for four years in the spring beginning in 1986. ESPN offered a contract worth $ 70 million over three years.

Nevertheless, during an August 1984 owners' meeting, the USFL decided to move to the fall in 1986. This decision was made despite: (i) ABC's warning that such a move would breach its contract for the spring of 1985 and 1986; (ii) the contrary recommendations of a management consulting firm, McKinsey & Company, which the USFL had retained for $ 600,000 to consider the advisability of a fall **[**40]** season; and (iii) the contrary recommendations of the USFL's directors of operations and marketing.

Moreover, Eddie Einhorn, a USFL owner who was to represent the USFL in negotiations to secure a network contract for the fall, warned that moving from large television markets to "merger" cities too quickly might preclude the securing of a network contract. Nevertheless, in the ensuing months, the USFL withdrew from Chicago, Detroit, Philadelphia, Pittsburgh and Washington, D.C. -- each a large television market with an NFL team -- and moved into Baltimore (which had lost its NFL team in 1984) and Orlando (which had no NFL team). Through mergers, the USFL bolstered franchises in Oakland (which had lost the NFL Raiders to Los Angeles) and Phoenix (which had been discussed as a possible NFL expansion city). The decision to move to the fall damaged the USFL's relations with ABC and ESPN. The former withheld a significant portion of the USFL's rights fees for the 1985 season, while the latter demanded a renegotiation of its proposed 1985-87 USFL contract. The following table reflects the USFL's movement from the top television markets:

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[16] After a January 1984 USFL owners' meeting, Myles Tanenbaum of the Philadelphia franchise complained that the "'Original' franchise owners" had become outnumbered, and expressed his outrage that "one of the group believes it would be fair or appropriate to simply 'pay off' others in the event there is a potential big hit by way of merger or whatever."

1983	1984	1985	1986 (Proposed)
New York	New York	New York	New York
Los Angeles	Los Angeles	Los Angeles	
Chicago	Chicago	San Francisco/ Oakland	
Philadelphia	Philadelphia		
San Francisco/ Oakland	San Francisco/ Oakland		
Boston	Detroit		
Detroit	Washington		
Washington			

[41]** In October 1984, the instant litigation was begun. The USFL's 1985 "lame-duck" spring season appears to have been affected adversely by the now publicly announced move to the fall. The league's television ratings declined to 4.1 on ABC and 2.0 on ESPN. By the end of the season, several owners had withdrawn financial support for their teams, and a number of clubs were no longer meeting their payrolls and other bills. The USFL scheduled eight teams for its fall 1986 season, which was ultimately cancelled after the verdict in this case. Only one team (New Jersey), was in a top-ten television market. One other team (Tampa Bay), was in a top-twenty **[*1353]** market. Three teams were located in Florida (Jacksonville, Orlando and Tampa Bay) but only one was west of the Mississippi River (Phoenix). In three years, USFL teams had left fourteen of the twenty-two cities in which they had played.

7. *The Verdict*

The jury found the NFL liable on the USFL's claim of actual monopolization, concluding that the older league had willfully acquired or maintained monopoly power in a market consisting of major league professional football in the United States (Question No. 4). The **[**42]** jury also found that the NFL's unlawful monopolization had caused injury to the USFL (Question No. 5). In ruling on the NFL's motion for judgment notwithstanding the verdict with respect to these findings, the district court held that sufficient evidence existed that the NFL had engaged in predatory conduct. This evidence related to: (1) NFL efforts to co-opt USFL owners and potential owners; (2) the NFL Supplemental Draft of USFL players; (3) the NFL's move to a forty-nine-man roster; and (4) the NFL's activity directed at specific USFL franchises such as the Oakland Invaders. *Opinion No. 16*, *644 F. Supp. at 1058*.

The USFL was unsuccessful on its remaining claims. The jury found that none of the defendants had violated *Section 2* by attempting to monopolize a relevant market (Question No. 7), or by conspiring to monopolize (Question Nos. 12-14). In addition, the jury found that even though "one or more defendants [had] participate[d] in a contract, combination or conspiracy to exclude competition within major league professional football" (Question No. 20), that combination was not an unreasonable restraint of trade in violation of *Section 1* (Question No. **[**43]** 21). The fatal blow, however, was the complete rejection of the USFL's television claims. The jury found that the NFL had not willfully acquired or maintained a monopoly in a relevant television submarket (Question No. 4). It further found that the NFL's contracts with all three television networks for the right to broadcast the league's regular season and championship games through the 1986-87 season were not an unreasonable restraint of trade violative of *Section 1* (Question No. 24). Finally, the jury rejected the USFL's "essential facilities" claim, specifically finding that "defendants [did not] have the ability to deny actual or potential competitors access to a national broadcast television contract" (Question No. 33), although it also found that such a contract was "essential to the ability of a major league professional football league to compete successfully in the United States" (Question No.

31) and "that potential competitors of the NFL, cannot as a practical matter, duplicate the benefits of a network contract" (Question No. 32). [17]

[44]** DISCUSSION

On appeal, the USFL raises a host of claims with respect to the NFL's liability, the district court's evidentiary rulings, damages charge, and denial of injunctive relief.

1. *Liability*

a. The Sports Broadcasting Act

The USFL contends that the Sports Broadcasting Act of 1961 limits the antitrust exemption for pooled-rights contracts to a single contract with one network. Therefore, it argues, the NFL's multiple contractual arrangements with three networks violates the injunction in *United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953)*, a decision claimed by the USFL collaterally to estop the NFL from denying that its arrangements **[*1354]** with the networks violate *Section 1* of the Sherman Act.

The Sports Broadcasting Act states that:

> ***HN1***[] The antitrust laws . . . shall *not* apply to all joint agreement by or among persons engaging in or conducting the organized professional team sport[] of football, . . . by which any league of clubs participating in professional football . . . contests sells or otherwise transfers *all or any* part of the rights of such league's member clubs in the sponsored telecasting **[**45]** of the game[] of football. . . .

15 U.S.C. § 1291 (emphasis added). ***HN2***[] This statutory language thus neither states nor implies that the exemption limits the NFL to a contract with only one network. *See, e.g., United States v. James, 478 U.S. 597, 106 S. Ct. 3116, 3121, 92 L. Ed. 2d 483 (1986)* (statute foreclosing government "liability of *any* kind . . . for *any* damage from or by floods" "outlines immunity in sweeping terms . . . It is difficult to imagine broader language"); *United States v. Holroyd, 732 F.2d 1122, 1124, 1128 (2d Cir. 1984)* (statute proscribing willful filing with IRS of "any" statement not believed to be accurate "means what it says on its face" and covers *all* statements to IRS). Moreover, the legislation does contain express limitations on the exemption designed to protect college football from televised competition with the NFL, which suggests by implication that no other limitations exist.

Faced **[**46]** with statutory language unambiguously hostile to its claims, the USFL resorts to alleged ambiguities in the legislative history. Upon examination, however, the legislative history offers no reason to depart from the statutory language. For example, NFL Commissioner Rozelle stated during the congressional hearings on the Act that if all the networks were tied up by the NFL, a competing league "would . . . possibly be at a major disadvantage" and that the bill was designed to allow the NFL to televise on one network. *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 35 (1961). These remarks were made, however, during a colloquy in which Rozelle twice stated explicitly that the proposed legislation would allow the NFL to utilize all three networks. Moreover, he predicted that, although the NFL had a present intention to use only one network, in twenty years a "single network may no longer be desirable, and it may become much better for the public and the league to use more than one network." *Id.* Rozelle's testimony thus provides little comfort to the USFL.

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[17] In ruling that any inconsistency in these verdicts did not require a new trial, a ruling not challenged on appeal, the district court first recognized that inconsistent verdicts in a civil case are fully permissible in this circuit. *Opinion No. 16*, *644 F. Supp. at 1045* (citing *Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1290 n.17 (2d Cir. 1969)*, *cert. denied*, ***397 U.S. 913, 90 S. Ct. 913, 25 L. Ed. 2d 93 (1970))***. The court also plausibly reconciled the actual verdicts in the instant case. *Id. at 1046-48*.

[47]** More tellingly, the USFL also relies upon the following passage in the House Report accompanying the 1961 legislation:

> Some concern has been expressed that the language of this section might be considered to give an absolute exemption from the antitrust laws for any kind of television arrangements entered into by a league, and particularly an arrangement which might involve several networks and might thus exclude a competing league from all television coverage. This is not the intent of H.R. 9096 which is designed to permit the sale of television rights by a league and its member clubs to a single network. The committee does not intend that an exemption from the antitrust laws should be made available to a league or its members where the intent or effect of a joint agreement is to exclude a competing league or its members from the sale of any of their television rights.

H.R. Rep. No. 1178, 87th Cong., 1st Sess. 4 (1961). This language was apparently included at the suggestion of AFL Commissioner Joe Foss, who testified that the proposed legislation should guard against agreements with networks that unreasonably excluded competing leagues. *See Opinion No. 2*, *634 F. Supp. at 1162*. **[**48]**

We believe the USFL exaggerates the import of that statement in the House Report. The report says no more than that multiple pooled-rights agreements may be the subject of a monopolization or unreasonable restraint of trade claim by a competing league. Precisely such claims were submitted to the jury in this case and rejected by it.

[*1355] The Senate Report does not expressly address the issue of multiple network contracts, other than to conclude ambiguously that the public interest would be served "with minimal sacrifice of antitrust principles by exempting *joint agreements* under which a league sells or transfers pooled television rights of its members to *a purchaser*." S. Rep. No. 1087, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Admin. News 3042, 3044 (emphasis added).

In any event, the passage of the 1966 NFL-AFL merger statute provides conclusive evidence that Congress did not intend the 1961 Act to prohibit NFL contracts with more than one network. When considering this legislation, Congress was explicitly informed that the merged league would continue to broadcast its games on "at least 2 networks," [18] and no concern whatsoever was expressed **[**49]** in Congress that such conduct was either undesirable or would go beyond the scope of the 1961 Act's exemption. Moreover, while permitting the merger, Congress added a further limitation to the exemption to protect high school games from televised competition with the NFL. The lack of a "one network" limitation in the 1966 merger bill thus dooms the USFL's claims. Accordingly, we hold that the mere existence of the NFL contracts with the three networks does not violate the antitrust laws.

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[18] During the hearings on the merger bill, Commissioner Rozelle testified "that because of the logistics of handling perhaps 13 or 14 games on a Sunday afternoon, [the NFL] would require at least 2 networks." *Professional Football League Merger: Hearings on S. 3817 Before the Antitrust Subcomm. (Subcomm. 5) of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 64 (1966). In response to the question of whether New York City residents would be able to see professional football on television when the other New York club was playing a home game, Rozelle said that the league would try to do so, "which is why I feel we will probably have to go to two networks, to assure that each of the 26 or 28 teams has all of its road games brought back to its home city." *Id. at 66*. Moreover, the NFL and AFL submitted a memorandum to the subcommittee concerning whether the merger would result in reduced broadcasts of football games:

> Because a single network cannot practicably establish as many as twenty-eight regional networks and because the expanded league desires to maintain its present level of club television income, the plan contemplates the continued *use of two networks* by the expanded league, *e.g.*, on a conference or other divisional basis. Thus, both during the period prior to the expiration of the existing television contracts and afterwards, it is contemplated that there will be continued home viewer access to duplicate broadcasts, including telecasts of other league games into home cities on days when the home team is playing at home.

Id. at 119 (emphasis added).

Having made this determination, we need not consider whether the decree in *United States v. National Football League* has any collateral-estoppel effect.

[50]** b. The "Dilution Effect"

The USFL does not argue that there was insufficient evidence to support the jury's rejection of its claim that the NFL prevented it from obtaining a network contract. The failure to make this argument is understandable in light of the swift dismissal such a claim would encounter. However, the USFL does the next-best thing by attacking the district court's instructions regarding "intent *and* effect" and "legitimate business purpose," both discussed immediately *infra*, on grounds that these instructions led the jury to ignore an "unchallenged showing of anticompetitive effect" and "textbook example of an anticompetitive practice." Moreover, the USFL continues to seek broad injunctive relief concerning the NFL's television contracts on the ground that such relief is necessary to bring competition to the industry. Because these claims are based on the so-called "dilution effect" of the NFL's contracts with the three networks, a separate discussion of the concept of a "dilution effect" and its role in the professional football industry is necessary.

The term "dilution effect" comes from a CBS business study ordered by Neil Pilson, CBS Sports' President, **[**51]** and completed in June 1984. CBS conducted the study because it was apprehensive over ABC's signing a USFL fall contract and desired the leverage a second league would afford it in its negotiations with the NFL. The study estimated the economic impact on CBS of **[*1356]** the televising of USFL games in the fall under various scenarios. One scenario posited only ABC televising USFL games on Sundays. The scenarios most pertinent to the present discussion posited CBS and either NBC or ABC televising USFL games. Under these scenarios, CBS would televise both USFL and NFL games on Sundays. The final scenario posited USFL games being televised by NBC and ABC on fall Sundays. No study was made of CBS being the only network with a USFL contract because CBS was not interested in such an arrangement. *See supra* note 11.

As explained by Pilson, the value of a USFL fall contract to CBS was determined (in simplified fashion) as follows. From the estimated gross advertising revenues would be subtracted estimates of: (i) expenses related to production; (ii) losses in revenues that would otherwise have been earned by programs preempted by USFL games, or "preemptive impact"; (iii) decreases **[**52]** in advertising revenues from NFL games resulting from the addition of USFL games, or "dilution effect"; and (iv) rights fees to the USFL. Pilson testified that when these estimates were made in June 1984, the resultant calculation, CBS's profit, was negative. The USFL argues that, but for the "dilution effect" of $ 50 million, the sum would have been sufficiently positive to make a USFL contract attractive. The USFL assumes that the "dilution effect" was experienced equally by all three networks and thus concludes that the effect of NFL's network contracts was to exclude all competition.

The district court instructed the jury to analyze the NFL's television contracts in light of the CBS study. Specifically, the jury was told to consider "the high NFL rights fees charged to the networks, which plaintiffs allege triggered a dilution effect that makes it economically infeasible for any network to offer a satisfactory television contract to any professional football league other than the NFL." The jury rejected the USFL's claims as to the "dilution effect" in finding that the NFL had not monopolized a television submarket, that the NFL television contracts were not an unreasonable **[**53]** restraint, and that the NFL did not have the power to exclude a competing league from obtaining a network contract. There was ample evidence to support these conclusions.

First, the USFL concedes, as it must, that the "dilution effect" is nonexistent when the NFL network contracts expire and negotiations over new contracts are under way. Whatever exclusionary effect exists is only for the term of the three NFL network contracts, and all leagues are free to compete on the basis of the quality of their product upon the expiration of these contracts. The district court's instructions directed the jury to consider the length of these contracts, then five years, in determining whether they were reasonable. Its verdict, therefore, is dispositive because the duration of the contracts was hardly unreasonable as a matter of law.

Second, there was no evidence that the result of the calculations described above would be the same for ABC as for CBS. ABC's contract was largely confined to televising a single NFL game in prime time on a weekday night. Its Sundays were free of football, and it would not encounter the scheduling problems faced by CBS in televising both NFL and USFL games **[**54]** on Sunday afternoons. ABC was thus free to schedule games so as to maximize revenue. Moreover, whatever "dilution effect" ABC's prime-time games might suffer was not necessarily identical to that faced by CBS. The jury might easily conclude, absent evidence to the contrary, that the "dilution effect" on CBS from back-to-back NFL-USFL telecasts on Sunday afternoons would be greater than on ABC, which would not broadcast NFL games on Sunday. And there was no evidence to the contrary. The USFL, which bore the burden of proof on this issue, called two witnesses from ABC in a position to testify about the "dilution effect" on ABC. Neither witness was questioned about the "dilution effect." Both did testify, however, that the USFL's exodus from major television markets and its other difficulties greatly diminished the value of USFL telecasts by 1985 and 1986.

[*1357] Third, the conduct of the NFL and the networks indicates that neither believed their contracts to be exclusionary. Notwithstanding the early opinion of the NFL's Moyer about a network without a contract being an "open invitation to a new league," the NFL's actual conduct displayed no marked desire to lock up all **[**55]** three networks. Prime-time weekday telecasts were offered to NBC and CBS, both of whom already had NFL contracts, before ABC was approached. It was the testimony of both the ABC executives and CBS's Pilson, elicited by counsel for the USFL, that Rozelle routinely used the threat of leaving them without an NFL contract in order to extract from them the largest possible rights fees. If the "dilution effect" theory of exclusion were correct, the NFL could not credibly threaten to leave one network without a contract. If the theory were correct, moreover, the last network to sign with the NFL would have a bargaining advantage because its agreement would be essential to the NFL's monopoly, much as the owner of the last lot in a tract of land needed for a construction project can demand the highest price. In the NFL-network negotiations, the opposite was the case, and the last network to sign was at a bargaining disadvantage. Thus, in 1982, the NFL first signed agreements with ABC and NBC and then approached CBS. According to Pilson, CBS regarded itself as being in a very disadvantageous bargaining position. As a result, CBS paid $ 736 million for the new contract, an increase of **[**56]** more than 100% over its previous contract. On the basis of this evidence, therefore, the jury would have been hard-pressed to conclude that the NFL needed a contract with CBS to freeze out a competing league, a circumstance that would have precluded a credible threat to leave CBS without a contract and the resultant hefty increase in rights fees.

Fourth, even if the "dilution effect" theory were alive and well in 1986, the jury could have found that that "effect" was not a cause of the USFL's failure to get a network contract in that year. The CBS study was made in 1984 and was based on estimates of revenues that were plainly excessive given the circumstances of 1986. Immediately after the study was completed, the Supreme Court decided *National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, invalidating the NCAA's exclusive control over the televising of college football games. This decision had the effect of multiplying greatly the number of college games telecast and of reducing advertising revenue generally for football games. An ABC witness also testified there was a proliferation of sporting events **[**57]** on network and cable television after the fall of 1984 that also reduced the advertising fees that could be charged for professional football. In addition, there were the problems of the USFL itself. The league had failed to establish fan loyalty in most places because of repeated franchise moves. Most importantly, the USFL had abandoned most major television markets, thereby rendering telecasts of its games much less valuable than had been estimated by the earlier CBS study. Finally, the disagreements among the USFL owners, the financial condition of some of the franchises, and the "lame-duck" spring season of 1985 further lessened the value of USFL telecasts in 1986. In fact, Pilson himself testified that by 1986 the events described above had rendered the "dilution effect" irrelevant to CBS's decision not to televise the USFL. In light of this evidence, the jury was free to conclude that the revenues to be expected from USFL telecasts were so low that no network would purchase them even if there were no "dilution effect." [19]

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[19] The USFL's brief offers an extreme version of the "dilution effect," which we quote:

> The NFL's television-related conduct constitutes a textbook example of an anticompetitive practice available only to one who dominates the market. In a normal, competitive market, the NFL's extraction of monopoly rents by fixing its rights fees at an artificially high level would prove pro-competitive by attracting new businesses into the market. *Cf.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 583, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. But by tying up the only three television networks capable of providing the revenue to support a competing league, and increasing the actual rights fees charged each of them by 625% in less than ten years (a feat only attainable through the exercise of market power), the

[58]** **[*1358]** c. "Intent *and* Effect" Charge

We now consider the district court's instruction regarding liability on the USFL's television-related claims. The USFL contends that it should not have been required to show that the intent *and* effect of the NFL's television contracts with the major networks were exclusionary (rather than simply intent *or* effect) in order to prove a *Section 2* claim. In addition, the USFL contends that the district court erred with respect to the *Section 1* television instruction because it applied the intent-and-effect standard to the Rule-of-Reason claims. We reject both contentions.

The district court gave the following charge with respect to the USFL's *Section 2* television-related claims: [20]

> A company may not be found to have wilfully acquired or maintained monopoly power if it has acquired that power solely through the exercise of superior foresight and skill or because of natural advantages . . ., or because of economic or technological efficiency; . . . or by laws passed by Congress
>
> . . . .
>
> In this regard, you should be aware that in 1966 Congress passed a law permitting the merger of the two major football leagues then **[**59]** existing. . . .
>
> Accordingly, I instruct you that the 1966 merger of the AFL and the NFL cannot be the basis for inferring that the NFL acquired monopoly power unlawfully.
>
> In addition, in 1961 Congress passed a statute that provides that a contract between a professional sports league and a television network for the sale of pooled telecast rights is not a restraint of trade in violation of the antitrust laws.
>
> Accordingly, I instruct you that the making of these contracts by the NFL with the television networks constitutes the lawful acquisition of power, even if you were to find that these contracts gave the NFL monopoly power, *unless you found that the intent and effect of these agreements is to exclude a competing league or its members from selling any of their television rights*.

(emphasis added). This instruction was consistent with the Sports Broadcasting Act, discussed *infra*, as exempting from antitrust scrutiny a league's pooled-rights contracts with networks unless they constitute illegal monopolization or an unreasonable restraint of trade so far as competing leagues are concerned. More importantly, the intent-and-effect charge was consistent with **[**60]** the legal standards for illegal monopolization under *Section 2*.

The Supreme Court has repeatedly defined ***HN3***[] monopolization as the "willful acquisition or maintenance" of monopoly power. *E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19,* ***[*1359]*** *105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed.*

> NFL forces the networks in turn to raise NFL advertising prices above competitive levels. This in turn creates a disincentive to televise a rival, competitively-priced football league in the fall because such a lower-priced league would drive down advertising rates and reduce the NFL viewing audience. This disincentive, termed the "dilution effect" and quantified by CBS at $ 50 million, applies equally to all the networks and prevents them from considering fairly the merits of a new league.

USFL Br. at 39 (footnote and citation to record omitted).

Even putting aside the unproven factual premises -- the existence of monopoly rents, the identical impact of the "dilution effect" upon all networks, the quantification of $ 50 million as realistic for 1986 -- this theory appears to posit a uniquely sadomasochistic economic relationship in which the more the seller charges, the happier the buyer is. Needless to say, the network executives who testified did not describe their negotiations with Rozelle as fitting that model. Nor was there evidence indicating why the networks had to be "forced" by high NFL rights fees to charge advertising prices the market would bear anyway.

[20] The USFL incorrectly claims that the district court's instructions applied a more stringent standard of proof to its television claims than to other claims. In fact, the intent-and-effect charge was given on all the monopolization issues. The USFL also claims it was surprised by the intent-and-effect charge. It was aware before trial, however, that the NFL would seek such a charge. In any event, no claim of harm other than a passing psychic injury to otherwise robust counsel is made.

2d 778 (1966); **[**61]** Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, *444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)*. The willfulness element certainly requires proof of intent. *See* Aspen Skiing, 472 U.S. at 602 n.28 (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945) ("*Alcoa*") ("In order to fall within § 2, the monopolist must have . . . the intent to monopolize.")). Proof of effect is required by definition alone to satisfy the "acquisition or maintenance" requirement.

A requirement that both intent *and* effect be proven is necessary to enable a trier of fact to make the critical distinction between conduct that defeats a competitor because of efficiency and consumer satisfaction, and conduct that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." Aspen Skiing, 472 U.S. at 605 n.32 (quoting 3 P. Areeda & D. Turner, ***Antitrust Law*** 78 (1978)). Hopes and dreams alone cannot support a Section 2 claim of monopolization. **[**62]** Berkey Photo, 603 F.2d at 273-75. If they did, the nationwide advertisement "Ford wants to be your car company" would constitute an open-and-shut Section 2 case. Success alone is not enough or the antitrust laws would have their greatest impact on the most efficient entrepeneurs and would injure rather than protect consumers.

Proof of intent *and* effect is also of evidentiary value. Distinguishing between efficient and predatory conduct is extremely difficult because it is frequently the case that "competitive and exclusionary conduct look alike." Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 972 (1986). Evidence of intent *and* effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices. [21] As Justice Stevens stated in *Aspen Skiing*,

> Evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive" -- to use the words in the trial court's instructions -- or "predatory," to use a word that scholars seem to favor. Whichever **[**63]** label is used, there is agreement on the proposition that "no monopolist monopolizes unconscious of what he is doing." As Judge Bork stated more recently: "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended."

472 U.S. at 602-03 (quoting R. Bork, *The Antitrust Paradox* 160 (1978)).

[64]** The present case is in fact a useful example of the intent-and-effect approach to determining whether certain practices are predatory. As the preceding discussion of the "dilution effect" indicates, the jury's conclusion that the NFL's three network contracts were not exclusionary was supported by evidence that a quality league could either have overcome the "dilution effect" or have acquired a contract when the NFL's contracts expired. The conduct of the NFL itself and the networks showed **[*1360]** their disbelief in any exclusionary effect by the NFL's threatening to leave a network without NFL games and the networks' taking the threat seriously. The evidence also supported the conclusion that when the NFL locked up the third network, CBS, in the 1982 negotiations, it did so to obtain $ 736 million in rights fees, not to exclude competitors.

Judge Leisure's instructions to the jury with respect to the Section 1 Rule-of-Reason claim stated that intent was not determinative as to whether a practice was an unreasonable restraint of trade:

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[21] The USFL contends that the district court improperly added a specific intent requirement to Section 2 by instructing the jury that it "should infer no anticompetitive intent from the mere existence of" the NFL's three network contracts. This argument is groundless. The quoted language simply restated the district court's holding in its *Opinion No. 2* interpreting the Sports Broadcasting Act of 1961. In any event, the district court instructed the jury that "monopoly power is obtained intentionally and this element is satisfied, if defendants acquired it by means other than superior skill or historical accident" or "by any means of wielding monopoly power to prevent or impede competition." This instruction applied to both the professional football market and television submarket claims and fully complied with *Alcoa's* requirement of only general intent for a monopolization violation. *See* 148 F.2d at 432. The usefulness in this area of the distinction between specific and general intent, moreover, may be diminished by *Aspen's* description of the intent requirement as an evidentiary tool to evaluate business conduct.

Examining the combination's purpose may assist you in determining the effects of the agreement on competition. The mere fact that **[**65]** the defendants had a good motive or sound purpose for entering into an agreement, however, does not in and of itself prevent you from finding that the agreement was an unreasonable restraint of trade.

On the other hand, the mere fact that defendants entered into an agreement with the intent of excluding competition, is not enough to establish a Section [1] violation. Even if you find that defendants' intent was evil or unlawful, you still must find evidence of anticompetitive effect before you can find a particular restraint of trade is unreasonable.

We disagree with the USFL that proof of either anticompetitive intent *or* effect is sufficient in a Rule-of-Reason case under *Section 1*. ***HN4***[] Unlike a *per se* price-fixing case, a Rule-of-Reason case requires the fact finder to balance the procompetitive and anticompetitive *effects* of any restraint. *See e.g., National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691* & n.17, *98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. Except for *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133* **[**66]** (2d Cir.) (in banc), *cert. denied*, *439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)*, the cases cited by the USFL are *per se* price-fixing cases. We have previously stated, however, that we "doubt" that the purpose-or-effect requirement stated in *Oreck* "is a disjunctive rule," and that "it is difficult to conceive of a viable private action for damages under *section 1* if some unreasonable restraint of trade has not been effected." *Borger v. Yamaha Int'l Corp., 625 F.2d 390, 397 & n.4 (2d Cir. 1980)*. Other courts agree, *see, e.g., Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366, 1372-73 (9th Cir. 1983)*; *Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1202-03 (6th Cir. 1982)*; *H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 246 (5th Cir. 1978)*, and we now hold, for reasons stated in our discussion of the *Section 2* claim, that ***HN5***[] an anticompetitive effect must be shown to make out a *Section 1* Rule-of-Reason violation.

d. Legitimate Business Opportunities **[**67]** and Profit-Maximization Charge

The USFL further argues that the district court erroneously charged the jury that the NFL's three network contracts were lawful if motivated by any "legitimate" purpose, including profit maximization. The pertinent charge reads as follows:

Plaintiffs allege that the NFL coerced the networks not to give the plaintiffs a contract. . . . So long as they have a legitimate business purpose in doing so, defendants have no duty to limit themselves in entering into the television contracts so that other football leagues would have an easier time entering the market, or to foresee that other leagues might do so, or for any reasons to decline a profitable business opportunity.

This charge was consistent with settled precedent. ***HN6***[] "[A] firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches." *Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986)*, *cert. denied*, *480 U.S. 934, 107 S. Ct. 1574, 94 L. Ed. 2d 765 (1987)*; **[**68]** *see Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986)*; *Berkey Photo, 603 F.2d at 274, 276, 287*. A monopolist may not, of course, use its market power, whether obtained lawfully or not, to prevent or impede competition in the relevant **[*1361]** market. *See Aspen Skiing, 472 U.S. at 605*; *Berkey Photo, 603 F.2d at 274*. The jury was thus properly instructed that:

A monopoly achieved or maintained as a result of . . . legitimate good business practices is not unlawful. A monopolist has the same right to compete as any other company. Under the antitrust laws, a monopolist is encouraged to compete vigorously with its competitors and to remain responsive to the needs and demands of its customers. At the same time, a monopolist cannot use its lawfully acquired power to maintain its monopoly.

In addition, there is nothing in the antitrust laws that requires a monopolist to act against its own self interest so long as the monopolist does not at the same time exercise its power to maintain that power. Thus, a

> monopolist is under no duty affirmatively to help or aid its **[**69]** competitors and is free to set as its legitimate goal the maximization of its own profits so long as it does not exercise its power to maintain that power.

The USFL challenges this charge on the ground that setting prices at a profit-maximizing level is an anticompetitive act. We disagree. Prices not based on superior efficiency do not injure competitors, *see* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582-83, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, but rather invite competitive entry. As we stated in *Berkey Photo*:

> ***HN7***[] 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 probably no better way for it to guarantee that its dominance will be challenged than by greedily extracting the highest price it can.

603 F.2d at 294. The USFL responds to this argument by falling back on its claim that professional football is not a typical market **[**70]** because of the "dilution effect," an argument rejected by the jury and discussed *supra*.

e. Television Submarket Definition

Regarding the relevant television submarket, the district court instructed the jury, first, to determine who were the potential purchasers of television broadcast rights for professional football in the fall. The jury was then, second, to determine from the perspective of those buyers what other products, if any, were reasonably interchangeable with broadcast rights to professional football. The USFL claims in particular that, in instructing the jury to determine who were potential purchasers, the district court erred by stating that:

> If you find that a professional football league would reasonably consider selling its broadcast rights to cable television companies or to individual television stations, then all those buyers must be included in the relevant submarket.

We do not agree with the USFL that this charge was error because it emphasized the view of potential buyers in determining the relevant submarket. *See* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; **[**71]** *see also* *United States v. Waste Management, Inc., 743 F.2d 976, 979-80 (2d Cir. 1984)* (defining relevant market by first determining potential buyers and then determining what products were reasonably interchangeable from buyers' perspectives); *JBL Enters., Inc. v. Jhirmack Enters., Inc., 698 F.2d 1011, 1016-17* (9th Cir.), *cert. denied*, *464 U.S. 829, 104 S. Ct. 106, 78 L. Ed. 2d 109 (1983)*. The fact that a cable contract might be less desirable, even much less desirable, to a league than a network contract is not relevant to determining the product submarket.

In any event, the USFL never objected to the relevant submarket instruction, and the objection was thus waived under *Fed. R. Civ. P. 51*. Contrary to its claim on appeal, the USFL did not "distinctly" object to this instruction, but merely proposed changes in language in the draft charge. These suggestions did not constitute a general objection to the entire charge. Indeed, the **[*1362]** district judge expressly stated his understanding that the parties had objected only "*to the extent* [of] proposed changes in the charge" (emphasis added). This was apparently **[**72]** the understanding of the USFL as well because the league raised a "general objection" to the intent-and-effect charge.

f. The Supplemental "Unambiguous Evidence" Charge

The USFL also challenges the supplemental "unambiguous evidence" instruction given by Judge Leisure in response to a note from the jury. The note sought guidance as to what the jury should do if it were to define a television market or submarket broader than the market alleged by the USFL. The supplemental instruction stated in part that:

> If you answer the second part of Question 3 [possession of monopoly power in the relevant submarket] in terms of your own broader definition of a relevant market or submarket, then I must also instruct you that you may only find that the NFL has monopoly power in this broader submarket if plaintiffs have produced

> unambiguous evidence that the defendants have the power to control prices or exclude competition in this broader market. Unambiguous evidence is evidence of a kind which is so clear that it supports only one conclusion.

The USFL contends that the instruction concerning a need for unambiguous evidence of the power to control prices or exclude competitors **[**73]** should not have been given.

HN8[] An "unambiguous evidence" instruction regarding the power to control prices or to exclude competition is appropriate where market share data for the relevant market is lacking. *See Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 130* (2d Cir.) ("when such a traditional form of proof [as market share data] is lacking, the plaintiff must produce unambiguous evidence that the defendant has the power to control prices or exclude competition"), *cert. denied*, *454 U.S. 968, 102 S. Ct. 512, 70 L. Ed. 2d 384 (1981)*. Absent market share data, definite evidence of monopoly power is needed lest profitability alone provide a basis for antitrust liability.

The parties' arguments on this point are based on differing assumptions as to what the jury actually did with regard to the submarket definition. The USFL assumes that the relevant submarket found by the jury was the sale of broadcasting rights for professional football in the fall to the networks, cable and syndicators. Because there was market share data **[**74]** for that submarket -- during 1983-86, for example, $ 1.7685 billion in revenue to the NFL, $ 65.9 million to the USFL -- it understandably concludes that the "unambiguous evidence" supplemental instruction was error. The NFL assumes that the relevant submarket found by the jury was the sale of broadcasting rights for professional football, other sporting events and television programming generally to the networks, cable and syndicators. Because no meaningful market share data was introduced for that much broader submarket, the NFL understandably concludes that the supplemental instruction was eminently correct. These differing assumptions require us to examine certain events at trial in some detail.

The pertinent portion of the submarket instructions reads as follows:

> In this case plaintiffs allege the existence of a relevant submarket in the nationwide market for the sale of network television broadcasting rights for major league professional football games in the fall.
>
> Defendants dispute plaintiffs' definition of the relevant submarket in at least two respects. First, the defendants contend that the buyers of broadcast rights are not limited to television networks. **[**75]** Instead, they say that football leagues and others who sell programs to be televised to the public can and do sell them to other buyers, such as individual television stations, through the process of syndication, and cable television companies, such as ESPN or Turner Broadcasting. If you find that a professional football league would reasonably consider **[*1363]** selling its broadcast rights to cable television companies or to individual television stations, then all those buyers must be included in the relevant submarket.
>
> Second, the defendants say that the relevant submarket is not limited to the sale of rights to telecast professional football in the fall, but should instead include the sale of broadcast rights for other sports programming, such as college football, and for other general entertainment programming. In order for plaintiffs to prove that their definition of the relevant submarket is correctly limited to the sale of broadcasting rights for professional football in the fall, plaintiffs must show that the purchasers of those rights did not regard other types of programming as reasonably interchangeable substitutes for professional football.
>
> In other words, you **[**76]** have to decide whether, based on all the evidence you have seen and the testimony you have heard, whether broadcasting rights to professional football in the fall compete as a product with broadcasting rights for other sporting events and other television programming. If you find that such competition does exist, then you have necessarily found that the relevant submarket is broader than the plaintiffs have alleged. If, on the other hand, you find that the sale of broadcasting rights for professional football in the fall is a specific universe, and that the buyers of those rights do not have reasonably interchangeable substitutes, then you have necessarily found that plaintiffs are correct in having limited the relevant submarket to the sale of broadcasting rights for professional football in the fall.

The jury was thus asked to undertake the following tasks: (i) determine whether buyers in the submarket include cable and syndicators as well as the networks, and (ii) determine whether those buyers regard the broadcasting rights to professional football in the fall as reasonably interchangeable with broadcasting rights to other sporting events and other programming. However, **[**77]** the interrogatory on the verdict sheet asked only:

> 2. Is there a relevant market or submarket, as alleged by plaintiffs, consisting only of the sale to the networks of television broadcasting rights for major league professional football in the Fall?
>
> YES NO

What appears to have been overlooked by counsel and the district court is that while the answer "YES" would complete the jury's tasks, the answer "NO" might not. A "NO" answer would leave unresolved the question of whether the relevant submarket was the sale of broadcasting rights to football to networks, cable and syndicators, or the sale of broadcasting rights to programming generally to networks, cable and syndicators. After it in fact decided to answer interrogatory 2 "NO," the jury thereupon sent a note asking for guidance as to what it should do next.

A colloquy took place over the proper response to the jury's question. The NFL took the position that a "NO" answer to the interrogatory obviated the need for the jury to answer any further interrogatories concerning monopolization of the television submarket. The USFL argued that the jury must go on to answer the questions concerning **[**78]** monopolization of whatever submarket it did find. Counsel for the USFL thus stated:

> MR. MYERSON: What the jury is saying is that if they find that the submarket is broader than sale by networks of television broadcasting rights for major league professional football, do they necessarily have to answer no to the question of did defendants willfully acquire or obtain monopoly power in either of the relevant market or submarket. And they say, or can we instead use our broader definition of what the relevant submarket is and answer whether or not the defendants have willfully acquired or maintained monopoly power in the relevant submarket.
>
> To follow Mr. Fiske's argument, what Mr. Fiske is asking the court to say is that you automatically must answer no, the defendants did not willfully acquire or maintain monopoly power in the relevant **[*1364]** submarket merely because they find that the relevant submarket is broader than broadcasting rights for major league professional football. And what we are saying to the court is that, as your Honor has already instructed, the relevant submarket may be broader, and then and obviously then when they define the relevant submarket do **[**79]** they answer the question 4: "Did defendants willfully acquire and maintain monopoly power in the relevant market or submarket?"
>
> And in 5, did the defendants' monopolization of the relevant market cause the injury, and in 6, etc. But to take the position that we lose the opportunity for the jury to say whether or not the defendants monopolized in a submarket merely because they think that the submarket may be broader than we submit, is inconsistent with your Honor's charge to the jury and to the law.
>
> The jury's province under your Honor's instruction is to determine what they think the accurate submarket is and then to answer the question of whether within their definition of what the accurate submarket is, defendants monopolized or attempted to monopolize in the way set forth in the verdict.
>
> * * *
>
> What the jury is asking is, if the submarket is broader in their view than just network, and presumably includes, as your Honor instructed they could find, cable TV or individual television stations as set forth on page 37, the jury is then saying do we necessarily have to answer no to the question of whether they have monopoly power in that submarket, and for them to argue yes, **[**80]** the jury has to say no because they found a broader submarket goes totally inconsistent and it is the antithesis of what your Honor instructed and what they asked your Honor to instruct over my objection.

What was lost in the verbal traffic over whether the jury should continue to answer questions on the verdict sheet was the fact that the jury had to determine not only whether the relevant buyers included cable and syndicators as well as the networks but also whether those buyers, once determined, would consider rights to fall professional football reasonably interchangeable with rights to other programming. This distinction was of little importance at the time of the colloquy because the "unambiguous evidence" instruction apparently was not yet in the picture.

After a break, during which counsel for the NFL submitted handwritten proposed instructions containing, apparently for the first time, the "unambiguous evidence" charge, the court reconvened outside the presence of the jury. The district judge offered the parties a chance for a side-bar discussion that was not accepted, although the challenged instruction was now on the table. He thereupon called in the jurors **[**81]** and told them that they should go on to answer the other questions relating to the television submarket even if they redefined that submarket. He then gave the "unambiguous evidence" instruction. No exception to that charge was taken at that time.

Fifteen minutes later, the jury came in with another question, and at that point the USFL objected to the supplemental instruction with regard to "unambiguous evidence." The district judge expressed mild surprise because he believed the instructions quite favorable to the USFL in allowing the jury to continue to answer questions concerning the submarket. Counsel for the USFL stated:

> MR. MYERSON: The applicable authorities, as plaintiffs have read them, stand for the proposition that the unambiguous evidence instruction is reached only in the absence of market share data, and it is plaintiffs' position, as the court is aware, that there is market share data even on the broader submarket that includes other forms of TV, and including ESPN, cable, etc., and with respect to even a broader submarket, including ESPN, cable, etc., there is market share data in the record showing an NFL share higher than 90 percent, and for that reason **[**82]** we object to the charge given by your Honor.

[*1365] Counsel for the USFL did not bring to the district court's attention the distinction between a submarket consisting of the sale of broadcasting rights to fall professional football to the networks, cable and syndicators, and a submarket consisting of the sale of broadcasting rights to programming generally to the networks, cable and syndicators. This was not an insignificant omission because an objection based on the proffered market share data had no merit whatsoever with regard to the broader market and the various colloquies leading up to the objection had served to blur what had now become a critical distinction.

The USFL was entitled at best to an instruction that monopolization of the narrow submarket could be found after resort to ordinary evidentiary principles. Such an instruction would have to be accompanied, however, by a further statement that monopolization of the broad submarket could be based only on "unambiguous evidence." The broad objection made by the USFL to the supplemental instruction did not, therefore, bring to the attention of the district court a valid claim of error, and a more precise **[**83]** claim cannot be raised on appeal. *See Fed. R. Civ. P. 51* (counsel ***HN9***[] must state to district court "distinctly the matter objected to and the grounds of objection").

We also note that it is not at all clear that the jury determined the relevant submarket to be the narrow market for broadcasting rights to fall professional football. After the jury went back to its tasks, it arrived at a verdict that we reproduce in pertinent part.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES FOOTBALL LEAGUE, et al., Plaintiffs

against

NATIONAL FOOTBALL LEAGUE, et al., Defendants

JURY VERDICT SHEET & INTERROGATORIES

84 Civ. 7484 (PKL)

We, the jury, unanimously make the following findings and render the following verdicts with respect to each of the claims alleged in this case:

RELEVANT MARKET

1. Is there a relevant market, as alleged by plaintiffs, consisting of major league professional football in the United States?

YES X NO

The burden of proof is on plaintiffs to prove by a preponderance of the evidence that the answer is "yes".

2. Is **[**84]** there a relevant market or submarket, as alleged by plaintiffs, consisting only of the sale to the networks of television broadcasting rights for major league professional football in the Fall?

YES NO X

[*1366] The burden of proof is on plaintiffs to prove by a preponderance of the evidence that the answer is "yes".

2A. WE the Jury have REDEFFIND the Relevant SUBMARKET TO INCLUDE NOT ONLY The SALE TO The NETWORKS OF TV BROADCASTING Rights but ALSO TO INCLUDE CABLE AND SYNDICATION.

SHERMAN ACT *SECTION 2*

A. Actual Monopolization

Answer Question 3 only if you have answered "yes" to either Questions 1 or Question 2, or both.

3. Does the NFL have monopoly power, that is, the power to control prices or exclude competition in either the relevant market or submarket?

(Check the market or submarket, if any, you have found to exist and then answer this question only as to such market, or submarket, or both):

In a relevant market consisting of major league professional football in the United States?

YES X NO

In a relevant market or submarket consisting only of the sale to the networks of television broadcasting rights for **[**85]** major league professional football in the Fall?

YES NO X

The burden of proof is on plaintiffs to prove by a preponderance of the evidence that the answers are "yes".

No party made an application to clarify the verdict. If the handwritten redefinition of the submarket in "2A" included only the sale of broadcasting rights to major league professional football in the fall, then the "unambiguous evidence" instruction may have misled the jury in answering the second part of question No. 3, even though the printed statement regarding the burden of proof would tend to counteract it. If "2A" included the sale of broadcasting rights to programming generally, then the supplemental instruction was correct.

We believe the redefinition of the submarket stated in "2A" is ambiguous and **[*1367]** cannot be determined on the present record. If one looks at the handwritten redefinition in isolation, the failure to modify the words "broadcasting rights" would imply the broadest definition, or television programming generally. If one looks at page one of the verdict sheet in isolation, it might appear that the jury omitted solely for the sake of convenience the words from question **[**86]** No. 2 immediately above "for major league professional football in the Fall." However, neither the handwritten redefinition nor the verdict sheet can be viewed in isolation. The jury had a copy of the charge in the jury room and the words "broadcasting rights" were used in that charge to describe each of the relevant submarkets. Indeed, the second paragraph of the portion of the television submarket charge quoted above specifically mentioned sales to cable and syndicators by "others [besides football leagues] who sell programs to be televised." We cannot assume that the jury believed that "broadcasting rights" was a short-hand term for professional football rights only.

We therefore cannot say that the jury's failure to include a modifying phrase providing a full description of the broadcasting rights represented a rejection of the NFL's contentions with regard to the broader submarket of television programming generally. We believe the failure of the USFL to seek clarification of the verdict, in addition to its failure to make a precise objection to the supplemental instruction, precludes it from claiming error now. [22] Courts have held **[**87]** ***HN10***[] that a party's failure to bring alleged inconsistencies in the verdict sheet to the court's attention before the jury has been discharged waives the right to have the alleged inconsistencies remedied by a new trial. *See, e.g., Strauss v. Stratojac Corp., 810 F.2d 679, 682-83 (7th Cir. 1987)*; *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416, 1423* (10th Cir.), *cert. denied*, *479 U.S. 1007, 107 S. Ct. 647, 93 L. Ed. 2d 702 (1986)*; *Fernandez v. Chardon, 681 F.2d 42, 58 (1st Cir. 1982)*, *aff'd*, *462 U.S. 650, 103 S. Ct. 2611, 77 L. Ed. 2d 74 (1983)*; *Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 534-35 (5th Cir. 1974)*. We believe that similar considerations justify application of doctrine of waiver where, as here, the jury returns an ambiguous verdict and counsel fails to seize the opportunity to raise an appropriate objection.

[88]** In any event, we believe it highly unlikely that the jury's verdict was affected by the events described above. Neither the USFL's Rule-of-Reason claim nor its essential-facilities claim was affected by the redefined submarket or the "unambiguous evidence" instruction. Nevertheless, the jury rejected the USFL's contentions regarding the NFL's network television contracts in both those claims. Given the common evidentiary basis for all the USFL's television claims described *supra*, it is most improbable that the " unambiguous evidence" instruction affected the jury's verdict on question No. 3 even if the submarket included only broadcasting rights to football.

g. Consumer-Satisfaction Charge

The district judge also charged that in considering whether the NFL had engaged in anticompetitive conduct, the jury might "consider . . . whether in a freely competitive market there would be any dissatisfaction with the present choices on the part of the buyers" or "whether or not the choices of those who purchased the rights to show or televise football have been restricted." This instruction was correct. **[**89]** ***HN11***[] An inquiry into consumer preference is obviously relevant to a determination of whether a monopolist has engaged in predatory conduct. *See Aspen Skiing, 472 U.S. at 605*. Given the **[*1368]** USFL's vigorously pressed claim that the NFL coerced the networks not to televise USFL games, it was entirely proper to allow the jury to consider whether the networks eschewed USFL fall contracts because of NFL coercion or because they were satisfied with the NFL's product.

h. Essential-Facilities Charge

Finally, the USFL contends that it was held to an improperly high standard of proof on its "essential-facilities" claim. We set out the pertinent charge:

> Plaintiffs allege that defendants violated *Sections [1*] and [2] of the Sherman Act by conspiring to and in fact denying plaintiffs access to a satisfactory national broadcast television contract for future seasons, with any one of the three networks. The legal basis for this particular claim by plaintiffs is that a network contract is an essential facility which the USFL or any other professional football league needs in order to compete in major league professional football.
>
> You should only consider this **[**90]** claim if you have already found, pursuant to my earlier instructions, that defendants possess monopoly power in a relevant market or submarket. If you have not found that defendants possess monopoly power, you must return a verdict in defendants' favor on this claim.
> In order to prove their essential "facilities" claim, plaintiffs must prove all of the following elements by a preponderance of the evidence:
> First: That a national broadcast television contract with at least one of the three networks, CBS, NBC or ABC is essential to the ability of a professional football league to compete successfully in the United States;
> Second[:] that potential competitors of the NFL cannot as a practical matter, duplicate the benefits of a network contract;

[22] We are aware that the NFL described the redefined market as being limited to the sale of broadcasting rights to football in a posttrial memorandum. *See* Memorandum of Law in Opposition to Plaintiffs' Request for Permanent Injunctive Relief at 33. The point being made, however, was in no way dependent on how the submarket was defined, and we see no reason to bind the NFL to that statement. As stated in the text, someone looking solely at the verdict sheet would reach that conclusion. In any event, the question is whether an adequate exploration of the issue was made before the district judge.

> Third: That the defendants control access to each of the three networks, that is, the defendants themselves have the ability by their actions to deny actual or potential competitors, such as the USFL, access to national broadcast television -- access to a national broadcast television contract;
>
> Fourth: That the defendants through their actions have exercised their ability to deny actual or potential competitors access to a national **[**91]** broadcast television contract by denying the USFL such access;
> Fifth: That a national broadcast television contract between one or more of the networks and a professional football league other than the NFL would not interfere with any of the defendants' lawful dealings with those networks.

The USFL argues first that this charge erred in failing to distinguish between a network television contract in the spring and one in the fall. The charge did, however, address the USFL's denial of "access to a *satisfactory* national broadcast contract for future seasons" (emphasis added). The jury was well aware of the USFL's claim that a spring contract was unsatisfactory as an "inferior facility" or "minor league." It thus either rejected that characterization of spring football or rejected the USFL's claim that the NFL could deny the USFL access to a network in the fall. The spring-fall issue was thus before the jury.

The USFL next claims that it was error for the district court to require a showing of monopoly power in a relevant submarket or market before considering the essential-facilities claim. We fail to see why the USFL challenges this instruction because the jury **[**92]** did find monopoly power in a relevant market and therefore *did* consider the essential-facilities claim. Had the challenged instruction been omitted, the verdict would have been exactly the same.

Finally, the USFL claims that the district court erred by instructing the jury that one element of an essential-facilities claim is that an antitrust defendant "control access" to the facility. In the USFL's view, this element requires a showing only of "defendants' contribution to the prevention of plaintiffs' access to the facility." ***HN12***[] The requirement that the defendant control **[*1369]** access to the facility is established in the caselaw, *see, e.g., MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1132* (to establish liability under the essential facilities doctrine, plaintiff must prove defendant's "control of the essential facility"), *modified on other grounds*, *1983-2 Trade Cas. (CCH) P65,520* (7th Cir.), *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*, and is necessary because an essential-facilities claim **[**93]** must be brought against the party that can provide access to the facility.

2. *The District Court's Evidentiary Rulings*

a. The USFL's Merger Strategy

The USFL vigorously contends that the NFL's introduction of evidence of its merger strategy enabled the NFL to present an impermissible *in pari delicto* or unclean-hands defense under the guise of damage causation. This claim is frivolous.

It is true that ***HN13***[] a plaintiff's own anticompetitive conduct generally cannot be raised as a defense to liability in an antitrust action. *See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)* (rejecting *in pari delicto* defense that plaintiff's participation in challenged scheme barred recovery); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214, 71 S. Ct. 259, 95 L. Ed. 219 (1951)* (rejecting unclean-hands defense based on plaintiff's involvement in unrelated conduct). The defense may be available, however, when the plaintiff was present at the creation and had **[**94]** a complete and continuing involvement in the monopolization scheme. *See Perma Life, 392 U.S. at 140*; P. Areeda & D. Turner, ***Antitrust Law*** para. 348c (1978).

Whatever its force or content, the *in pari delicto* defense was never interposed by the NFL, and the evidence in question was quite properly admitted as relevant to causation and damages. Stretching dictum in *Perma Life* 1292*94 beyond recognition, the USFL misreads that decision to proscribe the introduction of evidence that might "prejudice the jury improperly into evaluating 'the relative moral worth of the parties.'" USFL Reply Br. at 14 (quoting

Perma Life, 392 U.S. at 139). Neither *Perma Life* nor *Kiefer-Stewart* suggests that otherwise readily admissible evidence must be excluded because it might also be relevant to an *in pari delicto* or unclean-hands defense. In fact, *Perma Life* explicitly states that such evidence "can of course be taken into consideration in computing damages." *392 U.S. at 140*; *see also* *First Beverages, Inc. v. Royal Crown Cola Co., 612 F.2d 1164, 1175* (9th Cir.) (plaintiff's anticompetitive conduct could **[**95]** be introduced "to disprove part or all of the claimed damages"), *cert. denied*, *447 U.S. 924, 100 S. Ct. 3016, 65 L. Ed. 2d 1116 (1980)*; *Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122, 1131 (S.D. Tex. 1976)* ("evidence introduced by defendant of such conduct, if any, by a plaintiff which heretofore was labeled as '*in pari delicto*' now is appropriate when it provides rebuttal to that plaintiff's allegations of causation of injury by defendant and resulting damages therefrom"). Such evidence also can be used for purposes of impeachment. *See* *Memorex Corp. v. IBM Corp., 555 F.2d 1379, 1384 n.8 (9th Cir. 1977)*.

As with any evidence, therefore, the district judge had broad discretion to determine whether the probative value of the evidence of a merger strategy was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Fed. R. Evid. 403*. His decision that evidence of business decisions made by the USFL pursuant to the merger strategy was highly relevant to the issues of causation and damages and not outweighed by any prejudicial effect was clearly correct. **[**96]** This evidence was highly probative on the central issue of whether the USFL's alleged injury and damages, particularly with regard to its failure to obtain a fall network contract, were caused by the NFL's anticompetitive conduct or by the USFL's own deliberate business judgments. *See, e.g.,* *Costner v. Blount Nat'l Bank, 578 F.2d 1192, 1195 (6th Cir. 1978)*; *Heatransfer Corp. v. Volkswagenwerk,* ***[*1370]*** *A.G., 553 F.2d 964, 983 (5th Cir. 1977)*, *cert. denied*, *434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978)*; *Borger v. Yamaha Int'l Corp., 625 F.2d at 399*.

For example, Eddie Einhorn, the USFL owner who was to represent the USFL in negotiations with the networks for a fall contract, warned his fellow owners at a meeting in August 1984:

> We're starting to look for merger cities. Let's be honest about it. We're getting out of certain cities because we don't -- they're getting taken in by the other League, and we're looking for merger cities. We've got to get it on the table tomorrow or this afternoon and start looking at this damn thing. I have the television; I got other problems.
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> You can't get **[**97]** out of all the cities ahead of time because then you got no TV markets left. It's one of these chicken and egg deals. It's great to get out of them if we're absorbed; but if you're going to exist and need someone else to pay us television money, we can't get out of every city we've got here and just move into cities that aren't in the NFL or we're not going to have any product.

It quite simply defies logic for the USFL to assert on the one hand that it was denied a network contract indispensable to its survival because of the NFL's anticompetitive acts and to argue on the other for exclusion of evidence that the owners of USFL franchises knowingly lessened the value of their product to television. Courts do not exclude evidence of a victim's suicide in a murder trial.

To take another example, USFL Commissioner Usher testified that the USFL suffered a "tumbling" of teams and abandoned its spring season because NFL "pressure" caused ABC to withhold broadcast rights payments and to reject any proposal to televise the USFL. He further stated that the USFL sought competition between, rather than a merger of, the leagues, and that NFL pressure forced the USFL to move its **[**98]** teams from highly-rated television markets into low-rated non-NFL markets. Given that testimony, Judge Leisure would have erred had he not concluded that:

> certain of Usher's answers . . . put in issue the *fact* of the merger motive . . . thus . . . put[ting] in issue plaintiffs' theory that the cause of the moves to the [non-NFL] cities was NFL conduct. In addition, Usher has put in evidence the state of mind of the USFL owners who, he claims, moved the teams because of NFL competitive pressures.
>
> The proffered trial exhibits . . . suggest that the reason the USFL decided to move those teams was to position the league for a merger. Certainly, if Usher claims that the basis for the USFL owners' decisions for [moving] the teams was by reason of NFL conduct, the NFL should be entitled to show that there is evidence that suggests that the USFL owners had a different motive.

Moreover, it was clearly proper for the NFL to use evidence of this strategy for impeachment purposes. *See Memorex, 555 F.2d at 1384 n.8*. Although the USFL's desire to exclude this evidence is understandable, its own claims made it inevitable that the merger strategy **[**99]** and its resultant effect on the USFL's value as a television product would become an issue at trial. Indeed, the door was ajar to such evidence as early as the USFL's counsel's opening statement, in which he outlined the USFL's television claims. *See United States v. Bari, 750 F.2d 1169, 1180 (2d Cir. 1984)* (door may be opened through counsel's opening statement), *cert. denied*, *472 U.S. 1019, 105 S. Ct. 3482, 87 L. Ed. 2d 617 (1985)*.

Judge Leisure correctly circumscribed the uses to which the evidence of a merger strategy was put and gave a limiting instruction to the jury four times. In part, that limiting instruction stated that "the nature of plaintiffs' conduct must have no bearing on your evaluation of whether the defendants did anything in violation of the antitrust laws." [23] **[**100]** We have on "numerous **[*1371]** occasions" found that such "an instruction was sufficient to enable the jury to limit its consideration of the evidence to the purpose for which it was offered." *United States v. Siegel, 717 F.2d 9, 18 (2d Cir. 1983)*. [24]

Finally, we reject the USFL's claim that particular items of evidence of its merger strategy were inadmissible on other grounds. It was hardly an abuse of discretion to admit USFL owner Myles Tannenbaum's view of the three ways to make money in professional football, namely "tickets, television and triple damages," to show that plaintiffs, after failing in the marketplace, sought to compel a merger through the threat of antitrust litigation. *See Argus v. Eastman Kodak Co., 801 F.2d 38, 43 (2d Cir. 1986)* (relying on evidence that plaintiff had been "searching for the means of entering the antitrust fray"), *cert. denied*, *479 U.S. 1088, 107 S. Ct. 1295, 94 L. Ed. 2d 151 (1987)*. With respect **[**101]** to the McKinsey & Company report advising against a shift to fall play, Judge Leisure limited its use to showing that advice paid for by, and given to, the USFL owners was not followed. The report was not admitted for the truth of the statements contained therein. *See Siegel, 717 F.2d at 18*.

b. Prior NFL Antitrust Judgments

In his *Opinion No. 3*, Judge Leisure excluded from evidence prior court decisions that found the NFL to have violated *Section 1* of the Sherman Act. 634 F. Supp. at 1171-75. The USFL contends on appeal that this ruling was error, and that the NFL used this ruling as a "shield" to present a "good monopolist" defense.

Prior antitrust violations and the history of competition in a market may, in appropriate cases, be admissible to establish market power and intent to monopolize. *See, e.g., United States v. Grinnell Corp., 384 U.S. at 576*; *Lorain Journal Co. v. United States, 342 U.S. 143, 152-53 (1951)*. Such evidence also may be admissible to establish the intent, motive and method of a conspiracy under *Section 1*. *See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 710, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. **[**102]** In order for the NFL's prior antitrust

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[23] The full limiting instruction was as follows:

You have heard arguments presented by counsel and questions asked of witnesses which have brought to your attention the allegation that in some respects plaintiffs . . . may have had a motive to attempt to force a merger with the NFL in one of several ways. . . . Any arguments that suggest that such conduct is unethical or somehow improper, are themselves inappropriate in this type of case, and in the context of this lawsuit. Whether plaintiffs . . . may have pursued such conduct is irrelevant to the issue of whether the defendants here on trial engaged in any anticompetitive conduct towards the plaintiffs.

Defendants . . . are entitled to show you, however, that certain business decisions may have been the cause of the poor financial health of the USFL. Thus, while plaintiffs contend that they have been injured by defendants' anticompetitive conduct, defendants contend that certain USFL business decisions caused the financial harm to plaintiffs.

But, I must remind you that the nature of plaintiffs' conduct must have no bearing on your evaluation of whether the defendants did anything in violation of the antitrust laws.

[24] The USFL's claim that two jurors were improperly influenced by evidence of the merger strategy despite the district court's limiting instruction must also be rejected. *See Fed. R. Evid. 606(b)* (***HN14***[] prohibits use of extrajudicial statements by jurors to impeach verdict).

judgments to be admissible, however, the USFL bore the burden of demonstrating that the conduct underlying those prior judgments had a direct, logical relationship to the conduct at issue in this case. *See Buckhead Theatre Co. v. Atlanta Enters., Inc., 327 F.2d 365, 368-69* (5th Cir.) (***HN15***[] evidence of prior antitrust judgment irrelevant unless plaintiff introduced evidence that practices complained of in prior case "had an injurious effect upon the plaintiff"), *cert. denied*, *379 U.S. 888, 85 S. Ct. 158, 13 L. Ed. 2d 92 (1964)*; *Bray v. Safeway Stores, Inc., 392 F. Supp. 851, 866* (prior antitrust judgment admitted where underlying conduct was same as that alleged in main case) (citing *FTC v. Cement Inst., 333 U.S. 683, 705, 68 S. Ct. 793, 92 L. Ed. 1010 (1948))*, *vacated per settlement*, *403 F. Supp. 412 (N.D. Cal. 1975)*.

Judge Leisure found that the USFL never made such a showing, and, **[*1372]** although we do not fully embrace his reasoning, we agree that the prior **[**103]** judgments should not have been admitted as evidence of a longstanding conspiracy somehow casting light on current alleged illegalities. Two of the decisions in question, *Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978)* (invalidating rules for NFL player draft); *Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)* (invalidating "Rozelle Rule" for compensation of free agents), are not consistent with our decision in *Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987)*. The three others, *Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381* (9th Cir.) (invalidating NFL Rule 4.3 limiting franchise relocation), *cert. denied*, *469 U.S. 990, 105 S. Ct. 397, 83 L. Ed 2d 331 (1984)*, *later opinion*, *791 F.2d 1356 (9th Cir. 1986)*, *cert. denied*, *484 U.S. 826, 108 S. Ct. 92, 98 L. Ed. 2d 53 (1987)*; *North Am. Soccer League v. National Football League, 670 F.2d 1249* (2d Cir.) (invalidating rule forbidding franchise owners from owning other professional sports teams), *cert. denied*, *459 U.S. 1074, 103 S. Ct. 499, 74 L. Ed. 2d 639 (1982)*, **[**104]** and *United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953)* (invalidating rules limiting broadcast of games into home territories of other teams), involve difficult antitrust questions that were (and, in circuits other than the place of decision, may still be) fair game for litigation. Accordingly, these cases are at best marginally probative of an ongoing intent to exclude competitors.

Judge Leisure excluded the latter three judgments on the ground that they involved intraleague restraints, whereas the instant litigation involves interleague competition. Although we hesitate to adopt a rule that anticompetitive restraints among competitors can never reveal monopolistic intent toward would-be entrants, we do note that sports leagues raise numerous difficult antitrust questions involving horizontal restraints and group boycotts. The very concept of a league involving separate business entities (teams) requires concerted behavior among them and the exclusion of outsiders. Even the drawing up of a schedule requires that horizontal competitors (teams) conform to jointly made decisions and necessarily excludes others. *See* R. Bork, *The Antitrust* **[**105]** *Paradox* 332 (1978). Moreover, the ***antitrust law*** governing horizontal arrangements among competitors and group boycotts has been fluid. With regard to arrangements among competitors, compare *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* ("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*"), with *Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* ("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"). With regard to group boycotts, compare *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)* ("group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden [per se] category"), with *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 30-31, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* **[**106]** (exclusion of physician from hospital staff privileges not violation of antitrust laws "without a showing of actual adverse effect on competition" in product market), and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* (group boycott was not *per se* illegal absent proof that buying cooperative possessed market power).

Accordingly, we are wary of allowing a trier of fact to draw inferences of intent from the outcome of prior lawsuits in an area so fraught with uncertainty and doubt. Our wariness in this regard is enhanced by the fact that the lawsuits most pertinent to the instant action -- involving claims by another league or a team in another league -- were in fact won by the **[*1373]** NFL. *American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963)*; *Mid-South Grizzlies v. National Football League, 720 F.2d 772 (3d Cir. 1983)*. The district court thus acted within its discretion in excluding evidence of prior antitrust judgments against the NFL on the grounds that their prejudicial value outweighed their probative **[**107]** value under *Fed. R. Evid. 403*. *See International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 459* (1st Cir.) ("Whether admitted purely as 'background' evidence or not, evidence of a judicial determination of prior illegal conduct on the part of the defendant cannot help but have a great emotive impact on a jury."), *cert. denied*, *375 U.S. 820, 84 S. Ct. 56, 11 L. Ed. 2d 54 (1963)*; *see also Bohack Corp. v. Iowa Beef Processors, Inc., 715 F.2d 703, 709 (2d Cir. 1983)* (appellate court reluctant to overturn trial court decision under *Rule 403* unless arbitrary or irrational).

We next consider several related evidentiary issues. The USFL claims that a statement by Commissioner Rozelle that the NFL was "in bed with" the City of Oakland should have been admitted. This statement, made during testimony before the Senate Judiciary Committee on a bill that would have given the NFL greater control over franchise relocation, indicated that the NFL had cooperated closely with the City of Oakland during the course of litigation seeking to keep the NFL Raiders in that city. The USFL hoped to use this statement to demonstrate the **[**108]** existence of a conspiracy between the NFL and the City of Oakland to destroy the USFL Invaders in order to bring about the return of the Raiders to Oakland. Judge Leisure again acted within his discretion in ruling that Rozelle's statement did not tend to prove such a conspiracy and that the statement's probative value was thus outweighed by its prejudicial effect because of the need for foundation testimony regarding the Raiders' litigation against the NFL. [25]

Judge Leisure was also well within his discretion in excluding Al Davis's testimony about what Davis called the NFL's "habitual disregard" of antitrust advice. This evidence would have put before the jury the precise evidence of prior antitrust judgments previously and correctly deemed inadmissible. Moreover, Judge Leisure correctly found that this testimony was not admissible "habit" evidence **[**109]** ***HN16***[] under *Fed. R. Evid. 406*, because testimony as to "three or four episodes over a 20-year period" was hardly sufficient to "conclude that a pattern of behavior exists with respect to the conduct at issue here." *See G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526, 1533 (11th Cir. 1985)* (error to admit collateral evidence of routine practice that falls short of "adequacy of sampling and uniformity of response" required by *Rule 406*). Finally, Judge Leisure properly prevented the USFL from attempting to impeach Commissioner Rozelle through an affidavit of Lamar Hunt, an NFL owner who also owned a professional soccer team. This testimony was hearsay and, if allowed, would have resulted in a "mini-trial about the NASL case [or] about the position Hunt took in that litigation." *See Bari, 750 F.2d at 1178-79* (no ***HN17***[] abuse of discretion in refusing to permit cross-examination of witness that would lead to "mini-trial").

c. Legislative Process Evidence

The USFL claims that the district court erroneously excluded **[**110]** evidence relating to the activities of the NFL in Congress. This evidence included (1) the NFL's lobbying activities in connection with the 1961 Sports Broadcasting Act and the 1966 NFL-AFL merger legislation, (2) Congress's motives in enacting this legislation, and (3) Senator Alphonse D'Amato's knowledge of the NFL's use of "pressure" tactics in its congressional lobbying.

HN18[] Legislative lobbying efforts cannot of course be the basis of antitrust liability. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36,* ***[*1374]*** *81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669-72, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. Evidence of such lobbying may be admitted, however, "if it tends reasonably to show the purpose and character of the particular transactions under scrutiny," *Pennington, 381 U.S. at 670 n.3* (quoting *FTC v. Cement Inst., 333 U.S. at 705*), and that evidence is more probative than prejudicial. *Id.*

We address first **[**111]** the exclusion of evidence about the Sports Broadcasting Act and the 1966 merger legislation. The USFL objects to the exclusion of a House Committee Report on the Sports Broadcasting Act, which stated that Congress expected professional sports leagues to institute competitive bidding for their television rights as soon as existing contracts expired. *See* H.R. Rep. No. 1178, 87th Cong., 1st Sess. (1961). The USFL sought to demonstrate by this report that the NFL had misled Congress by promising to put NFL telecasts (especially of the

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[25] For similar reasons, exclusion of excerpts from minutes of the Oakland-Alameda County Coliseum Board of Directors was proper.

championship game) up for competitive bidding. Judge Leisure properly ruled that the interpretation of legislative history was not an issue of fact for the jury, *see* *Stissi v. Interstate & Ocean Transp. Co., 765 F.2d 370, 374 (2d Cir. 1985)*, and that such evidence was otherwise excludable under *Fed. R. Evid. 403* as overly prejudicial and confusing.

As to the NFL-AFL merger legislation, the USFL sought to introduce evidence that it was approved in part because the NFL had promised two powerful Louisiana lawmakers that a franchise would be awarded to New Orleans. The district court's refusal to admit such evidence was not an abuse **[**112]** of discretion, and we adopt Judge Leisure's reasoning as set forth in the margin. [26] We also reject the USFL claim with regard to the exclusion of allegedly "doctored" minutes of NFL League meetings. In a pre-trial ruling, Judge Leisure correctly found that these minutes, which were submitted to Congress in connection with the merger legislation, had not been doctored, and that plaintiffs' claim was just a "diversionary tactic."

[113]** Finally, we address the district court's exclusion of Senator D'Amato's testimony about the NFL's use of "pressure" tactics in Congress. These tactics allegedly included threats to certain members of the House and Senate to remove franchises from their states and promises to others to move franchises to their states. The USFL argued that these lobbying activities fell within the "sham" exception to *Noerr-Pennington*. We agree, however, with Judge Leisure that ***HN19***[] efforts to persuade government officials simply by appealing to their political interests have *Noerr-Pennington* protection. *See* *Noerr, 365 U.S. at 142-44*; *Mid-South Grizzlies, 720 F.2d at 784*; *BusTop Shelters, Inc. v. Convenience & Safety Corp., 521 F. Supp. 989, 995 (S.D.N.Y. 1981)*.

Evidence of lobbying may, as we have already stated, nevertheless be admitted as purpose or character evidence. *See* *Pennington, 381 U.S. at 670-71 n.3*. Judge Leisure thus allowed Senator D'Amato to testify about the Senator's own experience with the NFL's lobbying after **[**114]** formation of the USFL in 1982, but forbade any reference to prior lawsuits or to particular legislation. Senator D'Amato was also not permitted to testify concerning double-hearsay statements made by NFL officials to other members of Congress. Even if these statements could survive a hearsay objection, however, they were properly excluded on two other grounds. First, the testimonial privilege that members of Congress enjoy under the Speech or Debate Clause of the **[*1375]** Constitution, art. I, § 6, cannot be waived by another member (in this case, Senator D'Amato). As Judge Leisure stated, the underlying purpose of the *Speech or Debate Clause*, which is to "protect the integrity of the legislative process by insuring the independence of individual legislators," *United States v. Brewster, 408 U.S. 501, 507, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972)*, would be "ill-served" if such waivers were permitted. Second, this testimony was properly excluded under *Fed. R. Evid. 403* because of its potentially prejudicial impact on the jury.

Finally, with regard to all of the excluded evidence relating to the legislative process, we tend to share the view of the Third Circuit **[**115]** that, "if these allegations are true, . . . they are, perhaps, instructive on the nature of the federal legislative process. For purposes of [the Sherman Act], however, they are irrelevant." *Mid-South Grizzlies, 720 F.2d at 784*.

d. Examination of Damages Experts

The USFL further claims that Judge Leisure erred by not permitting the cross-examination of Dr. Bruce Owen, the NFL's damages expert, about testimony he gave in unrelated cases. In the cases in question, *Buffalo Broadcasting Co. v. American Society of Composers, Authors & Publishers, 546 F. Supp. 274, 293 n.42 (S.D.N.Y. 1982)* (rejecting testimony of defendant's expert Owen, in part because he had testified as government economist that ASCAP was anticompetitive cartel), *rev'd*, *744 F.2d 917 (2d Cir. 1984)*, *cert. denied*, *469 U.S. 1211, 105 S. Ct.*

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[26] The district court found that: (1) "an important aspect of the NFL's purpose in seeking the 1961 exemption was to join the other professional sports organizations in being able to enter into pooled rights television contracts," *Opinion No. 3*, ***634 F. Supp. at 1171***; (2) one of the terms of the 1966 merger was an increase in the number of teams; (3) at the NFL's request, the merger legislation did not grant the combined league any greater antitrust immunity than existed before the merger; (4) evidence on state of mind as to lobbying that took place fifteen to twenty years earlier was weak; and (5) the evidence was, in any event, merely cumulative. *See generally id.*

1181, 84 L. Ed. 2d 329 (1985), and *Southern Pacific Communications Co. v. AT&T Co., 556 F. Supp. 825, 913 (D.D.C. 1982)* (rejecting testimony of plaintiff's expert Owen, in part because of role as government economist favoring AT&T break-up), *aff'd*, *740 F.2d 980, 740 F.2d 1011 (D.C. Cir. 1984)*, **[**116]** *cert. denied*, *470 U.S. 1005, 105 S. Ct. 1359, 84 L. Ed. 2d 380 (1985)*, Dr. Owen's testimony was rejected by the district court but vindicated on appeal. *See Buffalo Broadcasting*, 744 F.2d at 931-33 & n.12; *Southern Pacific*, 740 F.2d at 1000-02. It was well within Judge Leisure's discretion to avoid a confusing and certainly complex digression into two earlier trials and appeals. *See* *Bari, 750 F.2d at 1178-79*. We note that such a digression is not required by *Walker v. Firestone Tire & Rubber Co., 412 F.2d 60, 63-64 (2d Cir. 1969)*, in which the expert in question had given extremely contradictory testimony regarding his qualifications in an earlier unrelated trial. Probing into the qualifications of an expert is a far cry from probing into differing judicial reactions to Owen's prior testimony in totally unrelated cases.

Moreover, the record does not support the USFL claim that the district court allowed the NFL to challenge the USFL's damages case unfairly. *Fed. R. Evid. 104(a)* permits voir dire of an expert witness, where, as here, an expert's testimony involved two industries, professional **[**117]** football and television, and various complex economic models and assumptions. The district court also properly allowed the NFL to question Dr. Cornell about the effect of injunctive relief on the USFL's damages, namely "what effect, if any, . . . a cessation of illegal conduct by defendants would have on plaintiffs' future." This cross-examination did no more than probe Dr. Cornell's direct testimony that future damages were appropriate because the USFL would suffer damage "as long as the particular behavior complained about . . . continues."

e. Miscellaneous Evidentiary Claims

We briefly address the USFL's remaining evidentiary claims. The record contradicts the USFL's claim that it was not permitted to examine New York Jets' owner Leon Hess about his alleged conflict of interest as an NFL owner and ABC director and about statements made by Senator D'Amato and Vincent Tese. The district court also acted within its discretion when it excluded a letter to Hess from Mayor Edward Koch regarding the return of the Jets to New York City, even though Hess's reply was admitted. The Koch letter was excluded on the grounds that it was both hearsay and unduly prejudicial under *Rule 403*. **[**118]** ***HN20***[] The doctrine of completeness, *Fed. R. Evid. 106*, does not compel admission **[*1376]** of otherwise inadmissible hearsay evidence. *See* *United States v. Terry, 702 F.2d 299, 314* (2d Cir.), *cert. denied*, *461 U.S. 931, 103 S. Ct. 2095, 77 L. Ed. 2d 304 (1983)*.

Judge Leisure also properly excluded a 1982 letter from the Senate Judiciary Committee to Roone Arledge of ABC regarding sportscaster Howard Cosell's testimony on legislation concerning sports franchise relocation. The USFL claimed that Arledge, at Rozelle's request, had sought to reschedule Cosell's testimony in order to increase the likelihood that the bill would be voted out of committee before Congress adjourned. However, the USFL failed to establish a sufficient foundation for the admission of this letter under the public record exception of *Fed. R. Evid. 803(8)*.

In addition, the USFL claims that an exchange of letters in 1970 between then ABC President Leonard Goldenstein and the president of an earlier United States Football League, which never fielded any teams, was improperly excluded **[**119]** from evidence. In his reply, Goldenstein had stated that ABC was not interested in televising another league because it had just signed an NFL contract for Monday Night Football. The USFL hoped to show by this evidence that the NFL's television contracts prevented the networks from broadcasting another league. Judge Leisure, however, acted within his discretion in concluding that the NFL would be unduly prejudiced under *Fed. R. Evid. 403* by the admission of these letters and that a proper foundation for this hearsay evidence had not been established pursuant to *Fed. R. Evid. 803(6)*. On the other hand, he did admit evidence relating to the WFL's futile attempts to obtain television contracts after Rozelle had testified that he told CBS officials of his "surprise" that Robert Wussler, president of CBS Sports, had attended a meeting with the WFL.

The district court also excluded testimony by Ed Garvey, former head of the NFL Players Association, regarding ABC's unwillingness, without NFL approval, to consider broadcasting touch football games during the halftime of NFL games. Such testimony was clearly irrelevant and misleading with respect to any alleged television conduct by the **[**120]** NFL because it had nothing to do with the USFL or NFL control over the networks. Instead it concerned the production only of NFL games.

Finally, we consider the USFL's attempt to impeach Tex Schramm of the Dallas Cowboys by showing that his testimony that the unionization of the USFL was never discussed at NFL meetings was false. First, no foundation was laid to introduce handwritten notes of an NFL official allegedly reflecting the comments of an NFL players union official at an NFL meeting. Second, these notes were, as Judge Leisure found, being offered for their truth, not simply for the fact that the statements were made, and were properly excluded as multiple hearsay under *Fed. R. Evid. 805*.

3. *The District Court's Damages Instructions*

The USFL contends that it received an award of only $ 1.00 because of incorrect jury instructions regarding damages. Again, we disagree. Specifically, the USFL challenges the instructions with respect to an antitrust plaintiff's burden of proving the amount of damages and with respect to nominal damages.

a. The $ 1.00 Award

The jury was given the following nominal damages instruction:

> Just because you have found the fact **[**121]** of some damage resulting from a given unlawful act, that does not mean that you are required to award a dollar amount of damages resulting from that act. You may find, for example, that you are unable to compute the monetary damages resulting from the wrongful act, except by engaging in speculation or guessing, or you find that you cannot separate out the amount of the losses caused by the wrongful act from the amount caused by other factors, including perfectly lawful competitive acts and including business decisions made by the **[*1377]** plaintiffs or the plaintiffs' own mismanagement. Or you may find that plaintiffs failed to prove an amount of damages.
> You may decline to award damages under such circumstances, or you may award a nominal amount, say $ 1.

The jury's $ 1.00 award was consistent with this instruction. The NFL offered much evidence of self-destructive USFL decisions, and the jury's nominal award suggests that it credited this proof, as it was free to do. Moreover, it is now clear that Dr. Cornell's testimony was based on a number of assumptions entailing legal premises that were incorrect or factual conclusions that were rejected by the jury. In **[**122]** awarding only nominal damages, the jury might reasonably have concluded that the USFL had failed to prove any damages.

b. Nominal Damages in Antitrust Cases

We also reject the USFL's claim that the award of nominal damages in antitrust cases is somehow "suspect." Other courts routinely approve the award of such damages, *see, e.g., Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130, 1147 (8th Cir. 1981)*, *cert. denied*, *457 U.S. 1111, 102 S. Ct. 2915, 73 L. Ed. 2d 1321 (1982)*, and the USFL cites no authority holding that nominal damages are impermissible in an antitrust case. It is true that we questioned the award of nominal damages in dictum, *Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 909 n.4* (2d Cir.) ("possibility of awarding nominal damages under § 4 of the Clayton Act . . . seems dubious in light of the language of the statute and the Supreme Court opinions"), *cert. denied*, *369 U.S. 865, 82 S. Ct. 1031, 8 L. Ed. 2d 85 (1962)*. However, our observations were made in the context of a directed verdict based on the plaintiff's failure to prove damages. The USFL's **[**123]** reliance upon *Schwabe* is, as the district court noted, "remarkably ironic" because the rationale of *Schwabe* would deny the USFL any damages at all. *Opinion No. 16*, *644 F. Supp. at 1053*.

c. Proof of Antitrust Injury and Damages

We next consider whether the district court properly instructed the jury with respect to an antitrust plaintiff's burden of proving the amount of damages. ***HN21***[] To recover treble damages under Section 4 of the Clayton Act, *15 U.S.C. § 15 (1982)*, an antitrust plaintiff must prove that its injury was, in fact, caused by the defendant's violation of the antitrust laws. *Argus, 801 F.2d at 41*; *MCI Communications, 708 F.2d at 1161*.

Judge Leisure instructed the jury as follows with respect to injury causation:

> Plaintiffs do not have to prove that the unlawful activity that the defendants allegedly engaged in was the sole cause of their injuries. Plaintiffs meet their burden if they show that the defendants' unlawful acts substantially contributed to their injuries, even though **[**124]** other facts may have contributed significantly. An antitrust plaintiff is not required to show that the defendants' acts were a greater cause of the injury than other factors. Plaintiffs need only show that their injury to *some* degree resulted from defendants' violation.

(emphasis added). The USFL understandably does not challenge this instruction, which was consistent with established precedent. *See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *Litton Sys., Inc. v. AT&T Co., 700 F.2d 785, 823 n.49 (2d Cir. 1983)*, *cert. denied*, *464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1984)*. Rather, the USFL challenges Judge Leisure's instruction that the jury could award no damages or one dollar in damages if they found that they could not "separate out the amount of losses caused by [NFL misconduct] from the amount caused by other factors, including perfectly lawful competitive acts and including business decisions made by the [USFL] or the [USFL's] own mismanagement."

The USFL claims that this instruction was incorrect because the NFL should have **[**125]** borne the burden of separating **[*1378]** out the amount of USFL losses caused by the NFL's wrongful acts from the amount caused by other factors such as the USFL's unsuccessful merger strategy. It is true that ***HN22***[] once proof of injury causation has been established, courts have allowed antitrust plaintiffs considerable latitude in proving the amount of damages. Proof of amount of damages thus need not conform to a particular theory or model, *see Locklin v. Day-Glo Color Corp., 429 F.2d 873, 880 (7th Cir. 1970)* (citing *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*), *cert. denied*, *400 U.S. 1020, 91 S. Ct. 582, 27 L. Ed. 2d 632 (1971)*, and exact proof of the amount of damages is not required. *See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)* (acceptance of "degree of uncertainty" in measure of antitrust damages is necessary because of difficulty of ascertaining "what plaintiff's situation would have **[**126]** been in the absence of the defendant's antitrust violation"). An antitrust plaintiff must thus provide only sufficient evidence to support a "just and reasonable estimate" of damages. *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*; *see also Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)* (proof of antitrust damages sufficient "if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate"). [27]

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[27] Judge Leisure gave an instruction regarding the USFL's lightened burden of proving the amount of damages that was entirely consistent with these rules. Repeating nearly verbatim the instruction set forth in Judge Sand's *Modern Federal Jury Instructions* para. 79.02, at 79-57 (1986) (Instruction 79-26), Judge Leisure instructed the jury as follows:

> It might be difficult for you to measure the plaintiff[s'] damages in this case. However, the fact that it might be difficult to determine the amount of the plaintiffs' damages should not prevent you from awarding damages to plaintiffs. The law allows a party injured by conduct which violates the Sherman Act to collect damages even if the evidence does not reflect how those damages are to be calculated with mathematical precision.
>
> This does not mean, however, that you may determine the plaintiff[s'] damages on the basis of mere speculation or guesswork. Rather, you must look to the evidence presented to you and make a fair and reasonable estimate of the plaintiff[s'] damages based on the evidence.

Judge Leisure properly instructed the jury as follows on future damages:

> In this case plaintiffs are seeking not only to recover those damages they allege they have already suffered, but also to recover damages they claim they will suffer in the future as a result of the anticompetitive conduct of defendants that has already taken place and which may take place in the future.
>
> With regard to future damages, you are instructed that such damages are not recoverable if you find that the fact of their accrual is speculative or that their amount and nature is unprovable. On the other hand, if you find that you can make a fair and reasonable estimate of plaintiffs' future damages, you may award such damages as you find appropriate, keeping in mind that the damage award need not be calculated with mathematical precision.

[127]** Whatever latitude is afforded antitrust plaintiffs as to proof of damages, however, is limited by the requirement that the damages awarded must be traced to some degree to unlawful acts. *MCI Communications, 708 F.2d at 1161*. [28] That latitude is thus circumscribed by the need for proof of causation. The Supreme Court emphasized this in *Bigelow* by relaxing the standard for proving amount of damages only after "proof of defendant['s] wrongful acts and their tendency to injure plaintiff['s] business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes*." *327 U.S. at 264* (emphasis added).

[128]** A plaintiff's proof of amount of damages thus must provide the jury with a reasonable basis upon which to estimate **[*1379]** the amount of its losses caused by other factors, such as management problems, a general recession or lawful factors. As the Seventh Circuit stated in *MCI Communications*:

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. . . . To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful.

708 F.2d at 1162-63. In *MCI Communications*, the court overturned a damages award based on a study that did not allow the jury to alter the award to reflect lawful competition from AT&T. *Id. at 1163*; *see Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1352 (9th Cir. 1985)* (court reversed jury award because of plaintiff's "utter failure to make any segregation between damages attributable to lawful competition and that attributable to [defendant's] **[**129]** unlawful scheme"); *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3d Cir. 1975)* ("In the absence of any guidance in the record, we cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition."); *Southern Pac. Communications v. AT&T*, 556 F. Supp. at 1090 ("court must have a basis for assuring itself that other causes of plaintiffs' injury have been 'filtered out' of the damage claim").

The Supreme Court's decisions in *Bigelow* and *Story Parchment* thus do not shift the burden of proving the cause of damages from the plaintiff to the defendant. They simply restate the established principle that ***HN23***[] where damages have been shown to be attributable to the defendant's wrongful conduct, but are uncertain in amount, the defendant bears the risk of those uncertainties.

4. *The District Court's Denial of Injunctive Relief*

Finally, the USFL claims that the district court should have granted sweeping injunctive relief under Section 16 of the Clayton Act, *15 U.S.C. § 26* ***[**130]*** *(1982)*. In particular, the USFL requested membership in the NFL, separation of the NFL into two leagues, each league being limited to one network, or a prohibition on the NFL from broadcasting its games in more than one afternoon time slot on Sunday. Judge Leisure held that the requested relief was unrelated to the monopolization of the market for major-league professional football verdict and not justified by the record as a whole.

The USFL contends that the jury's monopolization verdict compelled the district court to "pry open to competition [the] market that has been closed by defendants' illegal restraints." USFL Br. at 70 (quoting *Zenith Radio, 395 U.S. at 133*). However, this argument simply glosses over the critical fact that the jury did not find the NFL liable on any of the USFL's television-related claims. With regard to the findings implied by the monopolization verdict that the NFL engaged in predatory conduct through attempts to co-opt USFL owners, creation of a Supplemental Draft, or expansion in roster size, Judge Leisure denied relief on the ground that the USFL provided no evidence that such conduct was likely to continue or recur. The USFL **[**131]** has not asked us to overturn that denial of relief.

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[28] The USFL attempts to distinguish *MCI Communications* on the ground that, unlike the instant case, *MCI Communications* involved partial market foreclosure and thus "special proof problems." Even assuming that the instant case is a total foreclosure case, the Supreme Court stated in *Zenith Radio* that the same standards of proof apply whether there is "a partial or total exclusion from a market." *395 U.S. at 123*.

Instead, the USFL seeks sweeping injunctive relief on the ground that the NFL's single league structure, in conjunction with television contracts with the three networks, creates an impenetrable barrier to entry by a competing league into the market of professional football. No matter what the jury found, however, such relief would not have been appropriate. First, Congress has authorized the NFL's single-league structure and its joint economic operations. Second, at the time the district court denied the relief, the NFL's contracts with the networks had expired. There was thus no "tie-up" of the three networks and no barrier to entry created by the "dilution effect." There was only free competition between the NFL's product and the USFL's product. Of course, the district court also properly rejected this claim in **[*1380]** view of the jury's outright rejection of all of the USFL's television-related claims.

What the USFL seeks is essentially a judicial restructuring of major-league professional football to allow it to enter. Because of the explicit congressional authorization in 1966 for the NFL-AFL merger and single-league **[**132]** operation, the USFL does not attack the league structure directly. Instead, the USFL asks us to prevent networks from broadcasting, and fans from watching, NFL games in the hope that they will turn to the USFL. Absent a showing of an unlawful barrier to entry, however, new sports leagues must be prepared to make the investment of time, effort and money that develops interest and fan loyalty and results in an attractive product for the media. The jury in the present case obviously found that patient development of a loyal following among fans and an adherence to an original plan that offered long-run gains were lacking in the USFL. Instead, the USFL quickly changed to a strategy of competition with the NFL in the fall, hoping thereby to force a merger of a few USFL teams into the NFL. That led to a movement of USFL teams out of large television markets and a resultant reduction in value of USFL games to television. As USFL owner and negotiator Einhorn predicted, abandoning major television markets precluded the possibility of obtaining a network contract. The USFL hoped, however, that if a merger did not occur, a jury verdict in the instant litigation followed by a decree effectively **[**133]** forcing a network to televise its product would save the day. Instead, the jury found that the failure of the USFL was not the result of the NFL's television contracts but of its own decision to seek entry into the NFL on the cheap.

CONCLUSION

For the foregoing reasons, we affirm the jury's verdict and the judgments entered thereon. We thus need not consider the NFL's conditional cross-appeal.

Affirmed.

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Nurse Midwifery Associates v. Hibbett

United States District Court for the Middle District of Tennessee, Nashville Division

March 14, 1988, Decided ; March 14, 1988, Entered

Docket No. 82-3208

Reporter

689 F. Supp. 799 *; 1988 U.S. Dist. LEXIS 9358 **; 1988-1 Trade Cas. (CCH) P67,975

NURSE MIDWIFERY ASSOCIATES, ET AL. v. B.K. HIBBETT, M.D., ET AL.

Core Terms

conspiracy, plaintiffs', medical staff, Recommendation, alleged conspiracy, summary judgment, conspire, personal stake, staff, maternity, antitrust, privileges, agrees, competitors, pendent, ADOPTS, summary judgment motion, anti-competitive, intra-corporate, midwifery, centered, midwives, motive, insurance company, tying arrangement, anti trust law, entity, seller, state claims, conversations

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Administrative Proceedings > Fraud

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

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

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

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

HN1[] **Workers' Compensation, Fraud**

To survive a summary judgment motion in an antitrust case, a plaintiff must establish that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused the plaintiffs to suffer a cognizable injury.

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

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

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

HN2[] **Monopolies & Monopolization, Attempts to Monopolize**

Section 1 of the Sherman Anti-Trust Act (the Act), *15 U.S.C.S. §§ 1-7*, prohibits all contracts, combinations, or conspiracies in restraint of trade. *Section 2* of the Act prohibits all combinations or conspiracies to monopolize. Because these activities cannot be performed by a single person acting alone, it is well established that two or more persons are necessary to perform an actionable contract, combination, or conspiracy under the Act. It is also well established that unilateral action, no matter what its motivation, does not violate the Act.

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

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

HN3[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A corporation cannot combine or conspire with itself, and the acts of a corporation alone, acting through its directors, officers, and employees, generally are not cognizable under the Sherman Anti-Trust Act, *15 U.S.C.S. §§1-7*.

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

HN4[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The Court of Appeals for the Sixth Circuit does not intend to recognize the existence of the independent personal stake exception in the Sixth Circuit.

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

HN5[] **Monopolies & Monopolization, Conspiracy to Monopolize**

An independent personal stake exists only when an employee of a corporation has an interest in an economic entity that is separate from and unrelated to the corporation by which he is employed, and when that employee stands to benefit from the anti-competitive action taken by the corporate employer. A mere potential or indirect motive would be too speculative a basis from which to infer an independent personal stake. Furthermore, the employee would have to possess the power to institute the anti-competitive policy for his corporation.

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

HN6[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The power to institute an anti-competitive policy is a requisite element under the independent personal stake exception where applied.

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

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > Losses & Profits

Mergers & Acquisitions Law > Antitrust > Joint Ventures

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

HN7[] **Types of Contracts, Joint Contracts**

In partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss, the partnership is regarded as a single firm competing with other sellers in the market.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN8[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Physicians' joint arrangements to sell insurance, which is a different product from the medical services offered by physicians in their individual capacity, are single entities for antitrust analysis.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN9[] **Private Actions, Remedies**

A private plaintiff may not recover damages simply by proving a violation of the antitrust laws. Rather, the plaintiff must demonstrate a causal connection between the antitrust violation and the damages suffered. The causal link must be proved as a matter of fact and with a fair degree of certainty. To be one of several causes is not enough.

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

Evidence > Types of Evidence > Circumstantial Evidence

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

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

HN10[] **Conspiracy, Elements**

Although a plaintiff may not present direct evidence of an alleged conspiracy, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. Conspiracy can be established by showing business behavior evidencing a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

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

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

Evidence > Inferences & Presumptions > Inferences

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

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN11[] **Energy & Utilities, State Regulation**

On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. However, ***antitrust law*** limits the range of permissible inferences from ambiguous evidence. Thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. A plaintiff, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed plaintiff.

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

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

HN12[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A conspiracy may be found when one party acquiesces in the anti-competitive demand of another, even if the agreement is obtained through coercion.

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

HN13[] **Summary Judgment, Entitlement as Matter of Law**

If the nonmoving party's innocent explanation of the questioned conduct is plausible and more logical than a concerted action theory, summary judgment against the moving party is appropriate.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

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

HN14[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The federal courts consistently have recognized that mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence from which to infer an anti-competitive conspiracy to deny hospital privileges.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

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

Healthcare Law > ... > Actions Against Facilities > Agency Relationships > General Overview

Healthcare Law > ... > Actions Against Facilities > Agency Relationships > Respondeat Superior

HN15[] **Conspiracy, Elements**

Under the majority rule establishing the requisite elements for proving antitrust conspiracy by circumstantial evidence of parallel business activity, a plaintiff must show that (1) the alleged conspirators' business activities constituted parallel conduct; (2) the alleged conspirators had a motivation to enter into a conspiracy; and (3) the actions taken were contrary to the alleged conspirators' individual economic interests.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

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

HN16[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The elements of a per se illegal tying arrangement are: 1) that there are two separate and distinct products; 2) that the seller has sufficient economic power in the tying product market; and 3) that the tying involves a not insubstantial amount of commerce. Moreover, under the "rule of reason" analysis, another element is added -- that the tying arrangement had anti-competitive effects in the marketplace.

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

HN17[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Market power may be proven by showing that the firm offers a unique product that competitors are not able to offer. Where market power can be demonstrated by the uniqueness of a particular product, market dominance is not required. For antitrust purposes, the tying product's uniqueness is established by determining whether the seller has the power, within the market for the tying product, to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

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

HN18[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Uniqueness only can be established by showing either (1) a cost advantage on the part of the seller, or (2) a characteristic of the tying product that significantly differentiates it from that which competitors could offer if they so elected. A special advantage must be shown to establish uniqueness and economic power.

Judges: [1]** John T. Nixon, United States District Judge.

Opinion by: NIXON

Opinion

[*802] MEMORANDUM

JOHN T. NIXON, UNITED STATES DISTRICT JUDGE

The Court has received the Report and Recommendation issued by the Magistrate on July 31, 1987, concerning motions for summary judgment filed by each of the defendants in this case. Plaintiffs and certain defendants have filed written objections to the Report and Recommendation. Under *Rule 72(b) of the Federal Rules of Civil Procedure*, the Court must make a *de novo* determination of all matters to which the parties object. In its determination, the Court may adopt, modify, or reject any of the Magistrate's proposed findings or recommendations.

This is an antitrust action for injunctive relief and damages based upon *sections 1* and *2* of the Sherman Anti-Trust Act ("the Act"), *15 U.S.C. §§ 1-7*, and pendent state law claims. The plaintiffs are: two nurse midwives, Susan Sizemore and Victoria Henderson; their business partnership, Nurse Midwifery Associates ("NMA"); their physician associate, Dr. Darrell Martin; and several NMA clients. The defendants are: Vanderbilt Hospital ("Vanderbilt"); Hendersonville Community Hospital ("HCH"); Dr. Conrad Shackleford, a member of the pediatric staff at HCH; Southern Hills Hospital **[**2]** ("SHH"); Drs. Stephen Melkin, Harry Baer, and George Andrews, members of the obstetrics staff at SHH; State Volunteer Mutual Insurance Company ("SVMIC"); and Dr. B.K. Hibbett, a member of the obstetrics staff at Baptist Hospital in Nashville, and also a member of the SVMIC board of directors. Broadly stated, plaintiffs claim that the defendant doctors, hospitals, and insurance company engaged in various contracts, combinations and conspiracies that unreasonably restrained trade in violation of *section 1* of the Act, and attempted to monopolize trade in violation of *section 2* of the Act. Plaintiffs allege that defendants intended to prevent NMA from operating a private practice to provide nurse midwifery services at hospitals in Davidson County and Hendersonville, Tennessee, thus putting NMA out of business.

Having reviewed the record, including the Report and Recommendation, the objections thereto, and the responses to those objections, the Court ADOPTS the Magistrate's extensive findings of fact and incorporates them into this Memorandum.

HN1[] To survive a summary judgment motion in an antitrust case, a plaintiff "must establish that there is a genuine issue of material fact" as to whether **[**3]** the defendants "entered into an illegal conspiracy that caused [the plaintiffs] to suffer a cognizable injury." *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (citing, *inter alia*, *Fed. R. Civ. P. 56(e)*). With this standard in mind, the Court now considers the Magistrate's recommendation as to each allegation and makes a *de novo* determination of recommendations to which objections have been filed.

1. *Conspiracy Among Vanderbilt and Members of its Medical Faculty*

Based on the facts set out in the Report and Recommendation, plaintiffs allege that Vanderbilt should be held liable for conspiring with members of its medical faculty to **[*803]** deny plaintiff nurse midwives medical staff privileges at that hospital. The Magistrate recommended that all allegations of conspiracy among Vanderbilt and any members of its full-time faculty be dismissed. For the reasons stated below, the Court ADOPTS the Magistrate's recommendation and reasoning as to this claim.

HN2[] *Section 1* of the Act prohibits all contracts, combinations, or conspiracies in restraint of trade. *Section 2* of the Act prohibits all combinations or conspiracies to monopolize. Because these **[**4]** activities cannot be performed by a single person acting alone, it is well established that two or more persons are necessary to perform an actionable contract, combination, or conspiracy under the Act. *See, e.g.*, 2 Kintner, *Federal* ***Antitrust Law*** § 9.7 (1980). It is also well established that unilateral action, no matter what its motivation, does not violate the Act. *See* *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*.

HN3[] A corporation cannot combine or conspire with itself, and the acts of a corporation alone, acting through its directors, officers, and employees, generally are not cognizable under the Act. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. If this were not the rule, every decision of a corporation on pricing, marketing, and customer relations would be the result of a conspiracy actionable under the Act.

In *Weiss v. York Hospital, 745 F.2d 786, 816-17 (3d Cir. 1984)*, *cert denied*, *470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985)*, the Third Circuit held that a medical staff of a hospital cannot conspire with the hospital. The Court stated:

> Finally, we deal with the plaintiff's **[**5]** assertion that the district court erred in charging the jury that the hospital could not conspire with its medical staff. The district court found that the medical staff was an unincorporated division of the hospital, and as such the court determined that the two could not conspire. Although we do not necessarily agree with the district court's characterization of the medical staff as an unincorporated division of the hospital, we agree with its basic conclusion that, with respect to the issues in this case, the hospital could not, as a matter of law, conspire with the medical staff. The medical staff was empowered to make staff privilege decisions on behalf of the hospital. As such, with regard to these decisions, the medical staff operated as an officer of a corporation would in relation to the corporation. Although the members of the medical staff had independent economic interests in competition with each other, the staff as an entity had no interest in competition with the hospital. Accordingly, we conclude that the district court correctly charged the jury that there could not be a conspiracy between the hospital and the medical staff.

See also *McMorris v. Williamsport Hospital,* ***[**6]*** *597 F. Supp. 899, 914 (M.D. Pa. 1984)*. Likewise, Vanderbilt argues that plaintiffs' claim must fail because they allege only intra-corporate conspiracy.

Plaintiffs argue in response that *Weiss* states merely that a medical staff cannot conspire with a hospital where the staff has no interest in competition with the hospital. Plaintiffs argue that the individual members of the medical faculty had an "independent personal stake" separate from Vanderbilt's and, thus, could conspire with the hospital. Plaintiffs cite the only known case finding the possibility of an independent personal stake in a hospital privileges case, *Robinson v. Magovern, 521 F. Supp. 842 (W.D. Pa. 1981)*, *aff'd*, *688 F.2d 824* (3d Cir.), *cert. denied*, *459 U.S. 971, 74 L. Ed. 2d 283, 103 S. Ct. 302 (1982)*. There, the court found that a conspiracy between a hospital and the head of its surgery department would be possible where "the officer, agent or employee has an independent, personal stake in achieving the object of the conspiracy." *Id. at 907*.

The head of the hospital surgery department in *Robinson* also conducted a private surgical practice, which in that court's view **[*804]** provided an independent personal stake. Plaintiffs **[**7]** argue that, likewise, Vanderbilt's medical staff maintained private practices in addition to their duties at the hospital.

The independent personal stake exception relied upon by plaintiffs has never been adopted by the Sixth Circuit, which has expressed disfavor with the exception in the only two instances in which it has been argued to that court. In *Smith v. Northern Michigan Hospitals, 703 F.2d 942 (6th Cir. 1983)*, the court found that the individual hospital emergency room staff personnel did not have an independent personal stake separate from the hospital, but that even if they did, "it is doubtful that we would follow the analysis" of the independent personal stake exception. *Id. at 951 n.17*.

In *Potters Medical Center v. City Hospital Association, 800 F.2d 568 (6th Cir. 1986)*, the court went even further in voicing its reluctance to adopt the exception. In *Potters*, plaintiffs alleged that the hospital's staff attorney and its internal medicine department chairman had conspired with each other and with the hospital in violation of the Act. The staff attorney also owned an interest in a construction company that did work for the hospital, and the staff physician **[**8]** also received revenue from the hospital's use of EKG equipment that he owned. The plaintiffs in *Potters* argued that these interests gave these defendants an independent personal stake in harming plaintiffs and in furthering the alleged monopolistic goals of the hospital. The court stated:

> Although several courts have recognized the "independent personal stake" exception to the rule that officers and agents lack capacity to conspire with their corporation, . . . this circuit has never endorsed the exception. In fact, this court has noted the "rather substantial policy reasons for not adopting such an exception."

Id. at 573 (citing *Smith, 703 F.2d at 950 n.15*); *see* Note, "*Conspiring Entities" Under* Section 1 *of the Sherman Act*, 95 Harv. L. Rev. 661 (1981-82) (discussing policy considerations bearing on the intra-corporate conspiracy doctrine).

Given the clear language in *Potters*, this Court is constrained to agree with the Magistrate that ***HN4***[] the Sixth Circuit does not intend to recognize the existence of the independent personal stake exception in this circuit. In the absence of that recognition, allegations of intra-corporate conspiracy against Vanderbilt must **[**9]** be dismissed. [1]

The Court further agrees with the Magistrate that even if the Sixth Circuit were to recognize this exception, plaintiffs' argument still would fail. As the exception is applied elsewhere, ***HN5***[] an independent personal stake exists only when an employee of a corporation has an interest in an economic entity that is separate from and unrelated to the corporation by which he is employed, and when that employee stands to benefit from the anti-competitive action taken by the corporate employer. *See, e.g., H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978)*. A mere potential or indirect motive would be too speculative a basis from which to infer an independent personal stake. *Potters, 800 F.2d at 573*; *Smith, 703 F.2d at 951*. Furthermore, the employee would have to possess the power to institute the anti-competitive policy for his corporation. *Potters, 800 F.2d at 573*; *see also Greenville* ***[**10]*** *Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974)*.

Under the facts as stated in the Report and Recommendation, the success of the corporate entity, Vanderbilt, depends upon the success of the individual doctors, and vice versa. Because the success of the clinic practice of the individuals is so closely tied to that of Vanderbilt itself, the Court agrees with the Magistrate that any other possible motive would be too speculative to form the basis of an independent personal stake, even if that exception were recognized by the Sixth Circuit. In this **[*805]** regard, the alleged independent personal stake of the physicians at Vanderbilt is similar to those rejected by the courts in *H & B Equipment, 577 F.2d at 239*, and *Wahl v. Rexnord, Inc., 481 F. Supp. 573 (D.N.J. 1979)*, *rev'd on other grounds*, *624 F.2d 1169 (3d Cir. 1980)* (no conspiracy between corporation and its president, who held a patent licensed by the corporation). In addition, the Court further agrees with the Magistrate that Vanderbilt's medical staff by-laws, which required non-physicians applying for the medical staff to be employees of Vanderbilt with faculty appointments in the School **[**11]** of Medicine, were not the cause in fact of plaintiffs' alleged injuries. In any case, the by-laws were, at most, the product of an intra-corporate conspiracy. Accordingly, the Court ADOPTS the recommendation to enter summary judgment for defendant Vanderbilt on this claim, and hereby DISMISSES plaintiffs' allegation of conspiracy among Vanderbilt and any members of its medical staff.

2. *Conspiracy Between HCH and Dr. Shackleford*

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[1] This Court's earlier determination to the contrary in *Nurse Midwifery Associates v. B.K. Hibbett, 549 F. Supp. 1185, 1189-90 (M.D. Tenn. 1982)*, was rendered before the Sixth Circuit's pronouncements in *Smith* and *Potters*.

Plaintiffs allege that defendants HCH and Dr. Shackleford should be held liable for conspiring to deny plaintiff midwives privileges at that hospital. The Magistrate recommended that all allegations of conspiracy between HCH and Dr. Shackleford or any other member of HCH's medical staff be dismissed.

The facts presented indicate, at most, an intra-corporate conspiracy between these defendants. As noted above, the unilateral actions of a corporation acting through its employees generally do not constitute a conspiracy under the Act, *see* Copperweld, 467 U.S. at 752; Weiss, 745 F.2d at 786, and the Sixth Circuit does not recognize the independent personal stake exception to this general rule, *see* Potters, 800 F.2d at 568. In addition, even if **[**12]** the exception were available, the Court again agrees with the Magistrate that this claim would fail. Although defendant Shackleford's private practice arguably may have given him an independent personal stake in achieving the object of the alleged conspiracy, the facts do not show that he possessed or exercised ***HN6***[] the power to institute an anti-competitive policy for HCH, a requisite element under the exception where applied. *See, e.g.,* Potters, 800 F.2d at 573; Greenville Publishing, 496 F.2d at 391. Therefore, the Court hereby ADOPTS the Magistrate's recommendation to enter summary judgment for defendants HCH and Dr. Shackleford on this allegation, and DISMISSES plaintiffs' claim of conspiracy between HCH and Dr. Shackleford or any other member of HCH's medical staff.

3. *Conspiracy Among SHH and Drs. Melkin, Baer, and Andrews*

Plaintiffs allege that defendants SHH, Melkin, Baer, and Andrews should be held liable for conspiring to deny plaintiff nurse midwives privileges at that hospital. The Magistrate recommended that all allegations of conspiracy among SHH and its employees, including Melkin, Baer, and Andrews, be dismissed.

Again, the facts indicate, at most, **[**13]** merely an intra-corporate conspiracy, which is not cognizable under the Act in this circuit. *See* Copperweld, 467 U.S. at 752. Even if the private medical practices of the individual defendant doctors arguably gave them an independent personal stake in the object of the alleged conspiracy, this exception is not available to plaintiffs. Potters, 800 F.2d at 568. In any case, the claim would fail because the individual defendants did not possess the power to effect an anti-competitive policy at SHH. Therefore, the Court ADOPTS the Magistrate's recommendation to enter summary judgment for defendants SHH and Drs. Melkin, Baer, and Andrews on this claim. Accordingly, the Court DISMISSES plaintiffs' allegations of conspiracy among SHH and Drs. Melkin, Baer, and Andrews, or any other member of SHH's medical staff.

4. *Conspiracy Between SVMIC and Dr. Hibbett*

Plaintiffs further allege an illegal conspiracy among principals at SVMIC, a mutual insurance company, and between SVMIC and Dr. Hibbett, to deny plaintiff Dr. Martin's renewal of his medical malpractice **[*806]** insurance coverage. The Magistrate recommended that all allegations of conspiracy between SVMIC and Dr. Hibbett, a member **[**14]** of the board of directors of SVMIC, or any other board member, be dismissed, along with all allegations regarding SVMIC's decision not to renew Dr. Martin's insurance in 1980.

The Magistrate reasoned that the acts of SVMIC and Dr. Hibbett were merely intra-corporate, and not the products of concerted action under the Act. Although this Court earlier stated that SVMIC may be capable of concerted action because it is owned and operated exclusively by its physician policyholders, Nurse Midwifery, 549 F. Supp. at 1190, it is compelled to agree with the Magistrate in light of the nearly contemporaneous opinion in Arizona v. Maricopa County Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982). Discussing "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss," the Supreme Court stated that ***HN7***[] "in such joint ventures the partnership is regarded as a single firm competing with other sellers in the market." *Id. at 356*. The Court concluded that ***HN8***[] physicians' joint arrangements to sell insurance, which is a "different product" from the medical services offered by physicians in their individual capacity, are single **[**15]** entities for antitrust analysis. *Id*. Thus, in the instant case, SMVIC must be viewed as a single entity. It follows that actions between SMVIC and Dr. Hibbett, its board member and agent, are not cognizable as a conspiracy under the Act. *See* Copperweld, 467 U.S. at 752. Although this Court earlier ruled that a sufficient basis exists for finding an independent personal stake on the part of Dr. Hibbett in having Dr. Martin's malpractice insurance coverage cancelled, Nurse Midwifery, 549 F. Supp. at 1190, this fact is irrelevant in light of the Sixth Circuit's refusal to recognize that exception. *See* [Potters, 800 F.2d at 568](). In addition, the Court agrees with the Magistrate that plaintiffs have failed to show that Dr. Hibbett had the power to institute the decision to cancel the insurance.

The Court further agrees with the Magistrate that even if SVMIC's actions had violated the Act, plaintiffs' claim would fail. ***HN9***[] A private plaintiff may not recover damages simply by proving a violation of the antitrust laws. *Shreve Equipment, Inc. v. Clay Equipment Corp., 650 F.2d 101, 105* (6th Cir.), *cert. denied*, *454 U.S. 897, 70 L. Ed. 2d 213, 102 S. Ct. 397 (1981)*. Rather, the plaintiff must demonstrate **[**16]** "a causal connection between the antitrust violation and the damages suffered." *Id.; see also* *Englander Motors, Inc. v. Ford Motor Co., 267 F.2d 11, 15 (6th Cir. 1959)*. As the Sixth Circuit has observed, "the causal link must be proved as a matter of fact and with a fair degree of certainty . . . . To be one of several causes is not enough." *Shreve Equipment, 650 F.2d at 105* (citations omitted).

The record establishes that despite the cancellation of malpractice insurance by SVMIC, Dr. Martin could have sought coverage from another carrier. Thus, Dr. Martin's alleged injury was caused by his own failure to seek other coverage, not by the cancellation. *See* *McClure v. Undersea Industries, Inc., 671 F.2d 1287 (11th Cir. 1982)*, *cert. denied*, *460 U.S. 1037, 75 L. Ed. 2d 788, 103 S. Ct. 1427 (1983)* (plaintiff equipment dealer was not injured by alleged boycott by manufacturer, because dealer was able to purchase equipment at comparable cost from other dealers). In addition, the record further establishes that Dr. Martin had decided to leave Tennessee before he had exhausted his appeal of the cancellation. Because the Court agrees that the alleged actions were unilateral, and in any case did not proximately **[**17]** cause plaintiff's alleged injury, it hereby ADOPTS the Magistrate's recommendation to enter summary judgment for defendants SVMIC and Dr. Hibbett on this claim, and DISMISSES plaintiffs' allegations of conspiracy between SVMIC and Dr. Hibbett, or any other board member of SVMIC.

5. *Conspiracy Between Vanderbilt and Dr. Hibbett*

Plaintiffs allege that defendant Vanderbilt conspired with defendant Dr. Hibbett **[*807]** in July 1980 to deny plaintiff nurse midwives allied medical staff privileges at the hospital. The Magistrate recommended that summary judgment be denied on this claim, concluding that sufficient evidence exists to warrant submission of the question of conspiracy to a jury.

HN10[] Although plaintiffs have presented no direct evidence of this alleged conspiracy, "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540, 98 L. Ed. 273, 74 S. Ct. 257 (1954)*. Conspiracy can be established by showing business behavior evidencing "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States, 328 U.S. 781, 810,* ***[**18]*** *90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*; *see also* *Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 534-35 (E.D. Mich. 1974)*, *aff'd*, *519 F.2d 119* (6th Cir.), *cert. denied*, *423 U.S. 987, 46 L. Ed. 2d 304, 96 S. Ct. 395 (1975)* ("In nearly all cases in which a combination or conspiracy is established through circumstantial evidence, the alleged conspirators have engaged in conduct which is in some sense congruent, compatible, or harmonious.").

HN11[] On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *see also* *Potters, 800 F.2d at 572*. However, as the Supreme Court has stated:

> ***Antitrust law*** limits the range of permissible inferences from ambiguous evidence. . . . Thus, in *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id., at 764, 104 S. Ct., at 1470* . . . . To survive a motion for summary judgment or for a directed **[**19]** verdict, a plaintiff seeking damages . . . must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. *465 U.S., at 764, 104 S. Ct., at*

> 1471. Respondents . . ., in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Matsushita, 475 U.S. at 588; *see also* Potters, 800 F.2d at 572.

In the instant case, Vanderbilt may be found liable, under the theory of *respondeat superior* or vicarious liability, for any alleged violations of the Act attributable to actions of any medical staff member in conspiring with Dr. Hibbett. *See* *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-68, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*. ***HN12***[] A conspiracy may be found when one party acquiesces in the anti-competitive demand of another, even if the agreement is obtained through coercion. *See e.g.* *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*. This appears to be the essence of plaintiffs' claim. Turning to the record in this case, the Court notes that plaintiffs rely upon two types of circumstantial evidence: **[**20]** (1) evidence of an opportunity for Vanderbilt and Dr. Hibbett to conspire, and (2) evidence of a motive on Vanderbilt's part, namely to maintain its advantageous relationships with Baptist Hospital, at which Dr. Hibbett, an opponent of nurse midwifery, was an influential staff member, and with the local OB/GYN community generally, as discussed in the Report and Recommendation. Specifically, Dr. Hibbett allegedly had conversations with Vanderbilt staff members in July 1980 at which they may have conspired regarding denial of plaintiffs' privileges at Vanderbilt. Defendants deny ever having had conversations concerning plaintiffs or the subject of midwifery.

Having reviewed the record in light of the standard enunciated in *Matsushita*, the Court finds that the conduct alleged is as consistent with permissible individual conduct **[*808]** as with illegal conspiracy. Because the evidence does not tend to exclude the possibility of independent action, the inference of conspiracy between the defendants is not reasonable in light of the competing inferences.

First, Vanderbilt has asserted that plaintiffs' applications were denied for independent business reasons, namely the promotion of Vanderbilt **[**21]** as a tertiary care center and a high quality medical education and residency training institution. Vanderbilt's explanation that nurse midwifery did not fit readily into this program is both plausible and logical. ***HN13***[] If the nonmoving party's innocent explanation of the questioned conduct is plausible and more logical than a concerted action theory, summary judgment against the moving party is appropriate. *Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1488 (D.C. Cir. 1984)*.

Second, ***HN14***[] the federal courts consistently have recognized that "mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence from which to infer an anti-competitive conspiracy" to deny hospital privileges. *Cooper v. Forsyth County Hospital Authority, Inc., 789 F.2d 278, 281 (4th Cir. 1986)*, *cert. denied*, *479 U.S. 972, 107 S. Ct. 474, 93 L. Ed. 2d 418 (1986)*; *see, e.g.,* *Kaczanowski v. Medical Center Hospital of Vermont, 612 F. Supp. 688, 695 (D.C. Vt. 1985)*. As the court stated in *Venzie Corp. v. United States Mineral Products Co., 521 F.2d 1309, 1313 (3d Cir. 1975)*:

> While the jury was free to disregard the defendants' testimony that no agreement **[**22]** of any kind was formulated during the course of these contacts, mere disbelief could not rise to the level of positive proof of agreement to sustain plaintiffs' burden of proving conspiracy. Furthermore, while proof of contacts between the [defendants] during the crucial summer period may demonstrate the opportunity for formation of a conspiracy, such an opportunity is significant only if other evidence permits an inference that an agreement did in fact exist. Thus, it is necessary to review plaintiffs' other evidence before the importance of the contacts between defendants and the inferences the jury might legitimately draw therefrom may be determined.

Given the independent business motive stated by Vanderbilt, the mere opportunity to conspire during the alleged conversations does not warrant the inference of conspiracy. Moreover, the Court notes that even if the alleged July 1980 conversations between Dr. Hibbett and the Vanderbilt staff members had concerned plaintiffs' applications, the decision to deny the applications, although announced in September 1980, appears to have been made earlier in June 1980, before the alleged conversations would have occurred. *See Vanderbilt's* ***[**23]*** *Memorandum in Support, at Exhibit 5*.

For these reasons, the Court DOES NOT ADOPT the Magistrate's recommendation to deny defendants' motion. Accordingly, the Court ENTERS summary judgment for defendants on this claim, and DISMISSES plaintiffs' allegation of conspiracy between these defendants.

6. *Conspiracy between SHH and HCH*

Plaintiffs also allege that a conspiracy between SHH and HCH to deny plaintiff nurse midwives privileges at these hospitals can be inferred from their parallel business activity. The Magistrate recommended that these defendants' motion for summary judgment on this claim be denied because a genuine issue of material fact exists regarding the inference of a conspiracy.

The parties have not cited, and the Court has not found, any Sixth Circuit precedent establishing the requisite elements for proving antitrust conspiracy by circumstantial evidence of parallel business activity. However, ***HN15***[] under the majority rule, which the Court adopts, the plaintiffs must show that (1) the alleged conspirators' business activities constituted parallel conduct; (2) the alleged conspirators had a motivation to enter into a conspiracy; and (3) the actions taken were contrary **[**24]** to the alleged conspirators' individual economic interests. *See, e.g., Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1488 n.12* ***[*809]*** *(D.C. Cir. 1984)*; *Venzie Corp. v. United States Mineral Products Co., 521 F.2d 1309, 1314 (3d Cir. 1975)*; P. Areeda, ***Antitrust Law*** para. 1434c2 (1986). As noted earlier, these two hospitals may be found liable, under the theory of *respondeat superior* or vicarious liability, for any violations of the Act attributable to the actions of any members of their medical staffs. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-68, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*. Turning to the facts as summarized in the Report and Recommendation, the Court agrees with the Magistrate that sufficient genuine issues of material fact are presented to warrant denial of summary judgment. First, the two hospitals' actions were arguably parallel in that the hospitals were in similar situations and took strikingly similar actions within a short time of each other concerning the applications for privileges. Defendants contend that for such parallel behavior to be cognizable, plaintiffs must show "that the defendants were conscious **[**25]** of each other's conduct and that their awareness was an element in their decisional process." *Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 208 (3rd Cir. 1980)*. The Court concludes that because plaintiffs, in their application to SHH, described the events surrounding their applications at HCH, a sufficient showing has been made as to this element.

Second, plaintiffs have shown motivation to conspire on the part of the hospitals sufficient to survive a summary judgment motion. Plaintiffs' claim is that the hospitals intended to satisfy the objectives of certain members of their respective medical staffs not to allow plaintiffs to compete with local physicians. This contention is supported by evidence, discussed in the Magistrate's Report and Recommendation, of the decisionmaking process at the hospitals in denying the applications, in light of certain doctors' hostility toward midwifery and the hospitals' initial receptiveness to plaintiffs' proposals.

Third, the Court agrees with the Magistrate that the hospitals' actions arguably were against their individual economic interests. As the Magistrate noted, the anticipated yearly number of deliveries attributable to **[**26]** plaintiffs' proposed practice would have increased significantly the hospitals' occupancy rates and, presumably, their revenues. Thus, the Court ADOPTS the Magistrate's recommendation and DENIES summary judgment to defendants SHH and HCH on this claim.

7. *Tying by Vanderbilt*

Plaintiffs contend that Vanderbilt engaged in a tying arrangement in violation of the Act by requiring its hospital maternity patients to use physician maternity services. According to plaintiffs, the "tying" product is in-hospital maternity services, and the "tied" product is physicians' services. The relevant geographic market alleged by plaintiffs is Davidson County and Hendersonville, Tennessee. The Magistrate recommended that Vanderbilt's motion for summary judgment on this claim be denied.

HN16[] The elements of a *per se* illegal tying arrangement are: 1) that there are two separate and distinct products; 2) that the seller has sufficient economic power in the tying product market; and 3) that the tying involves a "not insubstantial" amount of commerce. *See, e.g.*, 2 Kintner, *Federal* ***Antitrust Law*** § 10.53. Moreover, under the "rule of reason" analysis, another element is added -- that the tying **[**27]** arrangement had anti-competitive effects in the marketplace. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. Thus, in order to establish an illegal tying arrangement under either the *per se* or the "rule of reason" analysis, plaintiffs first must establish that Vanderbilt had sufficient market power over in-hospital maternity services in Davidson County and Hendersonville to force patients to accept physicians' services. *See, e.g., Hyde, 466 U.S. at 13-14*.

HN17[] Market power may be proven by showing that the firm offers a unique product that competitors are not able to offer. Where market power can be demonstrated by the uniqueness of a particular product, **[*810]** market dominance is not required. *United States v. Loew's, 371 U.S. 38, 45, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*.

For antitrust purposes, the tying product's uniqueness is established by determining

> whether the seller has the power, within the market for the tying product, . . . to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

[28]** *United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II), 429 U.S. 610, 620, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)*. The Court continued:

> Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, . . . or physical, as when the product is land . . . . It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it.

Id. at 621 (quoting *Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner I), 394 U.S. 495, 505 n.2, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)* (citations omitted)).

Thus, under *Fortner II*, ***HN18***[] uniqueness only can be established by showing either "(1) a cost advantage on the part of the seller, or (2) a characteristic of the tying product that significantly differentiates it from that which competitors could offer if they so elected. A special advantage must be shown to establish uniqueness **[**29]** and economic power." 2 Kintner, *Federal* ***Antitrust Law*** § 10.56.

Plaintiffs argue that, as of the date of the nurse midwives' applications, Vanderbilt was one of three hospitals in the relevant area that offered a unique obstetrical service, family centered maternity care. The other two hospitals were defendants HCH and SHH. Family centered maternity care requires a particular combination of facility utilization, obstetrical policies, and personnel. Only Vanderbilt, SHH, and HCH offered this particular combination of facilities, policies, and personnel in 1980 in the relevant geographic area. Thus, plaintiffs base their tying theory on the alleged uniqueness of family centered maternity care in this market.

However, plaintiffs have made no showing that other competitors were in some way prevented from offering family centered maternity care because of legal, physical, or economic barriers. In short, plaintiffs have shown no cost advantage to Vanderbilt or any characteristic of family centered maternity care that significantly differentiates it from that which competitors could offer if they so elected.

The record shows that two other hospitals, SHH and HCH, both provided this "unique" **[**30]** product. While the record further shows that other hospitals with maternity units in the relevant area did not provide all the components that plaintiffs allege are necessary for family centered maternity care, plaintiffs have not offered any evidence as to why these other hospitals did not. Evidence that other hospitals were prevented from offering this product is critical to plaintiffs' claim. In the absence of proof, it cannot be assumed that these hospitals desired to provide the product but for one reason or another were thwarted from doing so. Hospitals make their own decisions concerning room usage, policies, and personnel. No reason has been presented to believe that the other hospitals in the geographic area could not adopt these policies and, thus, also offer family centered maternity care. Absent such proof, uniqueness has not been established. Plaintiffs, therefore, have failed to present facts to show that Vanderbilt possessed sufficient market power, a requisite element under the theory of illegal tying. For this reason, the Court DOES NOT **[*811]** ADOPT the Magistrate's recommendation to deny defendant Vanderbilt's motion. Accordingly, the Court ENTERS summary judgment for defendant **[**31]** Vanderbilt on this claim, and DISMISSES this claim from this action.

8. *Pendent State Claims*

Because defendants Melkin, Baer, Andrews, and Shackleford were acting, at all relevant times in this action, in their representative capacities as agents of the medical staffs of their respective hospitals, and are thus incapable as a matter of law of conspiring with those hospitals, the Court hereby DISMISSES these individuals from this action. There have been no allegations that these defendants conspired with anyone outside their respective hospitals. In addition, the Court DISMISSES from this action defendants SVMIC, Dr. Hibbett, and Vanderbilt because all federal claims against them have been decided in their favor.

The Court notes that plaintiffs also have alleged in their complaint various state law tort claims by way of the Court's pendent jurisdiction. Although the merits of these claims have not been argued in the motions for summary judgment or addressed in the Magistrate's Report and Recommendation, to the extent that all federal claims are dismissed as to a defendant this Court declines to exercise jurisdiction to hear any pendent state law claims against that defendant, and **[**32]** hereby DISMISSES such claims without prejudice. *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*; *Carnegie-Mellon University v. Cohill, 484 U.S. 343, at 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)* ("when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction") (citation omitted).

SUMMARY

Plaintiffs, a professional partnership created to provide nurse midwife services, its principals, an associated physician, and certain clients, brought this action against defendant hospitals, physicians, and insurance company, seeking injunctive relief and damages for alleged violations of *sections 1* and *2* of the Sherman Anti-Trust Act. Plaintiffs generally contend that defendants were involved in conspiracies, combinations, and contracts designed to prevent the operation of a private practice to provide nurse midwifery services at hospitals in Davidson County and Hendersonville, Tennessee.

Having reviewed the file and the written objections of all parties to the Magistrate's Report and Recommendation, the Court hereby makes the following *de novo* determinations:

[33]** (1) The Court ENTERS summary judgment for defendant Vanderbilt Hospital ("Vanderbilt") as to plaintiffs' allegation of conspiracy among Vanderbilt and any members of its medical staff, and DISMISSES this claim from this action;

(2) The Court ENTERS summary judgment for defendants Hendersonville Community Hospital ("HCH") and Dr. Shackleford as to plaintiffs' allegation of conspiracy between them or any other member of HCH's medical staff, and DISMISSES this claim from this action;

(3) The Court ENTERS summary judgment for defendants Southern Hills Hospital ("SHH") and Drs. Melkin, Baer, and Andrews as to plaintiffs' allegation of conspiracy among them or any other members of the SHH medical staff, and DISMISSES this claim from this action;

(4) The Court ENTERS summary judgment for defendants State Volunteer Mutual Insurance Company ("SVMIC") and Dr. Hibbett as to plaintiffs' allegation of conspiracy between them or any other member of the SVMIC board of directors, and DISMISSES this claim from this action;

(5) The Court ENTERS summary judgment for defendants Vanderbilt and Dr. Hibbett as to plaintiffs' allegation of conspiracy between them, and DISMISSES this claim from this case;

[34]** (6) The Court DENIES summary judgment for defendants SHH and HCH as to **[*812]** plaintiffs' allegation of conspiracy between them;

(7) The Court ENTERS summary judgment for defendant Vanderbilt as to plaintiffs' allegation of engaging in a tying arrangement, and DISMISSES this claim from this case;

(8) The Court DISMISSES all pendent state claims against defendants Vanderbilt, SVMIC, and Drs. Shackleford, Melkin, Baer, Andrews, and Hibbett, and hereby DISMISSES these defendants from this action;

(9) This action shall proceed to trial on September 12, 1988, on plaintiffs' claim of conspiracy between SHH and HCH, and any pendent state claims alleged against them.

An Order will be entered simultaneously with this Memorandum.

This the 14th day of March, 1988.

ORDER

In accordance with the Memorandum filed herewith, the Court makes the following determinations:

(1) the Court ENTERS summary judgment for defendant Vanderbilt Hospital ("Vanderbilt") as to plaintiffs' allegation of conspiracy among Vanderbilt and any members of its medical staff, and DISMISSES this claim from this action;

(2) the Court ENTERS summary judgment for defendants Hendersonville Community Hospital ("HCH") and Dr. Shackleford **[**35]** as to plaintiffs' allegation of conspiracy between them or any other member of HCH's medical staff, and DISMISSES this claim from this action;

(3) the Court ENTERS summary judgment for defendants Southern Hills Hospital ("SHH") and Drs. Melkin, Baer, and Andrews as to plaintiffs' allegation of conspiracy among them or any other members of the SHH medical staff, and DISMISSES this claim from this action;

(4) the Court ENTERS summary judgment for defendants State Volunteer Mutual Insurance Company ("SVMIC") and Dr. Hibbett as to plaintiffs' allegation of conspiracy between them or any other member of the SVMIC board of directors, and DISMISSES this claim from this action;

(5) the Court ENTERS summary judgment for defendants Vanderbilt and Dr. Hibbett as to plaintiffs' allegation of conspiracy between them, and DISMISSES this claim from this case;

(6) the Court DENIES summary judgment for defendants SHH and HCH as to plaintiffs' allegation of conspiracy between them;

(7) the Court ENTERS summary judgment for defendant Vanderbilt as to plaintiffs' allegation of engaging in a tying arrangement, and DISMISSES this claim from this case;

(8) the Court DISMISSES all pendent state claims against **[**36]** defendants Vanderbilt, SVMIC, and Drs. Shackleford, Melkin, Baer, Andrews, and Hibbett, and hereby DISMISSES these defendants from this action;

(9) This action shall proceed to trial on September 12, 1988, on plaintiffs' claim of conspiracy between SHH and HCH, and any pendent state claims alleged against them.

Entered this the 14th day of March, 1988.

Bobrowicz v. Chicago

Appellate Court of Illinois, First District, Third Division

March 16, 1988, Filed

No. 86-3163

Reporter

168 Ill. App. 3d 227 *; 522 N.E.2d 663 **; 1988 Ill. App. LEXIS 316 ***; 119 Ill. Dec. 1 ****

ALFONS W. BOBROWICZ, Indiv. and on behalf of all residents of unincorporated areas of the Metropolitan Sanitary District of Greater Chicago similarly situated, Plaintiffs-Appellees and Cross-Appellants, v. THE CITY OF CHICAGO, Defendant-Appellant and Cross-Appellee

Prior History: **[***1]** Appeal from the Circuit Court of Cook County; the Hon. Anthony J. Scotillo, Judge, presiding.

Disposition: Order affirmed.

Core Terms

municipality, surcharge, consumers, purchasing, residents, sanitary district, unincorporated area, furnish water, municipal corporation, nonresidents, village, rates, territory, sales, incorporated town, discriminatory, summary judgment, private entity, sell water, contracts, township, common law duty, rate charged, consumption, Antitrust, charges, reasonable rate, trial court, meter rate, indirect

LexisNexis® Headnotes

Governments > Local Governments > Boundaries

Governments > State & Territorial Governments > Property > Water Rights

HN1[] **Local Governments, Boundaries**

See Ill. Rev. Stat. 1985, ch. 42, par. 348.

Governments > Legislation > Interpretation

HN2[] **Legislation, Interpretation**

There is no rule of construction, which authorizes a court to declare that the legislature did not mean what the plain language of the statute imports.

Energy & Utilities Law > Antitrust Issues > General Overview

Governments > Courts > Common Law

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

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

Governments > Public Improvements > General Overview

HN3[] **Energy & Utilities Law, Antitrust Issues**

When a municipal corporation owns and operates a water system for the purpose of selling water to consumers, it is acting in a business capacity and is generally to be treated as if it were a private utility company. At common law, such an enterprise, because it had a monopoly on the service provided in the area, was prohibited from charging exorbitant rates and was required to serve all of its consumers without unreasonable discrimination in rates or manner of service. This common law duty still operates to prevent public utilities from acting in an unreasonable or discriminatory manner.

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

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

Governments > Local Governments > Ordinances & Regulations

HN4[] **Protection of Rights, Public Versus Private Discrimination**

The test to determine whether the rates charged by a privately owned municipality are discriminatory is based on a consideration of such factors as differences in the amount of the product used, the time when used, the purpose for which used, or any other relevant factors reflecting a difference in costs. Rates that are reasonably related to differences in the costs of providing service are not unreasonably discriminatory.

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

Governments > Public Improvements > General Overview

HN5[] **Utility Companies, Rates**

The court has held that when it comes to the extent of protection under the common law right, consumers of municipally owned utilities are just as completely protected from exorbitant rates and unjust discrimination as the consumers are under the Public Utilities Act, Ill. Rev. Stat. 1985, ch. 111 2/3, par. 1 -- 101 et seq.

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

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

HN6[] **Class Actions, Prerequisites for Class Action**

The Illinois Antitrust Act (Act), Ill. Rev. Stat. 1985, ch. 38, par. 60-7 clearly allows an indirect purchaser and others similarly situated the right to damages. The Act states that no person other than the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act.

Counsel: Judson H. Miner, Corporation Counsel, of Chicago (Ruth Moskovitch, Dodge Wells, and Robin Schulberg, Assistant Corporation Counsel, of counsel), for appellant.

Kevin M. Forde, of Chicago, for appellees.

Judges: JUSTICE McNAMARA delivered the opinion of the court. RIZZI and FREEMAN, JJ., concur.

Opinion by: McNAMARA

Opinion

[*229] **[**664]** **[****2]** Defendant, the City of Chicago, appeals from an order of the trial court granting summary judgment in favor of plaintiff Alfons Bobrowicz and all members of the class represented by plaintiff, in their action challenging the surcharge imposed by defendant on the sale of water to private entities and individuals residing in unincorporated areas of the Metropolitan Sanitary District. In a cross-appeal, plaintiffs appeal from the granting of summary judgment in favor of defendant on an equal protection claim and the dismissal of the last count of their complaint charging that the practices of defendant violate the Illinois Antitrust Act (Ill. Rev. Stat. 1985, ch. 38, par. 60 -- 1 *et seq*.).

Defendant owns and operates a waterworks system known as the Metropolitan Sanitary **[***2]** District of Greater Chicago (MSD). The MSD was created by the Chicago Sanitary District Act of 1889 (Ill. Rev. Stat. 1889, ch. 42, par. 320 *et seq*.), and since that time has been the main waterworks system for the greater metropolitan area of Chicago. The MSD procures its supply of water from Lake Michigan and protects the lak from sewage pollution with its sewage facilities. Defendant sells water to approximately 45 suburban municipalities within the MSD. Defendant also sells water to four railroads, a private utility company and approximately 300 private customers. The municipalities which purchase water from defendant supply water to their own residents, and often sell water to other municipalities or individual consumers outside their corporate limits.

Section 26 of the Sanitary District Act imposes a price restriction on sales of water to cities, villages, townships, incorporated towns or other municipal corporations. (Ill. Rev. Stat. 1985, ch. 42, par. 348.) Before defendant will sell water to a municipality, the purchaser is required to sign a water service contract which, until 1985, required the municipality to report the amount of water it delivered to consumers **[***3]** in unincorporated areas and to pay defendant a 50% surcharge above the city meter rate for such water. Defendant also required that the purchasing municipality impose these same conditions on any other municipality to which it sold water. Defendant eliminated the surcharge provision from contracts with municipal customers entered into or renewed after June 1982. Defendant also unilaterally cancelled the **[**665]** **[****3]** surcharge provision in all existing contracts as of May 1, 1985.

The representative plaintiff resides in an unincorporated area of Worth Township, in Cook County. This property is located within the boundaries of the MSD. Plaintiff purchases water from the City of Palos Heights, which receives its water from Alsip. Alsip purchases its water from defendant. During the period of time relevant to this suit, **[*230]** plaintiff paid the 50% surcharge to Palos Heights and that surcharge was eventually remitted to defendant.

Plaintiff filed this action in 1984 alleging that defendant's imposition of a 50% surcharge violated section 26 of the Sanitary District Act, and the common law duty of a utility to charge reasonable rates. Count II of the complaint alleged that defendant's 50% **[***4]** surcharge on water furnished for consumption by the plaintiff class violated their constitutional rights to equal protection of the law. Count III alleged that the surcharge constituted illegal monopolization and price discrimination and thus violated the Illinois Antitrust Act. Ill. Rev. Stat. 1985, ch. 38, par. 60 -- 1 *et seq*.

The trial court certified a plaintiff class consisting of all water consumers located outside Chicago, but within the MSD, who consumed water supplied either directly or indirectly by Chicago for which Chicago was paid a surcharge. As a result of this class definition, those represented include all private entities or individuals who purchase water from defendant, and all individuals who purchase water from a suburban municipality which either purchases from defendant or from another municipality which purchases from defendant, who pay a surcharge.

The trial court granted plaintiffs' motion for summary judgment on count I of their complaint. The court granted summary judgment for defendant on count II and granted defendant's motion to dismiss with prejudice count III. In its holding on count I, the trial court held that section 26 of the Sanitary **[***5]** District Act required defendant to furnish water to consumers within unincorporated areas of the MSD and private entities at a rate no greater than the rate defendant charges its own residents.

Pursuant to *Supreme Court Rule 308* (107 Ill. 2d R. 308), the trial court certified two questions for immediate appeal: (1) Does section 26 of the Sanitary District Act, or the common law, prohibit the City of Chicago from imposing a surcharge on water furnished within the MSD to a person or entity which is not a "city, village, township, incorporated town or other municipal corporation?" and (2) Did or does section 26 of the Act, or the common law, prohibit the City of Chicago from imposing a surcharge on water furnished within the MSD to a "city, village, township, incorporated town or other municipal corporation" for consumption by nonresidents of the purchasing entity?

Section 26 in relevant part states:

> "Any city, village or incorporated town located in any such sanitary district which owns a system of waterworks and procures its supply of water from a lake or other source which will **[*231]** be saved from sewage pollution by the construction of the sewage facilities provided by this **[***6]** Act shall furnish water to any city, village, township, incorporated town or other municipal corporation within [or outside] the boundaries of any such sanitary district in such quantities as may be required to supply consumers within [or outside] said territory at no greater price or charge than said city, village or incorporated town charges and collects of consumers within its limits through meters for like large quantities * * *." (Ill. ***HN1***[] Rev. Stat. 1985, ch. 42, par. 348.)

The two phrases set off by brackets were added by amendment in 1983.

Plaintiffs argue that this language of the statute requires defendant to furnish water at its corporate limits for consumption throughout the MSD and prohibits the surcharge imposed on private entities and residents of unincorporated areas within the MSD. Defendant, however, argues that the language of the statute unambiguously states that the price regulation applies only to the sale of water to public municipalities.

[666]** **[****4]** Plaintiffs agree that the statute as originally enacted regulated the price only on sales to municipal corporations. They argue, however, that when the statute was originally enacted in 1889, the legislature did not anticipate **[***7]** that municipalities within the MSD would extend water service to nonresident consumers or that Chicago would furnish water to private entities or individual consumers. At the time the MSD was created, only municipalities had facilities for water distribution, and many of these municipalities were not yet able to extend water service to all of their residents. Based on these historical facts, plaintiffs argue that even though the legislature had not amended the statute to provide for the sale to residents of unincorporated areas or private entities, it did not intend to preclude such consumers from the section 26 price restriction by the original wording of the statute.

We cannot agree with the arguments posed by plaintiffs regarding the intention of the legislature with regard to this statute. The language of section 26 is unambiguous and clearly states that the water must be furnished to a city, village, township, incorporated town or other municipal corporation to come within the statute. Legislative intent is to be derived primarily from a consideration of the legislative language itself. "'There ***HN2***[] is no rule of construction which authorizes a court to declare that the legislature **[***8]** did not mean what the plain language of the statute imports.'" *People ex rel. Scott v.* ***[*232]*** *Schwulst Building Center, Inc. (1982), 89 Ill. 2d 365, 371, 432 N.E.2d 855*, quoting *Western National Bank v. Village of Kildeer (1960), 19 Ill. 2d 342, 350, 167 N.E.2d 169*.

Section 26 has been redrafted several times since the original enactment, yet each draft has limited the scope to sales to municipal corporations, even after private corporations had contracted with defendant for the purchase of water. Evidence shows that defendant began furnishing water to the Chicago Rock Island and Pacific Railroad Company in 1922. The fact that the legislature never extended the wording of the statute to include private entities such as the railway makes it evident that the statute does not protect such entities from the surcharge.

We therefore find that section 26 does not prohibit defendant from imposing a surcharge on water furnished within the MSD to a person or entity which is not a "city, village, township, incorporated town or other municipal corporation."

The next contention between the parties is whether or not the price **[***9]** restriction imposed by section 26 applies when the consumers of the water are nonresidents of the purchasing municipality, such as plaintiff Bobrowicz, who resides in an unincorporated area within the MSD. Both parties focus on the trial court's interpretation of the phrase "within said territory" in section 26. The statute states: "Any city * * * located in any such sanitary district * * * shall furnish water to any city, village, township, incorporated town or other municipal corporation within [or outside] the boundaries of any such sanitary district in such quantities as may be required to supply consumers within [or outside] *said territory*" at the meter rate. (Emphasis added.) (Ill. Rev. Stat. 1985, ch. 42, par. 348.) The two phrases set off by brackets were added by amendment in 1983. Plaintiffs maintain that the phrase "said territory" underlined in the statute set out above refers to the MSD, and thus plaintiffs, as residents of the MSD, are included in the rate restriction imposed by section 26. Defendant counters that "said territory" refers to the purchasing municipality and thus plaintiffs are not included in the scope of section 26. The trial court held that **[***10]** "said territory" refers to the MSD and thus defendant is required to furnish water to consumers within unincorporated areas of the MSD and private entities at a rate no greater than the rate defendant charges its own residents.

Plaintiffs concede that as originally enacted, use of the word "territory" in the 1889 version of section 26 referred to land which was part of the "purchasing" entity rather than part of the MSD generally. Nothing in the subsequent history of amendments of the statute **[*233]** convinces us **[**667]** **[****5]** that the phrase has a changed meaning and now refers to the MSD. Furthermore, an interpretation of "said territory" as referring to the purchasing municipality is consistent with a logical reading of the statute. The purpose of the provision was to authorize, and later require, the sale of water from one municipality to another with the original requirement that both municipalities be within the same sanitary district. It is illogical that the statute would authorize or require one municipality to sell water to another in an amount sufficient to supply consumers within any portion of the sanitary district. This, in our estimation, would be an indirect and misleading **[***11]** attempt to include residents of unincorporated areas of the MSD within the reach of the statute.

In addition, our supreme court has interpreted "within said territory" to mean the purchasing municipality. In *Baltis v. Village of Westchester (1954), 3 Ill. 2d 388, 121 N.E.2d 495*, the court considered whether Westchester, which received its water from Chicago, was required to furnish water to bordering La Grange Park. We recognize that *Baltis* presented no issue as to whether that water would be consumed within or outside the boundaries of the municipality. However, the court did have occasion to interpret the relevant portion of section 26. In deciding that Westchester was authorized to sell water to La Grange Park, the court paraphrased section 26: "Under such circumstances, the village of Westchester is authorized by the statute to furnish water to any other municipality within the boundaries of the sanitary district in such quantity as may be required to supply consumers within such other municipality at the rates prescribed by the statute." (*3 Ill. 2d at 400*.) This passage from the *Baltis* opinion demonstrates **[***12]** that a logical interpretation of the phrase "within said territory" is as a reference to the purchasing municipality.

Plaintiffs maintain that under defendant's construction of the statute, residents of unincorporated areas would not only have no right to water at the meter rate, but they would have no right to water at any price. We disagree. Section 26 only imposes a price restriction on sales to municipal corporations. Nothing in section 26 prohibits extraterritorial sales either directly by defendant or by an intermediary municipality. That defendant has private contracts with 300 individual consumers, and that plaintiffs who reside in unincorporated areas have water available from neighboring municipalities, demonstrates that water is widely available to plaintiffs.

While section 26 did not govern the rates charged by defendant to plaintiffs herein, we hold that defendant does have a common law duty to charge reasonable rates. ***HN3***[] When a municipal corporation **[*234]** owns and operates a water system for the purpose of selling water to consumers, it is acting in a business capacity and is generally to be treated as if it were a private utility company. (*Austin View Civic Association v. City of Palos Heights (1980), 85 Ill. App. 3d 89, 405 N.E.2d 1256*; **[***13]** *Baltis v. Village of Westchester (1954), 3 Ill. 2d 388, 121 N.E.2d 495*.) At common law, such an enterprise, because it had a monopoly on the service provided in the area, was prohibited from charging exorbitant rates and was required to serve all of its consumers without unreasonable discrimination in rates or manner of service. This common law duty still operates to prevent public utilities from acting in an unreasonable or discriminatory manner. ***HN4***[] *Austin View, 85 Ill. App. 3d 89, 405 N.E.2d 1256*.

The test to determine whether the rates charged by a privately owned municipality are discriminatory is based on a consideration of such factors as differences in the amount of the product used, the time when used, the purpose for which used, or any other relevant factors reflecting a difference in costs. Rates that are reasonably related to differences in the costs of providing service are not unreasonably discriminatory. *Austin View, 85 Ill. App. 3d 89, 405 N.E.2d 1256*.

Defendant maintains that it has no common law duty to charge reasonable rates because it has no contractual obligation **[***14]** with plaintiffs. We note that several members of the plaintiff class did have contracts for the purchase of water with defendant, and thus defendant's common **[**668]** **[****6]** law duty to charge reasonable rates unquestionably applies to those plaintiffs. With regard to the remaining plaintiffs who did not contract directly with defendant for the purchase of water, we believe that a contract was not necessary to bind defendant to charge reasonable rates. Once defendant has undertaken to serve nonresidents of purchasing municipalities, it is bound to charge reasonable, nondiscriminatory rates. Our ***HN5***[] supreme court has held that when it comes to the extent of protection under their common law right, consumers of municipally owned utilities are just as completely protected from exorbitant rates and unjust discrimination as the consumers are under the Public Utilities Act (Ill. Rev. Stat. 1985, ch. 111 2/3, par. 1 -- 101 *et seq*.). (*Austin View, 85 Ill. App. 3d 89, 405 N.E.2d 1256*, citing *Springfield Gas & Electric Co. v. City of Springfield (1920), 292 Ill. 236, 126 N.E. 739*.) We acknowledge that plaintiffs are indirect customers of **[***15]** defendant and purchase their water from municipalities which purchase from defendant or purchase from another municipality which purchases from defendant. Nonetheless, it is significant that defendant referred to plaintiffs residing in unincorporated areas in the contracts between defendant and suburban municipalities, and **[*235]** more importantly, defendant required the purchasing municipalities to pay a surcharge for all sales to any such plaintiffs.

Defendant maintains that no duty exists with plaintiffs however, because the contracts with purchasing municipalities do not require those municipalities to impose the surcharge on any nonresident consumers to whom they sell water. While the contracts themselves do not impose the surcharge on such sales, defendant requires via its contracts with the purchasing municipalities that they pay defendant a 50% surcharge on any sales to nonresident consumers. The distinction between requiring the purchasing municipalities to impose the surcharge on nonresidents and requiring the municipality to pay defendant a surcharge for such sales is minimal in terms of the discriminatory effect.

The cases cited by defendant, *Adkisson v. Ozment (1977), 55 Ill. App. 3d 108, 370 N.E.2d 594*, **[***16]** *Exchange National Bank v. Behrel (1972), 9 Ill. App. 3d 338, 292 N.E.2d 164*, *Rehm v. City of Batavia (1955), 5 Ill. App. 2d 442, 125 N.E.2d 831*, to argue that it has no duty to plaintiffs do not stand for the proposition that a municipal utility which undertakes to serve a nonresident can charge unreasonable and discriminatory prices. The cases merely state that a municipal utility is under no duty to provide service to nonresidents. As stated above however, once the utility has undertaken to provide water to nonresidents, even indirectly through a contract, the municipal utility is under a duty not to charge discriminatory rates.

Citing *Austin View*, defendant further argues that the reasonableness of the rates it charges municipalities for water intended for consumption by nonresidents of the municipality is a question of fact that cannot be resolved by summary judgment. *Austin View* noted that when a privately owned utility company is charged with unreasonable discrimination in rates in violation of the Public Utilities Act, the question of whether the difference in the rates is reasonably related to a difference **[***17]** in costs of providing the service is always one of fact to be based solely on the evidence presented. See *Produce Terminal Corp. v. Illinois Commerce Comm'n (1953), 414 Ill. 582, 112 N.E.2d 141*; *Village of Niles v. City of Chicago (1980), 82 Ill. App. 3d 60, 401 N.E.2d 1235*.

Even recognizing this rule, we hold, as a matter of law, that in the present case, there is no disputed issue of fact regarding the cost of the water. It is undisputed that defendant delivers its water for extraterritorial consumption at the city boundaries. Every purchasing municipality must provide for the water to be connected at the city boundary and is responsible for delivery of the water beyond **[*236]** that point. Defendant does not operate any water distribution facilities outside of its corporate limits. We therefore agree with plaintiffs that it is impossible that defendant could incur greater costs in delivering water at its boundaries for consumption by nonresidents of a municipality as opposed to residents of a municipality.

[669]** **[****7]** Defendant cites *Village of Niles* in support of its argument that this issue cannot be decided on a motion **[***18]** for summary judgment. Defendant claims that *Niles* could have been decided on summary judgment if the termination points of Chicago's water mains were the sole determinant of costs. In *Village of Niles*, 47 suburban municipalities within the MSD alleged that Chicago's metered water rates were unreasonable and discriminatory. This court held that plaintiffs were entitled to an evidentiary hearing for several reasons. The complaint alleged discriminatory practices against the suburbs, including the rates charged for serving the suburbs, and the disparity of services and benefits received for the rates charged. Furthermore, plaintiffs in *Niles* challenged the reasonableness of the city meter rate which was used as the base for determining the rates charged to suburbs. In contrast, the present case does not challenge the reasonableness of the city meter rate, but only challenges the differential between the rate charged suburban municipalities for sales to their residents and the rate charged if the water is to be consumed outside a municipal corporation.

The result of the surcharge is to impose upon residents of unincorporated areas a 50% higher rate than that charged **[***19]** residents of Chicago, or residents of municipalities to whom Chicago sells water. This, in our estimation, is an arbitrary imposition of a surcharge on the plaintiff class and clearly in violation of defendant's common law duty not to charge unreasonable or discriminatory rates. We therefore affirm the trial court's granting of summary judgment in count I of plaintiffs' complaint.

Because we find that defendant has violated its common law duty to charge reasonable and nondiscriminatory rates, we find that we need not address plaintiff's claim regarding violation of their rights to equal protection.

Count III of plaintiffs' complaint alleged that the surcharge constituted illegal monopolization and price discrimination and thus violated the Illinois Antitrust Act. Ill. Rev. Stat. 1985, ch. 38, par. 60 -- 1 *et seq*.

HN6[] The Illinois Antitrust Act clearly allows an indirect purchaser such as the representative plaintiff and others similarly situated the right to damages. However, the Act states "that no person other than **[*237]** the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under **[***20]** this Act." (Ill. Rev. Stat. 1985, ch. 38, par. 60 -- 7.) The present case was filed in the form of a class action suit against defendant. The statute clearly mandates that such an action be brought by the Attorney General, and therefore we affirm the trial court's dismissal of count III.

Because we are dismissing count III of plaintiffs' complaint, we need not reach the question of whether Federal law has preempted the statute allowing indirect purchasers to sue under the ***antitrust law***, or the question of whether the 1986 amendments to the Illinois antitrust statute should be applied retroactively.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in all respects.

Judgment affirmed.

Ford Motor Co. v. Insurance Comm'r of Pennsylvania

United States District Court for the Eastern District of Pennsylvania

March 22, 1988, Decided; March 24, 1988, Filed; Affirmed in part, Reversed in part and Remanded May 5, 1989

Civil Action No. 87-3241

Reporter
1988 U.S. Dist. LEXIS 2489 *

Ford Motor Company, et al v. Insurance Commissioner of the Commonwealth of Pennsylvania

Core Terms

intervenors, reenacted, summary judgment, restrictions, pre-empted, banking

Counsel: **[*1]** Harvey Bartle III Esq., Lawrence A. Serlin Esq., for Plaintiffs.

Maria Parisi Vickers, Esq., for Insurance Commissioner of The Commonwealth of Pennsylvania; William R. Balaban Esq., Governors' Row, Jonathan B. Sallett Esq., for Pennsylvania Association of Independent Insurance Agents, John M. Ulrich, Jr. Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc., Charles P. Leach, Jr., Pennsylvania Association of Life Underwriters and Harold E. Alexander.

Opinion by: KELLY

Opinion

SUPPLEMENTAL MEMORANDUM

R. F. KELLY, J.

By Memorandum and Order of October 26, 1987, *672 F. Supp. 841*, the court granted summary judgment in favor of the plaintiffs. Subsequently, the intervenors have filed two motions: 1) for reconsideration of the decision of October 26; and 2) to amend or make additional findings of fact and to alter judgment. For the following reasons, both of these motions are denied. Defendant Insurance Commissioner has filed papers joining in these motions of the intervenors.

The main argument in support of the motion for reconsideration is that the court wrongly took into consideration legislative history associated with *12 U.S.C. § 1730a(m)*. The most important part **[*2]** of the court's memorandum dealing with the legislative history of *§ 1730a(m)* is as follows:

Regarding *§ 1730a(m)* itself, the report [Senate Committee on Banking, Housing and Urban Affairs, S. Rep. No. 536, 97th Cong., 2d Sess. *reprinted in* 1982 U.S. Code Cong. & Admin. News 3054.] stated:

This section allows the FSLIC, of any other law (except ***antitrust law***) to authorize an insured institution eligible for FSLIC assistance to merge with any other insured institution or an FDIC-insured bank, or to be acquired by any holding company. This would enable the FSLIC to arrange mergers of institutions across State lines notwithstanding interstate branching prohibitions, and to let holding companies acquire institutions other than in their home State and *without regard to normal activities restrictions.*

Id. at 49, 1982 U.S. Code Cong. & Admin. News at 3103 (emphasis added).

Section 1730a(m) was reenacted in 1987 as part of the Competitive Equality Banking Act of 1987. *Section 1730a(m)* had lapsed on October 13, 1986 and was reenacted by this Act retroactively on August 10, 1987. The Conference Report on this act states that *§ 1730a(m)*

preempts other provisions of Federal and **[*3]** State law that would have the effect of preventing a company from acquiring a failing thrift institution. Thus, for example, if a life insurance company invested in or acquired a thrift institution under *[§ 1730a(m)*], that section would preempt any State law that would prevent the company from continuing to engage in the life insurance business because of that investment or acquisition.

H.R.Rep. No. 261, 100th Cong., 1st Sess., Cong. Rec. H6857, H6895 (daily ed. July 31, 1987). *672 F. Supp. at 848*.

Regarding the first quotation above, the intervenors argue that this section "specifies that it is referring to interstate branching prohibitions and 'normal activities restrictions.' Clearly, such activities restrictions refer to those imposed by banking laws." Intervenors' Brief at 9 (emphasis in original). Nothing in the report indicates that the normal activities restrictions" referred to is limited to restrictions imposed by banking laws. The most natural interpretation of this language is that the FSLIC is authorized to arrange mergers without regard for federal laws or state law or any law other than antitrust laws that would prevent them. There seems to be no reason to add "imposed **[*4]** by banking laws" to the end of this passage.

As to the quotation from the conference report above, intervenors argued that as a statement from a subsequent Congress it is entitled to very little weight in the interpretation of the statute. The intervenors cite a number of cases in support of this proposition. *Milwaukee v. Illinois, 451 U.S. 304, 332 n.24 (1981)*; *Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980)*; *Cannon v. University of Chicago, 441 U.S. 667, 686-87 n.7 (1979)*. However, in none of these cases was the Congress reenacting the statute involved.

The plaintiffs cite a number of cases in which courts have relied on statements of Congressional intent found in the legislative history of reenactments of a statute. In *United States v. Sheffield Board of Commissioners, 435 U.S. 110, 134 (1978)*, the Supreme Court stated:

[T]he legislative background of the 1975 reenactment is conclusive of the issue before us. When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation and this Court is bound thereby.

In response **[*5]** to this, the intervenors argue that although the 1987 conference report might be viewed as conclusive for sales of savings and loans that take place after *§ 1730a(m)* was reenacted, *§ 1730a(m)* must be interpreted as not applying to insurance law restrictions before that date. It would be an anomalous and unsatisfactory result to decide that identical statutory language must mean different things depending on when the transaction involved took place. This court is unwilling to conclude that the language of *§ 1730a(m)* meant something different before it was reenacted.

Intervenors' second motion asks the court to amend or make additional findings of fact and to alter judgment.

The facts that must be considered to decide this motion are as follows. In 1985, the Ford Motor Company bought First Nationwide Financial Corporation (FNFC) a California corporation which owned banking operations in California, Florida, Hawaii and New York. In 1986, FNFC acquired two failing Ohio savings and loan associations from the FSLIC under authority of *§ 1730a(m)* and also acquired the right from the FSLIC to open branches in Pennsylvania and Colorado. In 1987, FNFC opened a branch in Pennsylvania and plaintiffs **[*6]** started this action maintaining that opening a Pennsylvania branch should not force Ford to cease selling insurance in Pennsylvania.

Plaintiffs filed a motion for summary judgment arguing that section 641 of the Pennsylvania Insurance Department Act violated equal protection or was pre-empted by federal banking regulations or by *§ 1730a(m)*. The court granted summary judgment finding that Pennsylvania law was pre-empted by *§ 1730a(m)*. In opposing the summary judgment, defendant Insurance Commissioner never advanced the argument that Ford violated section 641 in 1985 when it acquired FNFC. On page 3 of their 35 page brief in opposition to the motion for summary judgment, intervenors did assert that Ford violated section 641 when it acquired FNFC, and the court did not deal with this assertion in its Memorandum of October 26, 1987.

The intervenors now argue that, because the court's previous opinion found section 641 preempted by *§ 1730a(m)* and that Ford did not acquire FNFC under authority of *§ 1730a(m)*, the court should now find that Ford violated section 641 in 1985 when it acquired FNFC.

This court holds, however, for the reasons cited in the case of *U.S.A.A. v. Foster,* No. 84-1596 **[*7]** (M.D. Pa. Dec. 23, 1987) that the enforcement of section 641 on insurance companies that own banking affiliates that do not operate in Pennsylvania is invalid as a violation of the *commerce clause of the Constitution*.

ORDER

AND NOW, this 22nd day of March, 1988, upon consideration of Intervenors' Motion for Reconsideration and Motion to Amend or Make Additional Findings of Fact and to Alter Judgment and the responses filed thereto, it is hereby ORDERED and DECREED that said Motions are DENIED.

End of Document

Outlet Communications, Inc. v. King World Productions, Inc.

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

March 31, 1988, Filed

Case No. 85-1181-CIV-ORL-18

Reporter

685 F. Supp. 1570 *; 1988 U.S. Dist. LEXIS 4656 **; 1989-1 Trade Cas. (CCH) P68,562

Outlet Communications, Inc., Plaintiff, v. King World Productions, Inc., Defendant

Core Terms

pleadings, license, tying arrangement, alleges, tied product, enterprise, buyer, tying product, defense motion, competitor, antitrust, seller, pattern of racketeering activity, television, racketeering activity, license agreement, predicate act, Sherman Act, purchaser, market power, commerce, contends, products, merits, mail, decide a motion, interstate, affiliate, negotiate, audience

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Answers

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] **Pleadings, Answers**

The court may consider only the pleadings, that is the complaint and answer, in deciding a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings. The fact allegations of the complaint are to be taken as true, but those of the answer are taken as true only where and to the extent that they have not been denied or do not conflict with those of the complaint. In order to prevail, a motion for judgment on the pleadings "must be based on the undisputed facts appearing in all the pleadings.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN2[] **Pretrial Judgments, Judgment on Pleadings**

The court must examine the pleadings to determine whether any set of facts would permit plaintiff to recover as a matter of law.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN3[] Pretrial Judgments, Judgment on Pleadings

In deciding a motion for judgment on the pleadings, the court may consider exhibits to the pleadings as part of the pleadings pursuant to *Fed. R. Civ. P. 10(c)*. The court may not consider, however, matters outside the pleadings in a motion for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)*.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Sherman Act, Scope

Simply marketing two products together in a package is not an unlawful tying arrangement. Tying arrangements are anticompetitive, and thus unlawful under the Sherman Act, when the seller has the ability "to force" buyers to purchase the tied product because of the seller's "control or dominance" over the tying product.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

Tying arrangements, which pose the unacceptable risk of stifling competition, are anticompetitive and illegal per se.

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

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

HN6[] Tying Arrangements, Per Se Rule

In order to prove that a tying arrangement is illegal per se, a plaintiff must establish four elements: 1) that there are two separate products, a "tying" product and a "tied" product;2) that those products are in fact "tied" together -- that is, the buyer was forced to buy the tied product to get the tying product;3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

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

HN7[] Price Fixing & Restraints of Trade, Tying Arrangements

It is clear that although competitors do not have to show that they themselves were forced or coerced to do anything, they do have to show that the buyer of the tied package was forced or coerced to buy the tied product.

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

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

Direct evidence of coercive behavior is not required, rather coercion may be established by showing that the facts and circumstances surrounding the transaction as a practical matter forced the buyer into purchasing the tied product.

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

International Trade Law > General Overview

HN9[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The Supreme Court has held that the "controlling consideration" in determining whether the volume of commerce in the tied market is "not insubstantial" is whether a total amount of business, substantial enough in terms of dollar-volume of business so as not to be merely de minimis, is foreclosed to competitors by the tie.

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

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

HN10[] **Heightened Pleading Requirements, Fraud Claims**

When racketeering activity includes allegations of fraud, *Fed. R. Civ. P. 9(b)* requires that the circumstances constituting fraud shall be stated with particularity. Plaintiff may either allege date, time, place, and content of the alleged fraud or it may use alternative means of injecting precision and some measure of substantiation into its allegations of fraud.

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

Securities Law > RICO Actions > General Overview

HN11[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

In order to allege violation of *18 U.S.C. § 1962(a)-(c)*, a plaintiff must allege a pattern of racketeering activity, defined as at least two acts of racketeering activity within the time period specified by *18 U.S.C. § 1961(5)*.

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Attorneys for Cox Communications, Inc., Anthony E. DiResta, Esquire, Atlanta, Georgia.

John J. Upchurch, Esquire, Daytona Beach, Florida.

Judges: G. Kendall Sharp, United States District Judge.

Opinion by: SHARP

Opinion

[*1572] ORDER

G. KENDALL SHARP, UNITED STATES DISTRICT JUDGE

This action is before the court upon defendant's motion for judgment on the pleadings (Doc. 11) and defendant's motion for pretrial conference (Doc. 111). Plaintiff has opposed both motions (Docs. 13, 112). Defendant was permitted to file a reply memorandum in support of its motion for judgment on the pleadings (Doc. 18).

Pursuant to *Rule 12(c) of the Federal Rules of Civil Procedure*, defendant's motion for judgment on the pleadings requests dismissal from plaintiff's complaint of Count I, breach of contract; Count III, antitrust violations; and Count IV, RICO claim. ***HN1***[] The court may consider only the pleadings, that is **[**2]** the complaint and answer, in deciding a *Rule 12(c)* motion for judgment on the pleadings. *Fed. R. Civ. P. 12(c)*; *see* *Hill v. Linahan, 697 F.2d 1032, 1034 (11th Cir. 1983)* (per curiam). "The fact allegations of the complaint are to be taken as true, but those of the answer are taken as true only where and to the extent that they have not been denied or do not conflict with those of the complaint." *Stanton v. Larsh, 239 F.2d 104, 106 (5th Cir. 1956)*; *Bass v. Hoagland, 172 F.2d 205, 207* (5th Cir.), *cert. denied*, *338 U.S. 816, 94 L. Ed. 494, 70 S. Ct. 57 (1949)*; *see* *Swerdloff v. Miami National Bank, 584 F.2d 54, 57 (5th Cir. 1978)*; *Kohen v. H.S. Crocker Co., 260 F.2d 790, 792 (5th Cir. 1958)*. In order to prevail, a motion for judgment on the pleadings "must be based on the undisputed facts appearing in all the pleadings." *Stanton, 239 F.2d at 106*.

Furthermore, the court is obliged to scrutinize the complaint, construed in plaintiff's favor, and to allow it to stand "if plaintiff might recover under any state of facts which could be proved in support of the claim." *General Guaranty Insurance Co. v. Parkerson, 369 F.2d 821, 825 (5th Cir. 1966)*; *Swerdloff, 584 F.2d at 60*; *see* *Conley v. Gibson, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* **[**3]** ("The purpose of pleading is to facilitate a proper decision on the merits."). In reversing and remanding the district court's granting defendant's motion for judgment on the pleadings, the former Fifth Circuit stated:

> The posture of the case requires us to consider whether plaintiffs could prove *any* set of facts which would permit recovery . . . . We make no suggestion as to whether such facts can be proven in this case. We merely hold that in our view of the law sufficient facts might possibly be shown under the cause of action here alleged to permit recovery and defendant was not entitled to judgment as a matter of law at the pleading stage of the proceeding.

Swerdloff, 584 F.2d at 60 (emphasis in original). In essence, ***HN2***[] the court must examine the pleadings to determine whether any set of facts would permit plaintiff to recover as a matter of law. *See* *International Union of District 50, United Mine Workers v. Bowman Transportation, Inc., 421 F.2d 934, 935 (5th Cir. 1970)* (per curiam); *Security Life & Accident Insurance Co. v. United States, 357 F.2d 145, 150 (5th Cir. 1966)*.

Pursuant to the stringent requirements that govern granting a motion for judgment on the pleadings, **[**4]** the court will analyze the three counts, which defendant seeks to dismiss from plaintiff's complaint. For purposes of deciding the motion for judgment on the pleadings, the court must accept the facts stated in plaintiff's complaint as true. Two license agreements between the parties are attached to plaintiff's complaint; no exhibits are attached to defendant's answer.

The first count in question is Count I, plaintiff's breach of contract claim. This action concerns two consecutive, one-year **[*1573]** license agreements between plaintiff's Orlando and CBS television affiliate, WCPX, and defendant, a national programming distributor, for the television game show, WHEEL OF FORTUNE. Defendant is the exclusive distributor of WHEEL OF FORTUNE, which it licenses to various network affiliated stations and to independent stations. WHEEL OF FORTUNE premiered in broadcast year 1983-1984, which was its first season of syndication. Since the beginning of 1984, WHEEL OF FORTUNE has had the highest audience rating of any syndicated television show according to audience ratings published by Arbitron and A.C. Nielsen Company.

The court is precluded from addressing the merits of **[**5]** plaintiff's breach of contract count, alleging that it, as initial subscriber to a new first-run program, had an exclusive right to renewals based upon trade usage, because of the described pleading and procedural defect. ***HN3***[] In deciding a motion for judgment on the pleadings, the court may consider exhibits to the pleadings as part of the pleadings. *Fed. R. Civ. P. 10(c)*; *see* *Dyal v. Union Bag-Camp Paper Corp., 263 F.2d 387, 391 (5th Cir. 1959)*. The court may not consider, however, matters outside the pleadings in a motion for judgment on the pleadings. *Fed. R. Civ. P. 12(c)*; *Fidelity & Deposit Co. v. Southern Utilities, Inc., 726 F.2d 692, 693 (11th Cir. 1984)*; *see* *Galanti v. United States, 709 F.2d 706, 709 n.3 (11th Cir. 1983)*, *cert. denied*, *465 U.S. 1024, 79 L. Ed. 2d 683, 104 S. Ct. 1279 (1984)*; *Hill, 697 F.2d at 1034*. Since the court has not been provided either license agreement in full with the pleadings, it cannot decide the motion for judgment on the pleadings regarding the breach of contract count. Therefore, defendant's motion for judgment on the pleadings as to Count I, breach of contract, is DENIED.

Count III of plaintiff's complaint contains allegations of antitrust violations, pursuant to *section 1 et seq.* of **[**6]** the Sherman Act, *15 U.S.C. § 1 et seq.*, and *section 3* of the Clayton Act, *15 U.S.C. § 14*. Plaintiff's opposition to defendant's motion for judgment on the pleadings, however, states that, since its Clayton Act, *section 3* claim is "entirely duplicative" of its Sherman Act, *section 1* claim, plaintiff "will only press its claim under *§ 1*." (Plaintiff's Opposition to Defendant's Motion for Judgment on the Pleadings, at p. 7, n.6). Therefore, the court will consider that plaintiff has abandoned its antitrust claim, pursuant to *section 3* of the Clayton Act, and that the remaining antitrust allegation in plaintiff's complaint regards *section 1* of the Sherman Act.

The alleged antitrust violation derives from the purported negotiations for plaintiff's licensing WHEEL OF FORTUNE from defendant for the 1985-1986 broadcast year. Plaintiff alleges that defendant represented that it would negotiate exclusively with plaintiff for renewal of WHEEL OF FORTUNE only if plaintiff would license two additional game shows, JEOPARDY! and HEADLINE CHASERS, from defendant. Plaintiff claims that defendant's stated price for WHEEL OF FORTUNE alone was not economically viable and that the package of the three game shows **[**7]** was its only alternative.

Plaintiff contends that defendant's newly added conditions, regarding licensing WHEEL OF FORTUNE for the 1985-1986 year, constituted negotiation in bad faith with disregard for plaintiff's rights pursuant to the parties' two previous license agreements, their course of dealing, and industry practices. Plaintiff claims that defendant has continued to refuse to negotiate a license agreement with plaintiff for WHEEL OF FORTUNE without the additional conditions. Upon information and belief, plaintiff alleges that defendant negotiated with its Orlando/Daytona Beach television market competitor, SFN Communications of Florida, Inc., licensee of WFTV, the ABC affiliate, for licensing WHEEL OF FORTUNE, JEOPARDY! and HEADLINE CHASERS. Plaintiff further alleges that WFTV and others, whose identities are unknown, in other television markets **[*1574]** have acquiesced to defendant's tie-in arrangement. Plaintiff contends that WFTV (and others) will be able to capitalize on and to benefit from the good will and audience acceptance of WHEEL OF FORTUNE that it established in the Orlando/Daytona Beach market and, thereby, plaintiff will lose viewers and advertisers.

Plaintiff alleges that defendant **[**8]** has entered into a *per se* illegal tie-in violation of *section 1* of the Sherman Act by licensing WHEEL OF FORTUNE to WFTV and others with the condition that they also license JEOPARDY! and HEADLINE CHASERS from defendant. Such combinations, agreements, and contracts, plaintiff contends, were for the purpose and had the effect of restraining interstate and foreign trade and commerce in the license of first-run television programming to network affiliates and independent stations in the United States. Plaintiff claims that defendant possesses an unfair economic advantage over its competitors in the market because of its position as sole distributor of WHEEL OF FORTUNE and the success of that game show, and that it coerced the tie-in license agreement that resulted in WHEEL OF FORTUNE being obtained by a competitor of its affiliate, or WFTV. As a result of defendant's actions, plaintiff alleges that it will lose audience and advertising revenues in excess of $

1,000,000.00 for commercial time during the telecast of WHEEL OF FORTUNE as well as for prior and subsequent programming. Plaintiff also claims treble damages, interest, attorneys' fees and costs, pursuant to section 4 of the Clayton **[**9]** Act, *15 U.S.C. § 15*.

With respect to allegations regarding the parties' two prior license agreements, the court faces the same obstacle that flawed Count I, the omission of all or portions of the 1983-1984 and 1984-1985 license agreements for WHEEL OF FORTUNE between the parties. Based upon the facts alleged in plaintiff's complaint and the legal requirements for a Sherman Act, *section 1* tying claim, however, the court can analyze defendant's motion for judgment on the pleadings as to Count III as a matter of law. The court is guided by recent decisions regarding tying arrangements by the Supreme Court and the Eleventh Circuit Court of Appeals. *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*; *Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407 (11th Cir. 1987)*.

Plaintiff has alleged a tying arrangement by defendant whereby plaintiff economically could not license WHEEL OF FORTUNE (the tying product) for 1985-1986 without also licensing JEOPARDY! and HEADLINE CHASERS (the tied products) from defendant. "A tying arrangement is 'an agreement by a party to sell one product [the "tying" product] but only on the condition that the buyer also purchases a different **[**10]** (or "tied") product.'" *Tic-X-Press, 815 F.2d at 1414* (quoting *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958))*; *see* *Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985)*, *cert. denied*, *475 U.S. 1107, 89 L. Ed. 2d 912, 106 S. Ct. 1513 (1986)*; *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 711 (11th Cir. 1984)* (per curiam); *Olmstead v. Amoco Oil Co., 725 F.2d 627, 629 (11th Cir. 1984)*; *Kypta v. McDonald's Corp., 671 F.2d 1282, 1284* (11th Cir.), *cert. denied*, *459 U.S. 857, 74 L. Ed. 2d 109, 103 S. Ct. 127 (1982)*; *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 375 (5th Cir. 1977)*. Furthermore, a tie is unlawful "only if the seller of the tying product has a financial interest in the source of the tied product." *Midwestern Waffles, 734 F.2d at 712*; *Keener v. Sizzler Family Steak Houses, 597 F.2d 453 (5th Cir. 1979)*.

Plaintiff's complaint has alleged facts that could meet the definitional requirements of a tying arrangement, the analysis that the court must make in deciding a motion for judgment on the pleadings. Plaintiff has represented that, economically, it could not license WHEEL OF FORTUNE for 1985-1986 without also licensing **[*1575]** the less desirable game shows, **[**11]** JEOPARDY! and HEADLINE CHASERS. It is apparent that defendant had a financial interest in the tied products, JEOPARDY! and HEADLINE CHASERS, since it also licensed those game shows.

HN4[] Simply marketing two products together in a package is not an unlawful tying arrangement. *Tic-X-Press, 815 F.2d at 1414*; *see* *Jefferson Parish, 466 U.S. at 11-12*; *Northern Pacific, 356 U.S. at 7*; *Amey, 758 F.2d at 1502*. Tying arrangements are anticompetitive, and thus unlawful under *section 1* of the Sherman Act, when the seller has the ability "to *force*" buyers to purchase the tied product because of the seller's "control or dominance" over the tying product. *Tic-X-Press, 815 F.2d at 1414* (emphasis in original); *see* *Northern Pacific, 356 U.S. at 6*; *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; *Midwestern Waffles, 734 F.2d at 711-12*; *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 780-81 (11th Cir. 1983)*. The Supreme Court clarified the concern regarding seller exploitation of the tying product in a tying arrangement:

> The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the **[**12]** tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Jefferson Parish, 466 U.S. at 12. Plaintiff asserts that it was interested only in the licensing of WHEEL OF FORTUNE, not in licensing JEOPARDY! or HEADLINE CHASERS, the latter being characterized as "a new, untried and untested program with little appeal to a television station's requirement for programming." (Complaint at para. 25).

The Eleventh Circuit has held "that the principal evil of tie-ins is that they foreclose competition *on the merits* in the tied market." *Tic-X-Press, 815 F.2d at 1417* (emphasis in original); *see* *Kentucky Fried Chicken, 549 F.2d at 375*. ***HN5***[] Tying arrangements, which pose the unacceptable risk of stifling competition, are anticompetitive and illegal *per se.* *Jefferson Parish, 466 U.S. at 9-10*; *Tic-X-Press, 815 F.2d at 1414*; *see* *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-99, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*; *Times-Picayune, 345 U.S. at 608-10*; **[**13]** *International Salt Co. v. United States, 332 U.S. 392, 396, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*; *Midwestern Waffles, 734 F.2d at 711-12*; *Construction Aggregate, 710 F.2d at 772, 781*; *Kentucky Fried Chicken, 549 F.2d at 374*. ***HN6***[] In order to prove that a tying arrangement is illegal *per se*, a plaintiff must establish four elements:

1) that there are two separate products, a "tying" product and a "tied" product;

2) that those products are in fact "tied" together -- that is, the buyer was forced to buy the tied product to get the tying product;

3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and

4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Tic-X-Press, 815 F.2d at 1414; *see* *Amey, 758 F.2d at 1502-03*; *Midwestern Waffles, 734 F.2d at 711-12*; *Kentucky Fried Chicken, 549 F.2d at 375*.

The court has reservations concerning plaintiff's ability to establish the first element. "Two *separate* products are tied together if a difference exists in the 'character of the demand for the two items.'" *Amey, 758 F.2d at 1503* (emphasis in original) (quoting *Jefferson Parish, 466 U.S. at 19*). **[**14]** The Supreme Court has explained that "a tying arrangement **[*1576]** cannot exist unless two separate product markets have been linked." *Jefferson Parish, 466 U.S. at 21*; *see* *Times-Picayune, 345 U.S. at 614*; *Tic-X-Press, 815 F.2d at 1415 n.12*. Since JEOPARDY! and HEADLINE CHASERS, like WHEEL OF FORTUNE, also are game shows, plaintiff's complaint is unclear as to whether there are two product markets as opposed to two products within the same market. From the facts stated in plaintiff's complaint, it is questionable to the court that there is any market for the tied product HEADLINE CHASERS, and restraint of competition in the tied product market is a crucial component for analysis of a *per se* illegal tying arrangement. Because plaintiff may be able to prove some set of facts to overcome this potential barrier to its *per se* illegal tying arrangement claim and because there are possible legal and factual bases for the remaining elements, the court is unwilling to foreclose plaintiff's antitrust allegation on this first element in a motion for judgment on the pleadings.

The second element that a plaintiff must allege is "that the seller *forced* or *coerced* the buyer into purchasing the tied product." **[**15]** *Tic-X-Press, 815 F.2d at 1415* (emphasis in original); *see* *Jefferson Parish, 466 U.S. at 12-15*; *Midwestern Waffles, 734 F.2d at 712*. The court is cognizant that plaintiff did not purchase or license the alleged tied products for the 1985-1986 broadcast year. As in *Jefferson Parish*, a lawsuit brought by a competitor rather than a buyer, a competitor affected by an alleged unlawful tying arrangement is entitled to bring suit. *See* *Jefferson Parish, 466 U.S. at 5*; *Tic-X-Press, 815 F.2d at 1415 n.15*; *see also* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; *Amey, 758 F.2d at 1498-1500*; *Midwestern Waffles, 734 F.2d at 710-11* (regarding a plaintiff's standing pursuant to *15 U.S.C. § 15* and the target market area, or market endangered by the alleged antitrust violation). "***HN7***[] It is clear that although competitors do not have to show that they themselves were forced or coerced to do anything, they do have to show that the buyer of the tied package was forced or coerced to buy the tied product." *Tic-X-Press, 815 F.2d at 1415 n.15*.

HN8[] Direct evidence of coercive behavior is not required, rather "coercion may be established by showing that the facts and circumstances surrounding the transaction **[**16]** as a practical matter forced the buyer into purchasing the tied product." *Id. at 1418*; *Kentucky Fried Chicken, 549 F.2d at 377*. Plaintiff must demonstrate that defendant actually exerted its "economic muscle" against the buyer so that the buyer was forced to purchase products in the tied market that it did not want or would have preferred to buy elsewhere on other terms. *Tic-X-*

Press, 815 F.2d at 1415-16; *Jefferson Parish, 466 U.S. at 12*. In this action, plaintiff must show that the alleged purchaser/licensee, its competitor in the Orlando/Daytona Beach market, was forced to license tied products in order to license the tying product, WHEEL OF FORTUNE. It readily is apparent that this showing cannot be made without discovery or a trial. Therefore, a finding that the buyer/licensee was forced by defendant into a per se illegal tying arrangement is premature and inappropriate based solely on the pleadings. *See Jefferson Parish, 466 U.S. at 5*; *Tic-X-Press, 815 F.2d at 1411, 1415-19* (Allegations of per se illegal tying arrangements by competitors in the tied market were determined by the court following trial.).

The third element that a plaintiff must plead to prove a *per se* illegal tying **[**17]** arrangement is that defendant had sufficient "economic or market power" to force the purchaser into a tying arrangement, which the purchaser would not accept in a competitive market. *Tic-X-Press, 815 F.2d at 1420*; *see Jefferson Parish, 466 U.S. at 13-14*; *Times-Picayune, 345 U.S. at 605*. **[*1577]** The seller does not have to dominate the market or exercise economic power with regard to more than some of the buyers in the market to have sufficient market power. *Tic-X-Press, 815 F.2d at 1420*; *Fortner, 394 U.S. at 503*. "Economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." *Tic-X-Press, 815 F.2d at 1420*; *Jefferson Parish, 466 U.S. at 17*; *Fortner, 394 U.S. at 505* & n.2; *United States v. Loew's, Inc., 371 U.S. 38, 45, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*. Establishing sufficient market power requires showing that would-be competitors in the tied market cannot offer the tying product on competitive terms because the seller has a cost advantage in producing the tying product or substantial entry barriers into the tying product market exist. *Tic-X-Press, 815 F.2d at 1420*; *see Fortner, 394 U.S. at 505 n.2*; *Spartan Grain & Mill Co. v. Ayers, 735 F.2d 1284, 1288 (11th **[**18]** Cir. 1984)*, *cert. denied*, *469 U.S. 1109, 83 L. Ed. 2d 779, 105 S. Ct. 785 (1985)*.

When the government has granted the seller a monopoly, such as "a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power." *Jefferson Parish, 466 U.S. at 16*; *Loew's, 371 U.S. at 45-47*. Any attempt to enlarge such monopoly market power by conditioning the sale or lease of the monopolized or tying product on the purchase of a separate, tied product undermines competition on the merits in the second market and is unlawful. *Jefferson Parish, 466 U.S. at 16*; *see United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-59, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*; *International Salt, 332 U.S. at 395-396*. Plaintiff has alleged that defendant controls or holds the copyright to WHEEL OF FORTUNE. There is no dispute that defendant has the exclusive right to distribute WHEEL OF FORTUNE, which has the highest audience ratings of any syndicated television show. It appears to the court that plaintiff has demonstrated the uniqueness and desirability of WHEEL OF FORTUNE, the tying product, and that defendant has the requisite or sufficient market power. *See Tic-X-Press, 815 F.2d at 1420*.

The fourth **[**19]** element that a plaintiff must allege to prove a *per se* illegal tying arrangement is involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product. *Id. at 1414, 1419*; *see Jefferson Parish, 466 U.S. at 16*; *Fortner, 394 U.S. at 501-02*; *Northern Pacific, 356 U.S. at 6-7*; *Times-Picayune, 345 U.S. at 608-10*; *International Salt, 332 U.S. at 396*; *Amey, 758 F.2d at 1503*. ***HN9***[] The Supreme Court has held that the "controlling consideration" in determining whether the volume of commerce in the tied market is "not insubstantial" is "whether a total amount of business, substantial enough in terms of dollar-volume of business so as not to be merely *de minimis*, is foreclosed to competitors by the tie . . . ." *Fortner, 394 U.S. at 501*; *Tic-X-Press, 815 F.2d at 1419*. The Eleventh Circuit has explained that "the relevant figure is the total volume of sales tied by the sales policy under challenge, not merely the portion of this total accounted for by the particular plaintiff who brings suit." *Tic-X-Press, 815 F.2d at 1419*. Furthermore, "if only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would **[**20]** not be sufficient to warrant the concern of ***antitrust law***." *Jefferson Parish, 466 U.S. at 16*; *Tic-X-Press, 815 F.2d at 1419*.

The facts alleged in plaintiff's complaint are deficient for the court's analysis of the fourth element for establishing an unlawful *per se* tying arrangement. Not only has plaintiff failed to delineate the tied market, but also it has not provided a dollar **[*1578]** amount with respect to the tied market to enable the court to make the *de minimis* determination. *See Tic-X-Press, 815 F.2d at 1419-20*. Although plaintiff has failed to allege adequately two of the four elements of a *per se* illegal tying arrangement, the court deems it advisable not to preclude plaintiff's antitrust claim on the merits because of pleading deficiencies. Accordingly, defendant's motion for judgment on the pleadings as to Count III, the antitrust claim, is DENIED.

Count IV of plaintiff's complaint contains RICO allegations pursuant the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. §§ 1961-1968*. Plaintiff contends that defendant, a Delaware corporation, is a "person" within the meaning of *section 1961(3)* **[**21]** and that defendant engaged in *section 1961(1)* "racketeering activity" by means of mail and wire fraud, pursuant to *18 U.S.C. §§ 1341* and *1343*, respectively. Plaintiff specifically refers to defendant's fraud allegations of Count II, wherein plaintiff alleges that defendant falsely represented to plaintiff that the cost for licensing WHEEL OF FORTUNE alone was $ 5,000.00 per telecast so that plaintiff would not pursue the exclusive license for WHEEL OF FORTUNE and defendant could then market the three-program package to a competitor of WCPX. Plaintiff claims the defendant deceitfully informed plaintiff that it would not market WHEEL OF FORTUNE to another television station in the Orlando/Daytona Beach market until plaintiff made a decision regarding licensing the show for 1985-1986. Plaintiff also alleges that the antitrust conduct of Count III and the RICO conduct of Count IV involved mail and telephonic communications.

Furthermore, plaintiff alleges that defendant, associated with Merv Griffin Enterprises, for which plaintiff was exclusive distributor for WHEEL OF FORTUNE, engaged in a "pattern of racketeering activity," as that term is defined in *18 U.S.C. § 1961(5)* and that such **[**22]** activity affected interstate commerce. Plaintiff also contends that defendant violated *18 U.S.C. § 1962* by entering into illegal agreements in restraint of interstate commerce and that these racketeering activities caused plaintiff to lose its right to license WHEEL OF FORTUNE and defendant to derive income. Plaintiff alleges that defendant has caused plaintiff injury in the amount of $ 1,000,000.00, which figure should be trebled in accordance with *18 U.S.C. § 1964(c)*.

A claim of civil RICO pursuant to *section 1964(c)* necessarily alleges a violation of *section 1962*. *18 U.S.C. § 1964(c)*; *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)*. Although plaintiff has not designated the subsections of *section 1962* which it contends that defendant violated, it appears to the court that plaintiff has alleged violations of subsections (a) through (c), since it has not alleged conspiracy under subsection (d). The Supreme Court has explained the requisite violations of *section 1962(a)-(c)* which state a claim under *section 1964(c)*:

> *Section 1962* . . . makes it unlawful for "any person" -- not just mobsters -- to use money derived from a pattern of racketeering activity **[**23]** to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. *§§ 1962(a)-(c)*. If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under *§ 1964(c)*.

Sedima, 473 U.S. at 495.

Section 1961 is the RICO definitional section. *18 U.S.C. § 1961*. Plaintiff properly has alleged that defendant is a "person" within the meaning of *section 1961(3)*. An "enterprise," as that term is defined by *section 1961(4)*, however, is not alleged specifically.

The Eleventh Circuit has held in the criminal context that a corporation may be a defendant and enterprise under RICO, **[*1579]** and this has been recognized in civil RICO cases within the circuit. *United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982)*, *cert. denied*, *459 U.S. 1170, 74 L. Ed. 2d 1014, 103 S. Ct. 815 (1983)*; *Shared Network Technologies, Inc. v. Taylor, 669 F. Supp. 422, 427 (N.D. Ga. 1987)*; *A.L. Williams Corp. v. Faircloth, 652 F. Supp. 51, 55 (N.D. Ga. 1986)*. Nevertheless, the Supreme Court, in a criminal RICO case, has held that **[**24]** the existence of an enterprise is a separate, RICO element that must be alleged and proved. *United States v. Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*; *Mills v. Fitzgerald, 668 F. Supp. 1554, 1558-59 (N.D. Ga. 1987)*. Using this reasoning, a district court in this circuit has dismissed a civil RICO claim for failure "to allege the existence of an indispensable separate element of a civil RICO liability." *Mills, 668 F. Supp. at 1559*.

Merv Griffin Enterprises, for whom defendant exclusively distributes WHEEL OF FORTUNE, is mentioned twice in the complaint in a manner that appears to be insufficient to allege an enterprise. (Complaint at paras. 12, 60). Nowhere in plaintiff's complaint does the word "enterprise" occur with relation to *section 1961(4)*. *See* *Mills, 668 F. Supp. at 1559*. The court seemingly could grant judgment on the pleadings as to plaintiff's civil RICO count for failure to allege the element of enterprise. *Id*.

Even if plaintiff could overcome the pleading defect of failure to allege an enterprise, the court will continue its analysis of plaintiff's civil RICO count because there are additional pleading problems. Plaintiff has alleged the requisite predicate acts or "racketeering **[**25]** activity," defined under *section 1961(1)* as "indictable" under title 18 of the United States Code, to be mail fraud, *section 1341*, and wire fraud, *section 1343*. One Florida district court has held that indictable implies probable cause and that probable cause can be determined "only if the factual basis of the predicate acts is set out with specificity." *Banco de Desarrollo Agropecuario, S.A. v. Gibbs, 640 F. Supp. 1168, 1175 (S.D. Fla. 1986)*; *see* *United States v. Cox, 342 F.2d 167, 170* (5th Cir.) (en banc), *cert. denied*, *381 U.S. 935, 14 L. Ed. 2d 700, 85 S. Ct. 1767 (1965)*.

Furthermore, ***HN10***[] when the racketeering activity includes allegations of fraud, *Rule 9(b) of the Federal Rules of Civil Procedure* requires that "the circumstances constituting fraud . . . shall be stated with particularity." *Fed. R. Civ. P. 9(b)*; *Shared Network, 669 F. Supp. at 428*; *Mills, 668 F. Supp. at 1558*; *see* *Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 405 (7th Cir. 1984)*, *aff'd*, *473 U.S. 606, 87 L. Ed. 2d 437, 105 S. Ct. 3291 (1985)*. Plaintiff may either allege date, time, place, and content of the alleged fraud or it may "use alternative means of injecting precision and some measure of substantiation into . . . [its] allegations of fraud." *Seville Industrial **[**26]** Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984)*, *cert. denied*, *469 U.S. 1211, 84 L. Ed. 2d 327, 105 S. Ct. 1179 (1985)*; *Shared Network, 669 F. Supp. at 428*; *Mills, 668 F. Supp. at 1558*. While *Rule 9(b)* must be harmonized with *Rule 8(a)*, "the mere assertion of mail [and wire] fraud in conclusory language is not enough to support a RICO claim" because defendant is not notified of the precise misconduct with which it is charged. *Shared Network, 669 F. Supp. at 428*; *see* *Fed. R. Civ. P. 8(a)*; *Seville, 742 F.2d at 791*; *Mills, 668 F. Supp. at 1558*. Plaintiff's complaint generally alleges that defendant utilized the mail and wire communications to defraud plaintiff, and it does not supply an alternative means of substantiating the allegations of fraud. Plaintiff's pleading is insufficient to place defendant on notice of the charges of fraud. *Cf. Shared Network*, 669 F.2d at 428-29 (The court found that plaintiff's complaint plead circumstances of the fraud with sufficient particularity because it stated, among other things, the dates, descriptions and amounts due on each of the invoices; the purchase order reference and date and amount of a check signed by defendant; and the dates of board meetings **[**27]** **[*1580]** where defendant allegedly fraudulently failed to disclose material information regarding bogus invoices and defendant's alleged authorization of the payment of those invoices.).

HN11[] In order to allege violation of *section 1962(a)-(c)*, a plaintiff also must allege a "pattern of racketeering activity," defined as "at least two acts of racketeering activity" within the time period specified by *section 1961(5)*. *18 U.S.C. §§ 1961(5)* & *1962*. Expounding upon the two-acts-of-racketeering-activity requirement for a pattern, the Supreme Court has said:

> The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added).

[28]** *Sedima, 473 U.S. at 496 n.14*. In addition to the "continuity plus relationship" requirement, approved by the Supreme Court for establishing a pattern of racketeering activity, the Eleventh Circuit expressly has adopted "the threat of continuing activity" for finding a pattern. *Sedima, 473 U.S. at 496 n.14*; *Bank of America National Trust & Savings Association v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986)*; *Mills, 668 F. Supp. at 1560*; *Sheftelman v. Jones, 636 F. Supp. 263, 267 (N.D. Ga. 1986)*; *see* *United States v. Fernandez, 797 F.2d 943, 951*

(11th Cir. 1986), *cert. denied*, *483 U.S. 1006, 107 S. Ct. 3230, 97 L. Ed. 2d 736 (1987)*; Shared Network, 669 F. Supp. at 428.

District courts in the Eleventh Circuit have interpreted the continuity standard of *Touche Ross* to require "'both temporal separation and relatedness.'" Mills, 668 F. Supp. at 1560 (quoting Sheftelman, 636 F. Supp. at 268); *see* Touche Ross, 782 F.2d at 971; Shared Network, 669 F. Supp. at 428. While *Touche Ross* found that the predicate acts may occur in the same criminal scheme to satisfy the pattern requirement, it determined the "threat of continuing activity" based on the parties' relationship, the time frame of the predicate acts, and the **[**29]** number of predicate acts. Touche Ross, 782 F.2d at 971; Mills, 668 F. Supp at 1560; Sheftelman, 636 F. Supp. at 268; *see* Shared Network, 669 F. Supp. at 427-28. In *Touche Ross*, the complaint satisfied the pattern requirement because it alleged nine separate acts of wire and mail fraud over three years, involving the same parties for the purpose of inducing banks to extend credit to a corporation. Touche Ross, 782 F.2d at 971; *see* Shared Network, 669 F. Supp. at 427-28.

With the guidance of *Sedima* and *Touche Ross*, determination of the pattern requirement remains a decision that must be made in the context of the facts alleged in a given case. *See* Shared Network, 669 F. Supp. at 428; Ghouth v. Conticommodity Services, Inc., 642 F. Supp. 1325, 1337 (N.D. Ill. 1986). The court finds that plaintiff's civil RICO allegations in Count IV are too indefinite and conclusory to state a RICO claim under section 1962(a)-(c). Even if two predicate acts have been alleged, plaintiff has failed to state a pattern of racketeering activity by demonstrating a threat of continuity. Sheftelman, 636 F. Supp. at 268; *see* Mills, 668 F. Supp. at 1561.

Sedima states the prerequisites for alleging a civil RICO **[**30]** claim:

> Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. . . . Any recoverable damages **[*1581]** occurring by reason of a violation . . . will flow from the commission of the predicate acts.

Sedima, 473 U.S. at 497; Morast v. Lance, 807 F.2d 926, 932-33 (11th Cir. 1987); Touche Ross, 782 F.2d at 969. Plaintiff has failed to allege definitively an enterprise as well as to state a "threat of continuing activity" necessary to allege a pattern of racketeering activity in the Eleventh Circuit. The court also is mindful that plaintiff has not sought to amend its complaint since filing on November 14, 1985, and conducting over a year of discovery. Therefore, defendant's motion for judgment on the pleadings as to Count IV, the civil RICO allegations, is GRANTED.

Accordingly, defendant's motion for judgment on the pleadings is DENIED IN PART and GRANTED IN PART. Defendant's motion for pretrial conference is DENIED. This case will proceed to trial during **[**31]** the trial term commencing April 4, 1988, but not prior to April 11, 1988.

It is SO ORDERED at Orlando, Florida, this 31 day of March, 1988.

End of Document

Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.

United States District Court for the Middle District of North Carolina

March 31, 1988, Decided; April 1, 1988, Filed, Entered

C-86-674-D; C-86-675-G

Reporter
1988 U.S. Dist. LEXIS 19634 *

PARKWAY GALLERY FURNITURE, INC., Plaintiff v. KITTINGER/PENNSYLVANIA HOUSE GROUP, INC., d/b/a PENNSYLVANIA HOUSE, Defendant;ROSE FURNITURE COMPANY, Plaintiff v. KITTINGER/PENNSYLVANIA HOUSE GROUP, INC., d/b/a PENNSYLVANIA HOUSE, Defendant

Subsequent History: Motion denied by *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 121 F.R.D. 264, 1988 U.S. Dist. LEXIS 16138 (M.D.N.C., Aug. 17, 1988)*

Core Terms

dealers, manufacturer, Sherman Act, plaintiffs', claim for relief, complaints, conspiracy, concerted action, restrictions, nonprice, prices, distributors, allegations, furniture, vertical, retailers, retail price, summary judgment, conspired, price-fixing, act independently, discounter, terminate, defense motion, rule of reason, Marketing, antitrust, consumers, Customer, anti trust law

Counsel: **[*1]** For KITTINGER/PENNSYLVANIA INC. (1:86-cv-00674-HHW-RAE), Defendant: DAVID COVENTRY SMITH, KILPATRICK TOWNSEND & STOCKTON LLP, WINSTON-SALEM, NC.

For KITTINGER/PENNSYLVANIA INC. (2:86-cv-00675-HHW-RAE), Defendant: DAVID COVENTRY SMITH, KILPATRICK TOWNSEND & STOCKTON LLP, WINSTON-SALEM, NC.

Judges: HIRAM H. WARD, Chief United States District Judge.

Opinion by: HIRAM H. WARD

Opinion

MEMORANDUM OPINION AND ORDER

WARD, Chief Judge

This matter comes before the Court on Pennsylvania House's Motion for Partial Summary Judgment (October 29, 1986) pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. The claims contested by defendant's motion allege that prohibiting the solicitation or selling by mail or telephone order of defendant's furniture outside an individual dealer's area of retail responsibility constitutes an unreasonable restraint on trade in violation of section 1 of the Sherman Act (codified as amended at *15 U.S.C. § 1*). Having been fully briefed and argued at a hearing on December 9, 1987, the motion is now ready for ruling.

FACTS

Plaintiffs Parkway Gallery Furniture, Inc. and Rose Furniture Company are retail furniture dealers in North Carolina. Defendant Kittinger/Pennsylvania House Group, Inc. manufactures **[*2]** furniture known as "American Traditional" and provides plaintiffs with such merchandise for retail sales. Having no company—owned dealers, defendant relies wholly upon the business vitality of its dealers to provide Pennsylvania House furniture to consumers. For this reason, defendant imposes certain restrictions and obligations on its dealers.

Since 1975, defendant has placed two specific duties on its dealers. First, dealers must dedicate floor space to actually display defendant's furniture. In addition, defendant urges dealers to arrange the furniture in a room-like setting in order to establish a Pennsylvania House "gallery." Second, dealers must participate in defendant's promotional programs and invest in local tabloids to advertise Pennsylvania House lines. The parties agree that both Rose and Parkway fully comply with these requirements and are full service Pennsylvania House dealers. Moreover, defendant maintains that, although it provides suggested retail prices, individual dealers are free to set their own prices. (Affidavit of Edwin H. Roberts ¶ 16).

Over the past several years, various dealers around the country have notified defendant of lost sales to dealers such as plaintiffs **[*3]** who sell at discounts and engage in mail or telephone orders outside their local trading areas. See, e.g., (II Deposition of Edwin H. Roberts at 24-26). Specifically, a marketing survey conducted by defendant indicated that dealers were upset that consumers were using their local stores for shopping, display, and sales assistance prior to ordering furniture from plaintiffs at a discount. (Deposition of John F. Pastrone at 122-23, 154-57). Moreover, an employee of Parkway admitted that, in order to help a caller, "it might be that we would tell them to shop locally, that we didn't know the numbers or we didn't want any confusion in selling them a piece that wouldn't match [previously purchased furniture]." (Deposition of Daniel M. Warren at 372). In addition, plaintiff Rose maintains a toll—free telephone number for customers to use in ordering furniture for shipment outside its local calling area.

Based on these complaints, defendant revised its Retail Marketing Policy [RMP] in order to prohibit dealers from soliciting or selling its furniture by mail or telephone order to consumers residing outside the specific area of retail responsibility. Defendant specifically contends that its **[*4]** decision to adopt these prohibitions resulted from independent business considerations and was not the product of any agreement with its dealers. See (Affidavit of John F. Pastrone ¶ 11); (E.Roberts Aff. ¶ 15); (Affidavit of Terry J. Martina ¶ 6). Plaintiffs, on the other hand, contend that the RMP resulted from an illegal agreement between defendant and complaining dealers.

On August 11, 1986, plaintiffs filed these actions against defendant in the United States District Court for the Middle District of North Carolina, alleging, inter alia, that the Retail Marketing Policy violated federal antitrust laws. In response to a motion for a preliminary injunction, defendant voluntarily agreed not to enforce the relevant prohibitions as to plaintiffs pending the resolution of the merits of the case. See (Agreed Order [Aug. 16, 1986]). Defendant then filed a motion for summary judgment on plaintiffs' Sherman Act claims on October 28, 1986. After extensive attempts to settle the case failed, defendant implemented the RMP as to all of its dealers except plaintiffs on February 12, 1988.

DISCUSSION

In the time since the filing of defendant's motion, the parties have conducted at least twenty-six **[*5]** depositions and produced documents exceeding a total of 50,000 pages. The Court must now wade through this material and decide whether plaintiffs have sufficiently supported their allegation that defendant's Retail Marketing Policy is the product of an agreement either to fix or maintain prices or to impose an unreasonable nonprice restraint on trade. Defendant contends that plaintiffs engaged in "free riding" by selling Pennsylvania House furniture to consumers who shop at local dealers and then order by mail or telephone from plaintiffs at a discount. On the other hand, plaintiffs argue that defendant conspired with other dealers to artificially destroy price competition. Additionally, plaintiffs contend that the RMP constitutes an unreasonable nonprice restraint on trade.

The Tenth Circuit has emphasized the importance in antitrust cases of keeping in mind "that the purpose of antitrust laws is the promotion of consumer welfare." *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*(citing *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 107, 104 S. Ct. 2948, 2964, 82 L. Ed. 2d 70 (1984))*. On the other hand, "the antitrust laws should not restrict **[*6]** the autonomy of independent businessmen when their activities have no adverse impact on the price, quality, and quantity of goods and services offered to the consumer." Id. Consequently, "a manufacturer generally should have wide latitude in determining the profile of its distributorships." *Id. at 1225*. Accordingly, a court should keep both of these considerations in mind in ruling on the legality of a disputed practice.

With these general principles in mind, the Court now turns to the issues raised by defendant's motion. Prior to analyzing plaintiffs' Sherman Act claims, the Court will set out the law involved in this motion. First, the Court will discuss the law governing alleged vertical price-fixing agreements. Second, the Court will discuss the law as to alleged vertical nonprice restraints on trade. Third, the Court will discuss the law governing alleged vertical conspiracies between a manufacturer and an unwilling dealer. Fourth, the Court will discuss the law as to alleged horizontal price-fixing agreements between manufacturers. Following these sections on the law, the Court will analyze each of plaintiff's Sherman Act claims in light of the law as stated and the facts of this **[*7]** case.

I.

The Supreme Court has long held that concerted action by a manufacturer and its dealers to set or maintain retail prices violates section 1 of the Sherman Act. *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 405, 31 S.Ct. 376, 384, 55 L. Ed. 502, 517-18 (1911)*.[1] Hence, a manufacturer acting independently may announce a price and chose to deal with only those retailers who adhere to it without violating the Sherman Act. *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L. Ed. 992, 997, 1919 Dec. Comm'r Pat. 460 (1919)*(emphasis added). Moreover, evidence that a manufacturer terminated discounters in response to complaints from other retailers is insufficient by itself to prove an illegal price-fixing conspiracy. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760-64, 104 S.Ct. 1464, 1469-71, 79 L.Ed.2d 775, 783-86 (1984)*.

Writing for a unanimous Court in *Monsanto*, Justice Powell emphasized the rationale for such a high standard of proof in conspiracy cases. Specifically, he noted, "Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *Id. at 763, 104 S.Ct. at 1470, 79 L.Ed.2d at 785* (emphasis added). In a later case, Justice Powell added that "mistaken inferences in cases such as this one are especially **[*9]** costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S.Ct. 1348, 1360, 89 L. Ed. 2d 538, 557 (1986)*(emphasis added). Hence, "something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Monsanto, 765 U.S. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785*.

In construing Monsanto, the Fourth Circuit through Judge Butzner has emphasized the freedom of dealers to set their own retail prices as a fact that mandates the dismissal of conspiracy claims. See *Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905, 908 (4th Cir. 1986)*; *National Marine Elec. Dists., Inc. v. Raytheon Co., 778 F.2d 190, 193 (4th Cir. 1985)*. In *Raytheon*, the court specifically noted that "in order to conspire to restrain retail price competition there must be some agreement to set, control, fix, maintain, or stabilize prices. Here there was no

[1] The Supreme Court has long recognized that price-fixing agreements are unlawful per se under the Sherman Act. See *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129, 1168 (1940)*. In *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977)*, the Court overruled its recently **[*8]** adopted rule making vertical market allocations unlawful per se and reinstated a Rule of Reason analysis. Id. One commentator has noted, "Subsequent to Sylvania, several cases and law review articles have attacked or questioned the per se rule as applied to vertical price restraints." II E.Kintner, Federal ***Antitrust Law*** § 10.18, at 126 (Supp. 1988)[hereinafter Kintner]. However, finding that plaintiffs in this case have not produced sufficient evidence of a conspiracy either between defendant and other dealers or between defendant and other manufacturers, the Court need not decide whether a per se or Rule of Reason analysis applies to these price claims.

agreement. Each dealer, including [the plaintiff], set its own prices." Id. (emphasis added). This evidence, Judge Butzner reasoned, "refutes **[*10]** the charge that [the manufacturer] conspired with one or more dealers to terminate [the plaintiff] for the purpose of restraining price competition." Id. (emphasis added). For this reason, the court affirmed the district court's entry of a directed verdict in favor of the defendant on the plaintiff's conspiracy claims.

In likewise upholding a directed verdict in favor of the defendant/manufacturer, the *Belk* court first of all noted that "although [the manufacturer] suggested retail prices, each merchant was free to set its own price." *Belk, 799 F.2d at 908* (emphasis added). Moreover, Judge Butzner emphasized, "Although [the manufacturer] responded favorably to Belk's complaints about the [discounter], it did not enter into any agreement with Belk to fix or maintain retail prices. Belk and its neighboring competitor, Ivey's, remained free to set their own prices." *Id. at 908-09* (emphasis added). In addition, Judge Butzner noted that "the manufacturer sought to retain many dealers by sacrificing one. It acted without exacting an agreement from the remaining dealers to maintain prices." *Id. at 910* (emphasis added).

In applying *Raytheon* and *Belk* to the record in these cases, the Court feels **[*11]** constrained to grant defendant's motion as to plaintiffs' Sherman Act claims. Here, as in Raytheon and Belk, plaintiffs and other dealers set their own retail prices; defendant merely suggested a retail price that dealers could and do freely ignore. Moreover, although defendant responded favorably to dealer complaints about plaintiffs' way of doing business, no evidence exists that it entered into any agreement with those dealers. It merely sought to retain many dealers by sacrificing Rose and Parkway, if necessary, because of noncompliance with the RMP. The RMP operated for the good of all dealers and reflected legitimate business concerns of defendant; the fact that Rose and Parkway were harmed by the policy is immaterial. As stated in Belk, "[a] manufacturer is not prohibited from avoiding the potential loss of many of its dealers because it acted in response to price complaints." *Id. at 909* (citing *Monsanto, 465 U.S. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785*).[2]

II.

In light of the language in *Belk*, the record in this case appears deficient as to all claims under section 1 of the Sherman Act. The fact that plaintiffs and other dealers remained free to set price independently of defendant precludes a finding of conspiracy. In order to prove a Section 1 violation, a plaintiff must establish each of the following essential elements:

> (1) the activities must be in or affect interstate commerce or foreign commerce; (2) the activities must be performed by two or more persons; (3) the activities must be the result of concerted action; (4) the concerted action must constitute a restraint on trade or commerce; **[*13]** and (5) the restraint must be unreasonable.

II Kintner § 9.1, at 5 (1980). Hence, a broad reading of Belk stands for the proposition that undisputed evidence of freedom to set price precludes a finding that a manufacturer conspired with other dealers at all, whether with regard to price or nonprice aspects. On the other hand, a narrower reading of *Belk* and *Raytheon* would limit their holdings to claims of conspiracy as to price. Thus, nonprice conspiracies would still be judged independently under Monsanto. Believing that a reasonable question exists as to the application of *Belk* and *Raytheon* in this case, the Court will analyze plaintiffs' nonprice allegations in light of the *Monsanto* case.

As a preliminary matter, the Court will note that the Supreme Court expressly overruled its rule making vertical market allocations unlawful per se in *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977)*(overruling *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967))*. See also *Monsanto, 465 U.S. at 761, 104 S.Ct. at 1469, 79 L.Ed.2d at 784* (noting that "concerted

[2] The Court would specifically add at this point that plaintiffs' reliance on *Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469 (3d Cir. 1985)*, is misplaced. In Belk, the court expressly distinguished Fragale as there was **[*12]** no allegation in that case "that competing distributors threatened to stop buying from the defendants if they supplied the new distributor." *Belk, 799 F.2d at 910*, Hence, the Belk court reasoned on the facts before it that, even if the reason advanced to justify termination of a discounter is pretextual, "[the manufacturer] still had a legitimate, independent reason to terminate their relationship." *Id. at 910-11*, Similarly, threats by plaintiffs' competing dealers to stop buying from defendant likewise distinguishes the case sub judice from Fragale.

action on nonprice restrictions . . . are judged under **[*14]** the rule of reason . . . ."). Accordingly, plaintiff's claims that alleged vertical nonprice restraints are per se unlawful must be dismissed. However, although surviving Sylvania, plaintiffs' other nonprice allegations — those advocating a Rule of Reason analysis — must still pass muster under Monsanto as to the existence of concerted action.

As the Monsanto Court stated, "Section 1 of the Sherman Act requires that there be a 'contract, combination ... or conspiracy' between the manufacturer and other distributors in order to establish a violation." *Monsanto, 465 U.S. at 761, 104 S.Ct. at 1469, 79 L.Ed.2d at 783* (citing *15 U.S.C. § 1*). In other words, "[i]ndependent action is not proscribed." Id. Thus, a manufacturer "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." Id (citing *Colgate, 250 U.S. at 307, 39 S.Ct. at 468, 63 L.Ed. at 997*).[3]

In analyzing the facts before it, the Monsanto Court emphasized **[*15]** that "the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions." *Id. at 762, 104 S.Ct. at 1470, 79 L.Ed.2d at 784*. Accordingly, the fact that defendant communicated with distributors regarding prices and marketing strategy does not alone show a conspiracy under Section 1. As the Monsanto Court stated, "[a] manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market." Id. Consequently, "[t]he manufacturer often will want to ensure that its distributors earn sufficient profit to pay for its programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free—riders' do not interfere." *Id. at 762-63, 104 S.Ct. at 1469-70, 79 L.Ed.2d at 784-85* (citing *Sylvania, 433 U.S. at 55, 97 S.Ct. at 2560, 53 L.Ed.2d at 584*).

Although Monsanto itself involved allegations of vertical restrictions as to retail price, the Court finds its analysis equally applicable to alleged nonprice restraints. Thus, **[*16]** "something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785*.

In other words, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785-86*.

In this case, the record fails to support plaintiff's allegations as to conspiracy. The evidence before the Court involves the following facts: (a) complaints by dealers that plaintiffs were selling to customers who shopped at other stores; and (b) implementation of the RMP. As discussed infra, plaintiffs have failed to support their contention that defendant and other manufacturers or dealers conspired to impose territorial and customer restrictions. In addition, inferring concerted action merely from complaints and action consistent with those complaints would both encourage speculation and "chill the very conduct the antitrust laws are designed to **[*17]** protect." *Matsushita, 475 U.S. at 594, 106 S.Ct. at 1360, 89 L.Ed.2d at 557*. Consequently, the Court will dismiss all of plaintiffs' Sherman Act claims because the record does not support a finding of concerted action.

Regarding vertical nonprice restrictions, the Supreme Court has noted that "new manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often regarded in the distribution of products unknown to the consumer." *Sylvania, 433 U.S. at 55, 97 S.Ct. at 2560, 53 L.Ed.2d at 583*. More importantly, the Sylvania Court emphasized, "Established manufacturers can use [vertical restrictions] to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." Id. This is justified because "[t]he availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product." Id.

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[3] Specifically, the so-called Colgate Doctrine permits a manufacturer to announce its resale price in advance and refuse to deal with those who fail to comply. See *Monsanto, 465 U.S. at 761, 104 S.Ct. at 1469, 79 L.Ed.2d at 783-84*.

Similarly, defendant in this case implemented the RMP to induce retailers to engage in various promotional activities requiring a substantial investment of advertising and showroom **[*18]** space. Thus, the restraints imposed upon plaintiffs are justified because "[t]he availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product." Id. In this case, defendant chose to impose certain restrictions on its dealers to maintain the viability and success of all its distributors. Moreover, the Court notes that plaintiffs have failed to sufficiently support their allegations of conspiracy. Consequently, their Sherman Act claims must all be dismissed.

III.

In their briefs, plaintiffs contend that defendant also violated section 1 by inducing their participation as unwilling coconspirators. Under the Sherman Act, an antitrust plaintiff may establish the essential element of concerted action by evidence of a contract between itself and the defendant. See *Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 142, 88 S.Ct. 1981, 1986, 20 L. Ed. 2d 982, 992 (1968)* (following *Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968)*; *Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964))*.[4] However, the defendant must do more than merely "announce" its policy and refuse to deal **[*19]** with those not in full compliance therewith; a court must find that the defendant coerced the plaintiff's adherence to the policy by seeking and obtaining assurances of compliance. *United States v. Parke, Davis & Co., 362 U.S. 29, 46, 80 S.Ct. 503, 513, 4 L. Ed. 2d 505, 516-17 (1960)*. See also *Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1163 (7th Cir. 1987)*(noting that "a plaintiff who is an involuntary participant must prove that the defendant induced his participation by conduct that went beyond merely announcing a policy of terminating dealers who sell below suggested retail prices . . . . ").

In the case sub judice, the record does not support an inference that defendant sought and obtained such assurances of compliance from either plaintiffs or other dealers. Certainly defendant consulted with dealers as to the viability of the RMP, and such interaction and consultation has been recognized by the Supreme Court as appropriate. See *Monsanto, 465 U.S. at 762, 104 S.Ct. at 1470, 79 L.Ed.2d at 784* (noting that "the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions."). In response, dealers voluntarily acquiesced in the policy; the record contains no evidence that defendant coerced compliance with the RMP by means prohibited by the Sherman Act.

Plaintiffs have likewise failed to sustain their burden under *Rule 56* as to the element that defendant coerced their unwilling participation as coconspirators. The fact that Rose and Parkway faced sanctions and termination for noncompliance does not suffice under *Parke, Davis*. As the Colgate Court held, "In the absence of any purpose to create or maintain **[*21]** 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." *Colgate, 250 U.S. at 307, 39 S.Ct. at 468, 63 L.Ed. at 997*. Consequently, "he may announce in advance the circumstances under which he will refuse to sell." Id. Plaintiffs cannot prove a conspiracy merely by advancing facts upon which a finding of concerted action would be considered mere speculation. Hence, their Sherman Act claims must be dismissed insofar as they allege their participation as unwilling coconspirators.

IV.

In addition to alleging vertical arrangements, plaintiffs have proffered a claim of a horizontal conspiracy between defendant and other manufacturers. The Supreme Court has long recognized that consciously parallel business behavior supports an inference of concerted action when coupled with other circumstantial evidence. See *Theatre*

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[4] Each of these cases was limited by the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)*. The Copperweld Court specifically rejected the so-called "intra-enterprise doctrine" and held that a parent corporation and its wholly owned subsidiary are not legally capable of conspiring with each other under section 1 of the Sherman Act. *Id. at 777, 104 S.Ct. at 2745, 81 L.Ed.2d at 647*. However, Copperweld does not alter the cases cited above respecting the proposition that concerted action may be found between a defendant **[*20]** and an unwilling antitrust plaintiff.

Enters., Inc. v. Paramount Film Dist. Corp., 346 U.S. 537, 540-41, 74 S.Ct. 257, 259, 98 L.Ed. 273, 279 (1954). In order to prove consciously parallel behavior, an antitrust plaintiff must establish "(1) that **[*22]** the defendants' business behavior was parallel, and (2) that the defendants were conscious of each other's conduct and that their awareness was an element in their decisional process." *Schoenkopf v. Williamson Tobacco Corp., 637 F.2d 205, 208 (3d Cir. 1980)*. Moreover, "a plaintiff must also show (1) that the defendants acted in contradiction of their economic interests, and (2) that the defendants had a motive to enter into an agreement." Id. (citations omitted).[5] Absent such additional evidence, a defendant is entitled to judgment as a matter of law.

In the case sub judice, plaintiffs failed to sufficiently plead a horizontal conspiracy in their respective complaints. Consequently, the Court is inhibited in examining the record for evidence to support their contentions. In their briefs, plaintiffs allege that defendant and other furniture manufacturers have engaged in concerted action in violation of section 1 of the Sherman Act and specifically rely on the case of *United States v. Foley, 598 F.2d 1323 (4th Cir. 1979)*, cert. denied, *444 U.S. 1043, 100 S. Ct. 727, 100 S. Ct. 728, 62 L. Ed. 2d 728 (1980)*. However, the Foley court found "[a]cceptance by competitors of an invitation to participate in a plan . . . where each competitor knew that cooperation was essential to successful operation of the plan." *Id. at 1331* (quoting 3 P.Areeda & D.Turner, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶ 841a, at 361-62 (1978)).

Unlike the facts of *Foley*, the case before the Court does not contain evidence of such an "invitation." In Foley, the defendant called a dinner meeting of his competitors at which he announced that his real estate firm was changing its commission rate from six percent to seven percent. *Id. at 1332*. **[*24]** Moreover, in the following months, each defendant in fact began to take substantial numbers of seven percent listings. Id. Additionally, evidence was introduced that members of the conspiracy sought to hold their fellows to the "agreement." Id.

Plaintiffs in this case rely on the fact that defendant's RMP and those of other dealers are "remarkably similar in form and timing." (Plaintiffs' Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment at 73 [Aug. 31, 1987])[hereinafter (Plaintiffs' Brief)]. However, section 1 requires more than mere similarity in order to constitute concerted action. In this case, plaintiffs have failed to sufficiently support the contention in their briefs that defendant conspired with other furniture manufacturers. Pennsylvania House may have known of other marketing policies and specifically relied on them in formulating the RMP, but no evidence exists that these similar policies resulted from concerted action. See (II E.Roberts Dep. at 31). Consequently, plaintiffs' allegations of a horizontal conspiracy between defendant and other manufacturers must be dismissed.

V.

With the above legal principles in mind, the Court now turns to plaintiffs' **[*25]** specific claims challenged by defendant's motion. The first six claims for relief allege various per se violations of Section 1 of the Sherman Act. The eighth claim alleges violations to be judged under a Rule of Reason standard.[6] For the following reasons, the Court will dismiss all of plaintiffs' Sherman Act claims. As discussed supra, plaintiffs' Sherman Act claims must be dismissed insofar as they involve allegations of a vertical conspiracy between defendant and plaintiffs and contentions that defendant conspired with other manufacturers. Moreover, plaintiffs' per se allegations as to a nonprice conspiracy must be dismissed under Sylvania. Accordingly, the discussion below focuses on plaintiffs' Rule of Reason allegations that defendant and other retailers conspired to unreasonably restrain trade.

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[5] In other words, a factfinder may not transform conscious parallelism into conspiracy absent additional circumstantial evidence. Such facts are commonly referred to as "plus factors" and have been identified as follows: (1) indications of "traditional conspiracy;" (2) motive; (3) actions contrary to economic self-interests; (4) poor economic performance; and (5) actions facilitating oligopolistic collaboration. *McElhinney v. Medical Protective Co., 549 F.Supp. 121, 129 (E.D.Ky. 1982)* (quoting P.Areeda, Antitrust Analysis ¶ 325, at 371-82 (3d ed. 1981)), remanded for dismissal, ***738 F.2d 439, 1984-1 Trade Cas. (CCH) ¶ 66,054 (6th Cir. June 5, 1984)*** **[*23]** .

[6] The Court would note that defendant's motion challenges only plaintiffs' Sherman Act claims. The seventh claim alleged Clayton Act violations and therefore is not presently before the Court.

The Supreme Court recently noted that "the plain language of *Rule 56(c)* mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence **[*26]** of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986)*. In other words, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)*(emphasis added), quoted in *Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987)*.[7]

On the other hand, "the judge's function is not himself to weigh the evidence and determine the truth of the matter . . . ." *Id. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 212* (emphasis added). Instead, the court's role is "to determine whether there **[*27]** is a genuine issue for trial." Id. In this way, "th[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under *Federal Rule of Civil Procedure 50(a)* . . . ." *Id. at 249, 106 S.Ct. at 2511, 91 L.Ed.2d at 213*. In other words, a court should never dismiss a claim "[i]f reasonable minds could differ as to the import of the evidence . . . ." Id. (citing *Wilkerson v. McCarthy, 336 U.S. 53, 61, 69 S.Ct. 413, 417, 93 L. Ed. 497, 505 (1949))*. However, the Court finds summary judgment to be appropriate in this case since plaintiffs have failed to sustain their burden.[8]

A. First Claim for Relief — Refusal to Deal

As stated above, a plaintiff claiming a Section 1 violation must establish, inter alia, a "contract, combination ... or conspiracy" between the manufacturer and other distributors. *15 U.S.C. § 1*. Thus, "[i]ndependent action is not proscribed." *Monsanto, 465 U.S. at 761, 104 S.Ct. at 1469, 79 L.Ed.2d at 783*. **[*28]** In viewing plaintiffs' evidence in this case, the Court finds that the record fails to support their allegations of concerted refusal to deal. As the Monsanto Court noted, "something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785*. In this case, plaintiffs have presented no such evidence. Accordingly, this claim must be dismissed.

B. Second Claim for Relief — Price-Fixing

As stated above, the Fourth Circuit in construing Monsanto specifically noted that "in order to conspire to restrain retail price competition there must be some agreement to set, control, fix, maintain, or stablilize prices." *Raytheon, 778 F.2d at 193* (emphasis added). Consequently, the fact that dealers set their own prices "refutes the charge that [the manufacturer] conspired with one or more dealers to terminate [the plaintiff] for the purpose of restraining price competition." Id. (emphasis added). Similarly, the undisputed fact that plaintiffs remain free under the RMP to set their own prices precludes a finding of conspiracy as **[*29]** a matter of law.

Moreover, the Belk court followed to Raytheon despite two additional facts alleged by the aggrieved discounter. First, the court noted that "although [the manufacturer] suggested retail prices, each merchant was free to set its own price." *Belk, 799 F.2d at 908* (emphasis added). Second, the court emphasized, "Although [the manufacturer] responded favorably to Belk's complaints about the [discounter], it did not enter into any agreement with Belk to fix or maintain retail prices. Belk and its neighboring competitor, Ivey's, remained free to set their own prices." *Id. at 908-09* (emphasis added).

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[7] The Anderson Court also emphasized, "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214* (emphasis added).

[8] The Court would note that the voluminous record in these cases prevented intimate familiarity with the facts underlying plaintiffs' claims. Consequently, the Court relied heavily on the exhaustive briefs filed by counsel to guide its consideration of plaintiffs' evidence.

Belk is controlling in this case for two reasons. First, Pennsylvania House, like the manufacturer in Belk, merely suggests retail price to its dealers; each individual dealer remains free under the RMP to set its own price. See (E.Roberts Aff. ¶ 16).[9] Second, although responding favorably to complaints about discounters, Pennsylvania House, like the manufacturer in Belk, did not enter into any agreement to fix or maintain retail prices. As the Monsanto Court stated, "something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility **[*30]** that the information and nonterminated distributors were acting independently." *Monsanto, 765 U.S. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785*. In other words, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785-86* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)*, cert. denied, *451 U.S. 911, 101 S. Ct. 1981, 68 L. Ed. 2d 300 (1981))*.

In **[*31]** this case, the Court finds that plaintiffs' evidence on the element of conspiracy fails to create a genuine issue of fact under *Monsanto*, *Raytheon*, and *Belk*. Accordingly, the Court will enter judgment as a matter of law in favor of defendant on this claim and dismiss it with prejudice. The Monsanto Court emphasized the importance of distinguishing vertical price-fixing agreements that are per se illegal under the Sherman Act and "[a] independent action by the manufacturer, and [b] concerted action on nonprice restrictions . . . ." *Id. at 763, 104 S.Ct. at 1470, 79 L.Ed.2d at 785*. In this case, the record indicates that the RMP is not the result of a price-fixing agreement; rather, it results either from defendant's independent action (as alleged by defendant) or from concerted action respecting nonprice restrictions (as alleged by plaintiffs). Moreover, plaintiffs' other allegations as to price-fixing similarly lack evidentiary support in the record. Accordingly, plaintiffs' allegations of a vertical price-fixing agreement must be dismissed.

C. Third Claim for Relief — Customer Restrictions

As noted earlier, "concerted action on nonprice restrictions . . . are judged under the rule of **[*32]** reason . . . ." *Id. at 761, 104 S.Ct. at 1469, 79 L.Ed.2d at 784* (citing *Continental T. V. v. GTE Sylvania, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568*). Consequently, plaintiffs' allegations that defendant has committed per se violations of the Sherman Act by restricting their access to customers must be dismissed as a matter of law.

D. Fourth Claim for Relief — Territorial Restrictions

Similarly, plaintiffs' allegations that the RMP constitutes a per se violation under Section 1 by imposing territorial restrictions on dealers must be dismissed under *Sylvania*.

E. Fifth Claim for Relief — Resale Price Maintenance

For the reasons stated above, plaintiffs' claims as to a vertical price-fixing agreement between defendant and other dealers must be dismissed under *Monsanto*, *Raytheon*, and *Belk*. In this case, defendant merely suggested retail prices; plaintiffs remained free at all times to set their own retail prices independently of both defendant and other dealers. This evidence, the Raytheon court reasoned, "refutes the charge that [the manufacturer] conspired with one or more dealers to terminate [the plaintiff] for the purpose of restraining price competition." *Raytheon, 778 F.2d at 193* (emphasis added).

F. Sixth **[*33]** Claim for Relief — Customer Allocation and Market Division

These allegations repeat contentions made above. Accordingly, this claim alleging per se violations of the Sherman Act must be dismissed since "concerted action on nonprice restrictions . . . are judged under the rule of reason . . .

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[9] Plaintiffs attempted to create a genuine issue of fact by producing claims of other dealers that defendant attempted to restrict their freedom to set their own price. See (Plaintiffs' Brief at 55-58). However, the Ninth Circuit rejected similar evidence as irrelevant because "[the plaintiff] cannot claim that the excluded evidence relates to business activity that involved or affected it; rather it relates to other retailers in other parts of the country." *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1264 (9th Cir.)*(emphasis added), cert. dismissed, ***464 U.S. 956, 104 S. Ct. 385, 78 L. Ed. 2d 331 (1983)***.

." *Monsanto, 465 U.S. at 761, 104 S.Ct. at 1469, 79 L.Ed.2d at 784* (citing *Sylvania, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568*).

G. Eighth Claim for Relief — Refusal to Deal, Price—Fixing, Customer and Territorial Restrictions, and Resale Price Maintenance

Since concerted action to set prices has been held per se illegal, plaintiffs' final Sherman Act claim involves only those allegations regarding concerted action on nonprice restrictions. As stated in Monsanto, "[t]he latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition." Id. While oftentimes this standard requires a factual determination, the undisputed fact that a manufacturer acted independently is dispositive of the case and mandates judgment in favor of the defendant as a matter of law.

In Monsanto, **[*34]** a unanimous Supreme Court emphasized through Justice Powell, "Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *Id. at 763, 104 S.Ct. at 1470, 79 L.Ed.2d at 785*. Hence, "something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785*. In other words, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785-86* (quoting *Texaco, 637 F.2d at 111*).

Applying this standard to the record in this case, the Court finds that plaintiffs have failed to sufficiently support their allegations of unreasonable vertical and horizontal nonprice restraints on trade. The record contains evidence of complaints by other dealers and defendant's response **[*35]** to those complaints. In addition, plaintiffs have offered evidence that other furniture manufacturers imposed similar nonprice restrictions on dealers. But the Court cannot find "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." Id. Thus, plaintiffs have failed to "set forth specific facts showing that there is a genuine issue for trial." *Fed.R.Civ.P. 56(e)*. Consequently, *Rule 56* mandates that summary judgment be entered against them.

IT IS, THEREFORE, ORDERED that Pennsylvania House's Motion for Partial Summary Judgment be, and the same hereby is, GRANTED, and that plaintiff's First Claim for Relief, Second Claim for Relief, Third Claim for Relief, Fourth Claim for Relief, Fifth Claim for Relief, Sixth Claim for Relief, and Eighth Claim for Relief be, and the same hereby are, DISMISSED.

/s/ Hiram H. Ward

United States District Judge

March 31 , 1988.

JUDGMENT

This matter came before the Court on Pennsylvania House's Motion for Partial Summary Judgment (October 29, 1986) pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. For the reasons set out in the Memorandum Opinion and Order filed contemporaneously **[*36]** herewith, the Court granted defendant's motion. Moreover, finding that there is no just reason for delay, the Court will enter a judgment in favor of defendant on plaintiff's Sherman Act claims.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Pennsylvania House's Motion for Partial Summary Judgment be, and the same hereby is, GRANTED, and that plaintiff's First Claim for Relief, Second Claim for Relief, Third Claim for Relief, Fourth Claim for Relief, Fifth Claim for Relief, Sixth Claim for Relief, and Eighth Claim for Relief be, and the same hereby are, DISMISSED.

/s/ Hiram H. Ward

United States District Judge

March 31, 1988.

Stitt Spark Plug Co. v. Champion Spark Plug Co.

United States Court of Appeals for the Fifth Circuit

April 1, 1988

No. 87-2656

Reporter

840 F.2d 1253 *; 1988 U.S. App. LEXIS 4064 **; 1988-1 Trade Cas. (CCH) P67,946

Stitt Spark Plug Co., Plaintiff-Appellant, v. Champion Spark Plug Co., Defendant-Appellee

Subsequent History: **[**1]** Petition for Rehearing En Banc Denied May 9, 1988.

Prior History: Appeal from the United States District Court for the Southern District of Texas.

Core Terms

pricing, plugs, spark plug, distributors, replacement, predatory, manufacturer, engine, competitor, antitrust, district court, original-equipment, monopoly, directed verdict, anticompetitive, industrial, markets, brand, Clayton Act, purchasers, practices

LexisNexis® Headnotes

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

A district court should grant a directed verdict only if reasonable people could not arrive at a verdict against the moving party after considering all the evidence and all reasonable inferences that can be drawn from it in a light most favorable to the nonmoving party's case.

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Implausible Claims

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

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

HN2[] **Summary Judgment, Opposing Materials**

A plaintiff's burden in opposing a motion for summary judgment in an antitrust case is to come forward with specific facts showing that there is a genuine issue for trial, that is, one that is economically plausible in light of the evidence presented. If the factual context renders the claim implausible, if the claim is one that simply makes no economic sense, a plaintiff must come forward with more persuasive evidence to support its claim than would otherwise be necessary to avoid summary judgment. The economic disincentives to predatory pricing often will justify a presumption that an allegation of such behavior is implausible.

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

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

Predatory pricing can be anticompetitive if it contributes to monopoly power; the successful predator eliminates its competitors in order to raise prices above competitive levels at a later time.

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

HN4[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Without an economically plausible theory of anticompetitive effect, a plaintiff is not entitled to reach the jury on a predatory-pricing claim.

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

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

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

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN5[] **Monopolies & Monopolization, Attempts to Monopolize**

The Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, prohibits either direct or indirect discrimination in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Governments > Local Governments > Claims By & Against

HN6[] Price Discrimination, Competitive Injuries

When a company claims that its competitor engaged in price discrimination, a "primary-line" claim, injury to competition is not established by evidence of a mere diversion of business from one competitor to another.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Breach of Contract

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

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Section 3 of the Clayton Act makes it unlawful to make a sale or contract for sale of goods on the condition, agreement, or understanding that the purchaser thereof shall not deal in the goods of a competitor of the seller, where the effect of such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. *15 U.S.C.S. § 14*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN8[] Standards of Review, Abuse of Discretion

Evidentiary rulings are reviewable for abuse of discretion.

Civil Procedure > Appeals > Standards of Review

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN9[] Appeals, Standards of Review

The court will reverse a judgment for an evidentiary ruling only if it affects the substantial rights of the parties.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN10[] Estoppel, Collateral Estoppel

15 U.S.C.S. § 16(a) provides that a final judgment or decree in an antitrust proceeding brought by the government constitutes prima facie evidence against the defendant in any subsequent proceeding brought by a non-government party as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

Counsel: Wayne H. Paris, Attorney for Appellant.

Donald F. Melhorn, Jr., Rufus W. Oliver and N. K. Alexander, Jr., Attorneys for Appellee.

Judges: Brown, Johnson, and Patrick E. Higginbotham, Circuit Judges.

Opinion by: HIGGINBOTHAM

Opinion

[*1254] PATRICK E. HIGGINBOTHAM, Circuit Judge:

Stitt Spark Plug Company brought this antitrust suit against Champion Spark Plug Company alleging that Champion engaged in anticompetitive practices, including price discrimination, predatory pricing and exclusive dealing, violative of the Sherman and Robinson-Patman Acts. The district court entered a directed verdict for Champion after Stitt presented its evidence to the jury. We find that Stitt's theory of predatory pricing is implausible and that a reasonable jury could not have concluded that any exclusive dealing agreements with dealers denied Stitt access to the market for industrial spark plugs. We affirm.

I

Champion Spark Plug Company is the leading independent manufacturer of spark plugs, and sells at least three hundred different models **[**2]** of plugs, many of which can be used in a variety of different engines. Champion's plugs fall into three broad categories: "industrial" plugs, for use in large, stationary engines; "commercial" plugs, for automotive and smaller engines; and "dual" plugs, which can be used in either industrial or commercial engines. Stitt Spark Plug Company, a smaller manufacturer, makes over two hundred different models, nearly all of which fall into the "industrial" category.

Both companies sell their spark plugs to two distinct kinds of purchasers. One group of buyers consists of companies that manufacture engines in which spark plugs are included as original equipment. The other group consists of warehouse distributors and retail part stores that purchase spark plugs for resale to engine owners as replacement equipment. The two "markets" are related, however, in that engine owners tend to purchase replacement plugs **[*1255]** of the same brand as the plugs that came with the engine originally. Stitt's witnesses provided at least three explanations for this preference: (1) engine operators have confidence in the original brand of plug because it performed well; (2) operators trust that the engine **[**3]** manufacturer selected the original brand because it was well suited for the engine; and (3) operators fear that use of a different brand will endanger the engine's warranty.

In order to capitalize on this consumer preference, Champion sells spark plugs to original equipment manufacturers at prices well below the price of replacement plugs, even though the products are otherwise identical. Stitt brought this lawsuit alleging that Champion's pricing policy was predatory and in violation of the antitrust laws. The suit also alleged that Champion was guilty of price discrimination and exclusive dealing. After Stitt presented its evidence to a jury, the district court issued a directed verdict for Champion on all counts.

II

Stitt accused Champion of three kinds of anticompetitive conduct: predatory pricing under Sherman Act *§ 2* and Clayton Act *§ 2(a)*; price-discrimination under Clayton Act *§ 2(a)*; and exclusive dealing under Sherman Act § 1 and Clayton Act § 3. We deal with each allegation in turn, keeping in mind that ***HN1***[] the district court should have granted a directed verdict only if **[**4]** reasonable people could not arrive at a verdict against Champion after considering all the evidence and all reasonable inferences that can be drawn from it in a light most favorable to Stitt's case. [1]

A

Stitt first argues that Champion sold spark plugs in the original-equipment market at prices below cost in order to eliminate Stitt as a competitor in the replacement market. This conduct, according to Stitt, was an illegal attempt to monopolize within the meaning of Sherman Act *§ 2* [2] as well as unlawful price discrimination in violation of Clayton Act *§ 2(a)*. [3] Because we use a similar standard for judging assertions of predatory pricing under these statutes, [4] we discuss the claims together.

[5]** The Supreme Court recently discussed predatory pricing in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* [5] **[**7]** Matsushita considered the claim of American television manufacturers that a group of Japanese competitors conspired to lower the price of television sets in order to drive American manufacturers out of business. ***HN2***[] In holding that the district court properly dismissed the case on summary judgment, the Court noted that plaintiff's burden was to "come forward with 'specific facts showing that there is a *genuine issue for trial*,'" [6] that is, one that is economically plausible in light of the evidence presented. "If the factual context renders respondents' claim implausible--if the claim is one that simply makes no economic sense--respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary [to avoid summary judgment]." [7] The Court went on to hold that the economic disincentives to predatory pricing often will justify a presumption that an allegation of such behavior is implausible.

> The success of [predatory **[**6]** pricing] schemes is inherently uncertain: the short-run loss is definite, but the long-run **[*1256]** gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "the predator must make a substantial investment with no assurance that it will pay off." Easterbrook, Predatory Strategies and Counterstrategies, 48 U.Chi.L.Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful. [8]

HN3[]

As the Court recognized, predatory pricing can be anticompetitive if it contributes to monopoly power; the successful predator eliminates its competitors in order to raise prices above competitive levels at a later time.

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[1] *See* *Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir.1969)*.

[2] *15 U.S.C. § 2*.

[3] *15 U.S.C. § 13(a)*.

[4] *See* *Malcolm v. Marathon Oil Co., 642 F.2d 845, 853 n. 16* (5th Cir.), *cert. denied*, ***454 U.S. 1125, 102 S. Ct. 975, 71 L. Ed. 2d 113 (1981)***.

[5] *475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *see also* **Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 493-94, 93 L. Ed. 2d 427 (1986)** (discussing predatory pricing).

[6] *Matsushita*, 106 S. Ct. at 1356 (emphasis in opinion) (quoting *Fed.R.Civ.P. 56(e)*).

[7] *Matsushita*, 106 S. Ct. at 1356.

[8] *Id. at 1357-58*.

[9] **[**8]** Stitt's theory here is different: Champion is accused of cutting prices in one market--original equipment--in order to capture concurrent gains in another market--replacement equipment. It is central to Stitt's theory that purchasers of replacement spark plugs prefer the same brand that came with the equipment when new. [10]

Premised on this theory, Stitt's evidence could not support an economically plausible inference that Champion's policy was aimed ultimately at raising prices above competitive levels. Under Stitt's theory that a sale to an original-equipment manufacturer assures sales to the replacement market, an inquiry into competitive effect must look at the original and replacement markets together. When Champion sets the prices for original-equipment plugs, the expected return includes not only the price paid by the original-equipment manufacturer, but also the replacement purchases that probably will follow. Hence, any meaningful comparison of price and cost must encompass Champion's sales to both markets. [11] Stitt's evidence did not demonstrate that Champion's practices were "predatory" across both markets.

[9]** Looking at it another way, Stitt never proved that Champion's recoupment of losses on below-cost sales depended upon the absence of Stitt as a competitor. No action of Champion prevented Stitt from also pricing its product to original-equipment manufacturers with an expectation of return from the replacement market. Stitt's own witnesses testified that the consumer preference can be captured by *any* manufacturer who can place its plugs with engine makers. [12] Hence, any ability Champion may have had to raise prices for replacement plugs was not the result of market power. ***HN4***[🡅] Without an economically plausible theory of anticompetitive effect, Stitt was not entitled to reach the jury on the predatory-pricing claim.

[10]** B

Stitt also alleged that Champion engaged in two kinds of illegal price-discrimination: **[*1257]** Champion charged different prices in the markets for original and replacement equipment, as we discussed, and Champion varied its prices between different warehouse distributors of replacement plugs. Stitt contended that these practices constituted an attempt to monopolize in violation of Sherman Act *§ 2*. Stitt also complained that this discrimination violated ***HN5***[🡅] the Robinson-Patman Act, which prohibits either direct or indirect "discrimination in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . ." [13]

HN6[🡅]

We **[**11]** explained in *International Air v. American Excelsior Co.*, [14] that when a company claims that its competitor engaged in price discrimination--a "primary-line" claim--injury to competition is not established by evidence of "a mere diversion of business from one competitor to another." [15] In *International Air*, we affirmed entry

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[9] *See Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884, 889 (5th Cir. 1984)*, *cert. denied*, ***469 U.S. 1160, 105 S. Ct. 910, 83 L. Ed. 2d 924 (1985)***; *International Air Industries, 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)***.

[10] The phenomenon that consumers prefer the original plug for replacement is not new to ***antitrust law***. *See Ford Motor Co. v. United States, 405 U.S. 562, 565, 92 S. Ct. 1142, 1145, 31 L. Ed. 2d 492 (1972)* (discussing "OE tie" in automotive spark plugs).

[11] *Cf. Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 305* (5th Cir.) (stating that predatory-pricing analysis must include entire product line), *cert. denied*, ***469 U.S. 833, 105 S. Ct. 123, 83 L. Ed. 2d 65 (1984)***.

[12] Counsel for Stitt retreated from this admission at oral argument, contending for the first time that consumers tended to use Champion plugs for replacement purposes because Champion's exclusive-dealing practices made other brands unavailable. Such a theory is inconsistent with the essence of the predatory-pricing claim: if Champion so dominated the replacement market, it would not need to sell below cost in the original equipment market.

[13] *15 U.S.C. § 13(a)*.

[14] *517 F.2d 714 (5th Cir.1975)*.

of a directed verdict against a manufacturer of cooling pads who sued a competitor alleging that the competitor charged lower prices in some cities than in others. We found the directed verdict appropriate because there was no evidence that the defendant predatorily priced; in charging differential prices the defendant had not "sacrificed present revenues for the purposes of driving [the plaintiff] out of the market." [16] For proof of competitive effect, Stitt rests upon its assertion that the differences in price constitute predatory behavior.

As **[**12]** we have explained, Stitt failed to prove that Champion's pricing of spark plugs in the original and replacement equipment markets was predatory. On this record, then, there was no attempt to monopolize nor proof of "lessened competition" within the meaning of the Robinson-Patman Act.

Champion did not deny that it sold industrial spark plugs to NAPA, a national chain of auto parts stores, at a lower price than it sold to other warehouse distributors and intermediate sellers. However, Stitt never produced evidence that the price difference inhibited competition or even its ability to compete in the replacement plug market; indeed, Stitt's brief on appeal fails to offer any theory as to why this should be so. Because the Robinson-Patman Act only prohibits price-discrimination with the requisite anticompetitive effect, the district court was justified in entering a direct verdict on this issue.

C

Stitt also alleged that Champion violated the Clayton Act in making agreements with distributors to carry Champion plugs exclusively. ***HN7***[] Section 3 of the Act makes it unlawful to

> make a sale **[**13]** or contract for sale of goods . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not . . . deal in the goods . . . of a competitor . . . of the . . . seller, where the effect of . . . such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. [17]

The written agreement between Champion and its distributors disclaimed any obligation for the distributor to carry only Champion products. Stitt alleges, however, that Champion secured such agreements under the guise of a promotional program known as "Feature Line Selling." Under the program, Champion analyzed the distributor's rate of inventory turnover to determine which non-Champion brands were worth carrying; the underlying principle was that a distributor could reduce inventory costs by carrying only Champion's full line of plugs. Champion supplemented this persuasion by offering distributors **[**14]** promotional gifts, ranging from jackets **[*1258]** to refrigerators, if they removed competing spark plugs from their shelves. Several former Champion salespersons and supervisors testified that these incentives persuaded at least three distributors to agree to stop carrying Stitt plugs.

Whether there were exclusive dealing contracts was a jury question, perhaps, but it does not follow that the district court erred in its directed verdict. While Stitt proved that a handful of distributors once removed Stitt plugs from their shelves, Stitt proved no instance in which a distributor honored an exclusive dealing agreement by refusing to purchase Stitt plugs. In addition, there was no testimony that any distributor agreed to refrain from selling competing plugs for any specified period of time. [18] There was no evidence that a distributor who failed to abide by the agreement would be subject to any sanction and hence no reason to believe distributors did not feel free to stock

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[15] *Id. at 721*.

[16] *Id. at 723*.

[17] *15 U.S.C. § 14*.

[18] *Cf.* *Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403, 412 (5th Cir.1962)* (finding exclusive-dealing contract permissible because it was terminable without cause in six months). The Seventh Circuit also recently has concluded that because they lack any serious anticompetitive effect, "exclusive-dealing contracts terminable in less than a year are presumptively lawful under section 3." *Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir.1984)*.

competing plugs. More to the point, Stitt did not prove the extent of its foreclosure from the replacement market; Stitt offered no comparison between the number of distribution outlets available and the number **[**15]** of those foreclosed. Without more, no reasonable jury could have concluded that Champion's efforts foreclosed a "substantial share of the relevant market." [19]

[16]** Finally, Stitt's theory of the original-equipment preference is inconsistent with its claim that Champion denied Stitt access to the replacement market through exclusive-dealing contracts. Stitt would not gain much from access to distributors' shelves if Stitt could not place its plugs in original equipment and capture the consumer preference. Stitt's proof leads to the inescapable conclusion that the main competitive battle in this industry is fought at the front door of the original-equipment manufacturer. The jury was offered no proof that any anticompetitive practice of Champion handicapped Stitt in that fight.

III

Stitt also challenges the judgment on the basis of two evidentiary rulings. One ruling precluded discovery and admission of evidence as to any matter before April 15, 1978, the date of an existing antitrust settlement between Stitt and Champion. The other ruling excluded from evidence a 1953 cease-and-desist order entered against Champion by the Federal Trade Commission. ***HN8***[] Keeping in mind that such evidentiary rulings are reviewable for abuse of discretion, [20] we find neither **[**17]** ruling to be a basis for reversal.

A

The parties entered into a settlement on April 15, 1978, in which Stitt released Champion of any antitrust claims Stitt may have had at that time. The district court refused discovery of any document relating to Champion's activities before the settlement. The court also ordered such evidence excluded at trial.

Stitt argues persuasively that even though it could not sue Champion for conduct before the settlement, such conduct may be relevant to Champion's post-settlement activities and thus discoverable and admissible. [21] The argument is sound, as **[*1259]** far as it goes. ***HN9***[] However, we will reverse a judgment for an evidentiary ruling such as this only if it affects the "substantial rights of the parties." [22] Stitt has yet to articulate a legitimate theory of antitrust **[**18]** liability or to explain how the limit on discovery caused any prejudice. On these facts we will not speculate that the denial of discovery altered the result in this case.

B

An FTC investigation of Champion begun in the late 1940s resulted in a cease-and-desist order against the company based on violations of the antitrust laws. Although no copy of the 1953 order appears in the record, Stitt urges that it would have tended to prove that Champion engaged in a "common scheme or pattern of conduct" to violate the antitrust laws and should **[**19]** have been admitted. But such an aged order is not probative of

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[19] *See Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 328-29, 81 S. Ct. 623, 628-29, 5 L. Ed. 2d 580 (1961)*. We assume without deciding that Stitt adequately defined the relevant market. The district court held that Stitt never demonstrated which manufacturers and models of spark plugs should be included in the market for industrial plugs. We need not reach the issue.

[20] *See Jon-T Chemicals, Inc. v. Freeport Chemical Co., 704 F.2d 1412, 1417 (5th Cir.1983)*.

[21] Many courts have followed a similar principle in permitting discovery of evidence pertaining to a defendant's conduct occurring before a limitations period has run. *See* Wright & Miller, Federal Practice & Procedure: Civil § 2009 n. 38 (1970 and Supp. 1987).

[22] *See Fed.R.Evid. 103(a)*; *Tugwell v. A.F. Klaveness & Co., 320 F.2d 866, 868 (5th Cir.1963)*, *cert. denied*, ***376 U.S. 951, 84 S. Ct. 967, 11 L. Ed. 2d 970 (1964)***.

Champion's present practices. Moreover, because the order pertained only to Champion's conduct in the market for automotive spark plugs, it is of little relevance to Champion's present practices in the industrial-plug market.

Nor did excluding the order contravene ***HN10***[] *15 U.S.C. § 16(a)*, which provides that "a final judgment or decree" in an antitrust proceeding brought by the government constitutes "prima facie evidence" against the defendant in any subsequent proceeding brought by a non-government party "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." Again, the conduct of which Stitt complains does not extend back three decades; the order would have no collateral estoppel effect if the government brought these claims.

AFFIRMED.

Burchett v. General Tel. Co. of South

United States District Court for the Eastern District of Kentucky

April 5, 1988, Decided ; April 5, 1988, Filed

Civil Action No. 87-33

Reporter

699 F. Supp. 114 *; 1988 U.S. Dist. LEXIS 12340 **; 1989-1 Trade Cas. (CCH) P68,568

PAUL BURCHETT, PLAINTIFF, v. GENERAL TELEPHONE COMPANY OF THE SOUTH, DEFENDANT

Core Terms

summary judgment, antitrust, defense motion, termination, outrageous conduct, motive, group boycott, blacklisting, contractor, non-moving, telephone company, employees, reasons, malice

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

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

Under *Fed. R. Civ. P. 56(e)*, when a motion for summary judgment is made and supported as provided for in the rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

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

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

HN2[] **Summary Judgment, Burdens of Proof**

In a motion for summary judgment, although the moving party has the burden of showing conclusively that no genuine issue of fact exists and all facts and inferences drawn therefrom must be viewed in a light most favorable to the non-moving party, the factual dispute must be both genuine and material. Further, the facts must be such that if they were proven at trial a reasonable jury could return a verdict for the non-moving party and the non-moving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

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

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

HN3[] **Intentional Interference, Elements**

An essential element of the tort of intentional interference with a contract is the existence of "improper interference." The improper interference conclusion is reached by an examination of motive, the interest that it is trying to advance or protect, the nature of the conduct, the means used to interfere, and whether or not the interference was based upon malice. Although Kentucky has adopted the formulation of this tort, the state has not rejected the requirement of malice.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Torts > ... > Pain & Suffering > Emotional Distress > General Overview

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

HN4[] **Damages, Punitive Damages**

In suits alleging severe emotional distress, cases find liability only where the defendant's conduct is extreme and outrageous. It is not been enough that the defendant acted with an intent which is tortious or even criminal, or that he intended to inflict emotional distress, or even that his conduct is characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability is found only where the conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

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

HN5[] **Antitrust & Trade Law, Sherman Act**

Summary judgment is particularly appropriate in antitrust cases because ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a Sherman Act case. When the moving party his carried its burden under *Fed. R. Civ. P. 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.

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

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

HN6[] **Standing, Requirements**

In order to have standing to bring an antitrust claim, a private litigant must pass two tests. First, the plaintiff must allege that the defendant caused him injury in fact. Second, the interest sought to be protected must be arguably within the zone of interests to be protected or regulated by the statute in question. The antitrust laws were enacted to preserve competition and thereby to protect the individual plaintiff and the consuming public from the effects of any combinations or conspiracies in restraint of trade.

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

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

HN7[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In an antitrust action, after the standing requirements are satisfied, an antitrust violation may be shown by either of "two complementary categories of antitrust analysis." In the first category are agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal per se." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. The second category applies what is better known as the "rule of reason."

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

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

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

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

HN8[] **Practices Governed by Per Se Rule, Boycotts**

Under ***antitrust law***, group boycotts, or concerted refusals by traders to deal with other traders, are in the forbidden category of actions and considered per se antitrust violations.

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

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In order to support a per se violation under ***antitrust law***, a plaintiff would have to show that the motive behind the concerted action or the direct effect of the action or both is anti-competitive.

Counsel: [1]** John Harlan Callis, III, Perry & Preston, Paintsville, Kentucky, for Plaintiff.

Gregory L. Monge, VanAntwerp, Monge, Jones & Edwards, Ashland, Kentucky, for Defendant.

Judges: Henry R. Wilhoit, Jr., United States District Judge.

Opinion by: WILHOIT, JR.

Opinion

[*115] MEMORANDUM OPINION

HENRY R. WILHOIT, JR., UNITED STATES DISTRICT JUDGE.

This matter is before the Court upon defendant's motion for summary judgment. The plaintiff has filed a response and the defendant has filed a reply.

FACTS

Construed in a light most favorable to the plaintiff, the following facts are relevant to the defendant's motion for summary judgment. Late in 1985 the plaintiff was involved in a domestic dispute with his wife. The plaintiff was arrested and indicted for second degree assault and terroristic threatening. Because of the indictment, the plaintiff was terminated from his employment with the defendant, General Telephone Company of the South ("GTE"). The plaintiff had been an employee of the GTE for approximately 19 years. Although the indictment was subsequently dismissed, the plaintiff was not reinstated.

In the present action, the plaintiff does not challenge his termination. Instead, he attacks a long-standing policy that allows GTE to remove any employee of any contractor working **[**2]** for GTE. Each contractor employed by GTE is required to sign a contract containing a provision that allows GTE to implement this policy. Apparently, this policy has been used to prevent any discharged employee of GTE from working on GTE property. GTE alleges that the sole basis for this policy is to prevent a disgruntled former employee from damaging GTE property. However, the plaintiff asserts that this policy amounts to a virtual blacklisting of former GTE employees who may try to seek employment with other telephone service companies who do contract work for GTE. By its contractual agreements with other businesses, the plaintiff alleges that GTE engaged in a group boycott of his services and placed an unfair and unreasonable restraint and burden upon trade and interstate commerce.

After his termination, the plaintiff has attempted to obtain employment in the same industry. A company called SGI refused to employ the plaintiff because of GTE's refusal to allow the plaintiff access to its premises. The plaintiff declined to accept employment at Morehead State University as a telephone repairman because it was only a part-time position at $ 5.00 an hour. Also, the plaintiff declined **[**3]** a job offer by Hinkle and McCoy, a construction company that works in the communications business. Although the plaintiff was unclear as to the reason for his refusal to accept employment with Hinkle **[*116]** and McCoy, he implied that it was because he would have to work out-of-state.

In addition, the defendant asks the Court to take judicial notice of the fact that GTE is not the only telephone company in Kentucky or in this immediate area. The Court does take judicial notice of the existence of other large telephone companies located in West Virginia and Ohio and of many smaller telephone companies and related service industries in Kentucky. In fact, the defendant has attached four letters written to the plaintiff from companies to which he has applied. Not one of those companies makes any mention of the refusal to hire the plaintiff because of a contract with GTE.

DISCUSSION

As a preliminary matter, the plaintiff asserts that the Court is without power to deal with most of the factual matters in dispute because of the existence of doubt in favor of the plaintiff. However, the non-moving party has a greater burden in challenging factual matters in light of recent case law. While in the **[**4]** past a non-moving party may have been able to defeat a summary judgment motion by showing "the slightest doubt", the current summary judgment standards require the production of more proof. *See generally*, Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 Yale L.J. 914, 928-31 (1976). ***HN1***[] Under *Rule 56(e)*

> when a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

HN2[] Although the moving party has the burden of showing conclusively that no genuine issue of fact exists and all facts and inferences drawn therefrom must be viewed in a light most favorable to the non-moving party, the factual dispute must be both genuine and material. *60 Ivy Street Corporation v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987)*. Further, "the facts must be such **[**5]** that if they were proven at trial a reasonable jury could return a verdict for the non-moving party" and the non-moving party "is required to present *some significant probative* evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial." *Id*. (emphasis added). A discussion of three recent Supreme Court decisions reinforces the need for the non-moving party to provide some support for his position. *See generally* Childress, *A New Era For Summary Judgments: Recent Shifts At The Supreme Court, 116 F.R.D. 183 (1987)*.

The arguments presented in the defendant's motion for summary judgment are whether the plaintiff can maintain his claims under these facts. The plaintiff has attempted to assert three claims: intentional interference with prospective contractual relations, outrageous conduct causing severe emotional distress, and a violation of the Sherman Antitrust Act, *15 U.S.C. Section 1*.

INTERFERENCE WITH CONTRACT

The plaintiff alleges that the defendant has violated the tort of intentional interference with prospective contractual relations. ***HN3***[] An essential element of this tort is the existence of "improper interference". *Cullen v. South **[**6]** East Coal Company, 685 S.W.2d 187, 189-90 (Ky. App. 1983)*. The improper interference conclusion is reached by an examination of "motive, the interest that it is trying to advance or protect, the nature of the conduct, the means used to interfere, and whether or not the interference was based upon malice." *Id. at 190*. Although Kentucky has adopted the formulation of this tort as set forth by the *Restatement (Second) of Torts Section 766*, Kentucky has not rejected the former requirement of malice. *Carmichael-Lynch-Nolan Advertising Agency, Inc. v. Bennett & Associates, Inc., 561 S.W.2d 99, 102 (Ky. App. 1977)*; *Thermothrift Industries, **[*117]** Inc. v. Mono-Therm Insulation Systems, Inc., 450 F. Supp. 398, 404 (W.D. Ky. 1978)*.

The Court is unable to find any evidence of malice. The plaintiff has failed to show any evidence that GTE has adopted this policy with malicious intent or without any justification. As early as 1976, GTE has stated this policy in writing and the plaintiff has admitted that he was aware of this policy prior to his termination. At best, the plaintiff has shown that one company, SGI, refused to hire the plaintiff because of GTE's refusal to allow him on its **[**7]** premises. Moreover, GTE's contract with SGI was precipitated by the plaintiff's request that SGI check with GTE. (Plaintiff's Deposition, p. 14).

Further, the contract provision allowing GTE to terminate employees of any contractor was in force at least 10 years prior to the plaintiff's termination and this policy was not adopted with the malicious intent of preventing the plaintiff's future employment. Apparently, the plaintiff is attempting to show that his termination was made with malice and that this improper motive satisfies the "improper interference" element of the intentional interference with a prospective contract. However, the relevant motive in this action is GTE's motive in including this provision in its contracts with other businesses and the policy behind it. The plaintiff has submitted no proof that this policy and the attendant contract provision was adopted with the malicious intent of preventing the plaintiff from seeking other employment. As a result, the plaintiff has failed to meet his burden of producing "some significant probative evidence" to show that this issue is in dispute.

For these reasons, the defendant's motion for summary judgment on the tort of **[**8]** intentional interference with prospective contractual relations is sustained.

OUTRAGEOUS CONDUCT

The plaintiff has also alleged a claim of outrageous conduct causing severe emotional distress. *See* *Craft v. Rice, 671 S.W.2d 247, 251 (Ky. 1984)*. The defendant states that the plaintiff has utterly failed to produce any evidence that the defendant's conduct was extreme and outrageous. In response, the plaintiff asserts that *Craft* was a case primarily concerned with the statute of limitations and that the references to outrageous conduct are inapplicable to the case at bar. However, the plaintiff overlooks the definition of extreme and outrageous conduct as recited by Justice Stephenson.

> d. *Extreme and outrageous conduct*
>
> ***HN4***[] The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct had been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where **[**9]** the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.

Id. at 251 (dissent) (citing *Comments to Section 46 of the Restatement (Second) of Torts*). No evidence or even reasonable inference has been supplied by the plaintiff that would support a claim for outrageous conduct and the defendant's motion for summary judgment is sustained as to the plaintiff's second claim.

ANTITRUST VIOLATION

The plaintiff has, in addition, alleged a violation of the Sherman Antitrust Act, *15 U.S.C. Section 1*. Apparently, the plaintiff is alleging that GTE's policy has caused him to be blacklisted with other employers in the same field and that such action has caused him injury. The plaintiff has cited a long litany of cases holding that summary judgment should rarely be applied in antitrust litigation. However, the plaintiff has neglected to cite a recent Supreme Court case which held that ***HN5***[] summary judgment is particularly appropriate in antitrust cases because "***antitrust law*** limits the **[*118]** range of permissible inferences from ambiguous evidence" in a Sherman **[**10]** Act case. *Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. "When the moving party his carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id. at 586*.

Although the plaintiff's counsel has extensively briefed ***antitrust law*** in his pre-trial memorandum and in his response to the motion for summary judgment, no affidavits or exhibits have been attached to his response and only two depositions have been made a part of the record. The discovery deadline expired on January 15, 1988. On this meager record, the Court must determine if the plaintiff has met his burden of showing at least "some significant probative evidence" to sustain an antitrust violation. The Court also notes that since the plaintiff has the burden of proof at trial, it is even more incumbent upon him to supply evidence of such violations. Moreover, if the factual context renders the plaintiff's claim implausible, then the plaintiff "must come forward with more persuasive evidence to support [his] claim than would otherwise be necessary." *Id. at 587*.

HN6[] In order to have standing to bring **[**11]** an antitrust claim, a private litigant must pass two tests. *Malamud v. Sinclair Oil Corporation, 521 F.2d 1142, 1151 (6th Cir. 1975)*. First, the plaintiff must allege that the defendant caused him injury in fact. Second, the interest sought to be protected must be "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Id*. (citing *Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)*. "The antitrust laws were enacted to preserve competition and thereby to protect the individual plaintiff and the consuming public from the effects of any combinations or conspiracies in restraint of trade." *Id. 521 F.2d at 1152*.

The defendant asserts that the plaintiff has failed to show any injury because of the lack of any evidence that the plaintiff has been deprived of any realistic job opportunities. However, the plaintiff has at least alleged injury because of the refusal of one company, SGI, to employ a person who is not permitted on GTE property. The second requirement for standing is less supportable. If the Court assumes that the plaintiff has been "blacklisted" or is the victim of a "group boycott", then **[**12]** the plaintiff might be within the zone of interests to be protected under the statute. An examination of these matters requires an examination of the merits of the antitrust claim. As a result, the Court will assume that the plaintiff has standing so that the merits of the claim may be examined.

HN7[] After the standing requirements are satisfied, an antitrust violation may be shown by either of "two complementary categories of antitrust analysis" as follows:

> In the first category are agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal per se." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.

National Society of Professional Engineers v. United States, 435 U.S. 679, 692 ***[**13]*** *55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*. The second category applies what is better known as the "Rule of Reason". *Id. at 687-91*.

The plaintiff has attempted to define the contract between GTE and its contractors as a "per se" violation of the Sherman Antitrust Act on the basis of a "group boycott" of the plaintiff or a "blacklisting" of the plaintiff's services. Although both **[*119]** of these practices have been shown to be per se violations, the facts presented in this action fail to rise to the level of either practice. *See* *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; *Quinonez v. National Association of Securities Dealers, Inc., 540 F.2d 824, 828-29 (5th Cir. 1976)*; *Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974)*, *aff'd*, *586 F.2d 644 (9th Cir. 1978)*, *cert denied*, *441 U.S. 907, 60 L. Ed. 2d 375, 99 S. Ct. 1996 (1979)*. In *Quinonez*, the plaintiff was unable to obtain employment as a security sales representative because of alleged blacklisting arising out of an express or tacit agreement between national securities firms not to hire anyone who had been fired or dismissed from any firm. *Quinonez at 826*. However, in the case at bar, the plaintiff has failed to show that GTE's policy prevents **[**14]** his employment with different companies who do not work on GTE property. The Supreme Court found that ***HN8***[] "group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category." *Klor's at 212*. A wide combination of traders acting in concert to prevent a single retailer from selling certain household appliances was held to be an illegal group boycott. *Id. 359 U.S. at 213-14*.

However, in the case at bar, the plaintiff has failed to submit any proof that the agreements between GTE and its contractors were for the purpose of "blacklisting" the plaintiff or organizing a "group boycott" of his services. The plaintiff has not shown how these agreements would affect his employment with a company that did not do contract work for GTE. In fact, the agreements would force the plaintiff to work for competitors of GTE because he would have to be employed by a company that was not permitted on GTE property. ***HN9***[] In order to support a per se violation, the plaintiff would have to show that the "motive behind the concerted action or the direct effect of the action or both is anti-competitive." *Cesnik v. Chrysler Corporation, 490 F. Supp. 859, 866* ***[**15]*** *(M.D. Tenn. 1980)*. Even if the restraint of trade is viewed as the plaintiff's ability to practice the skills of his profession, the plaintiff has not shown that the agreements would prevent his employment with companies who do not work on GTE property. At best, the plaintiff can show that his termination from GTE has made it more difficult for him to obtain employment in this immediate area. However, the cause for this result is the size of GTE and its decision to prevent discharged employees from working on its property and not any anti-competitive motive.

Since the agreements have not been shown to be illegal per se, the plaintiff must show at least "some significant probative evidence" of the violation of the "Rule of Reason". The competitive effect of the agreements must be examined by looking at the history of the restraint and the reasons why it was imposed. *National Society, 435 U.S. at 692*. The only evidence that the Court can find that relates to the reasons behind the agreements with the contractors is a statement by William Spears, personnel manager for GTE. Mr. Spears stated that the purpose of the contract provision was a "prudent business decision" to prevent harm to the **[**16]** company and its employees. (Spears Deposition, pp. 17-18). Although this statement is self-serving, no evidence has been submitted by the plaintiff that would indicate any other possible motive behind this policy. Clearly, the purpose of the policy is to prevent the possibility of damage to GTE property by disgruntled employees. Assuming that the agreements pose a restraint on competitive conditions, these agreements are a reasonable restraint because of the purpose of preventing destruction of property.

Any other conclusion based upon the factual context that has been presented is implausible and the plaintiff has failed to meet his burden of coming forward with more persuasive evidence than would otherwise be necessary. *Matsushita, 475 U.S. at 587*. For these reasons, the defendant's motion for summary judgment on the violation of the Sherman Antitrust Act is sustained. This 5 day of April, 1988.

[*120] JUDGMENT - April 5, 1988, Filed

For the reasons stated in a memorandum opinion of even date, the Court sustains the defendant's motion for summary judgment.

Accordingly, having reviewed the entire record and being sufficiently advised,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) that the defendant's **[**17]** motion for summary judgment is SUSTAINED;

(2) that summary judgment is GRANTED for the defendant, General Telephone Company, on all claims of the plaintiff;

(3) that this is final and appealable order.

This 5 day of April, 1988.

Flip Side Prods. v. Jam Prods.

United States Court of Appeals for the Seventh Circuit

December 10, 1986, Argued ; April 5, 1988, Decided

Nos. 87-1531, 87-1547, 87-1496

Reporter

843 F.2d 1024 *; 1988 U.S. App. LEXIS 5068 **; 1988-1 Trade Cas. (CCH) P67,964; 10 Fed. R. Serv. 3d (Callaghan) 1070

Flip Side Productions, Inc., Plaintiff-Appellant, v. Jam Productions, Ltd., et al., Defendants-Appellees; Flip Side Productions, Inc., Plaintiff-Appellant, v. Tempo, Inc., Defendant-Appellee; Flip Side Productions, Inc., Plaintiff-Appellee, v. Jam Productions, Ltd., Chicago Jam, Inc., Jerry Mickelson, and Arny Granat, Defendants-Appellants

Subsequent History: **[**1]** As Amended April 8, 1988.

Prior History: Appeals from the United States District Court for the Northern District of Illinois, Eastern Division, No. 82 C 3684 -- James B. Moran, Judge.

Core Terms

concerts, district court, promotion, arena-level, Stadium, facilities, sanctions, artists, performers, summary judgment motion, metropolitan area, antitrust, discovery, summary judgment, essential facilities doctrine, imposition of sanctions, market power, competitor, frivolous, staging, genuine issue, material fact, annually, license, exclusive right, anti trust law, circumstances, defendants', bottleneck, consumer

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Evidence > Burdens of Proof > Initial Burden of Persuasion

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

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

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

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

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

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

HN1[] **Supporting Materials, Affidavits**

Summary judgment is appropriate when there exists no genuine issue as to any material fact and the moving parties are entitled to a judgment as a matter of law pursuant to *Fed. R. Civ. P. 56(c)*. The moving party bears the initial burden of establishing through affidavits or otherwise, the absence of a genuine issue as to any material fact, but does not necessarily have to put on evidence which negates the opponent's claim. Instead, the moving party may prevail by simply pointing out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

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

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

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

HN2[] **Summary Judgment, Evidentiary Considerations**

After the party moving for summary judgment has identified portions of the record which demonstrate the absence of a genuine issue of material fact, and the opposing party will have the burden of proof as to that fact at trial, the opposing party has the responsibility of going beyond the pleadings and setting forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial only exists when there is sufficient evidence favoring the nonmovant for a jury to return a verdict for that party. The court will not weigh the evidence, but if the evidence is merely colorable, or is not significantly probative, summary judgment is appropriately granted. If the opposing party fails to establish that the facts are in dispute, the court must enter judgment in favor of the moving party.

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

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

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

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

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

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

HN3[] **Summary Judgment, Burdens of Proof**

A district court's grant of summary judgment will be affirmed if the reviewing court determines that there is no genuine issue of material fact for trial, which turns on the court's decision that there was insufficient evidence, taking into account the evidentiary standard of proof and drawing all reasonable inferences in the nonmoving party's favor, to allow a rational jury to decide for the nonmoving party.

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

HN4[] Monopolies & Monopolization, Actual Monopolization

There are four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN5[] Sherman Act, Claims

Before a defendant can sustain antitrust liability, the plaintiff must establish the defendant's market power, i.e., the power to raise prices significantly above the competitive level without losing all of one's business. Market power means the ability to injure consumers by curtailing output and raising price; no possible injury, no market power; no market power, no violation; injury to the consumers is therefore an essential ingredient of liability. The threat to competition and ultimately to the consumer posed by a monopolist who controls and excludes its competitors from an essential facility, sometimes called a bottleneck, is that it can extend monopoly power from one stage of production to another and from one market into another. Under these circumstances, the essential facilities doctrine is used to preserve horizontal competition at a level other than the bottleneck.

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

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

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

HN6[] Private Actions, Standing

In an antitrust action, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

Civil Procedure > Attorneys > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN7[] Civil Procedure, Attorneys

See *Fed. R. Civ. P. 11*.

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

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN8[] Standards of Review, Clearly Erroneous Review

In order to determine whether a district court properly imposed *Fed. R. Civ. P. 11* sanctions, a court reviews the district court's findings of fact with respect to the imposition of sanctions under the clearly erroneous standard. Subsequently, the court reviews de novo the district court's legal conclusion that conduct in a particular case constitutes a violation of *Fed. R. Civ. P. 11*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

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

HN9[] Standards of Review, Abuse of Discretion

The decision whether there has been a violation of *Fed. R. Civ. P. 11* is a judgment call. *Fed. R. Civ. P. 11* speaks of reasonable pre-filing inquiry, the language of tort law. And although the definition of a frivolous legal position is itself a question of law, there will often be factual questions concerning the actual position the litigant took -- questions on which the court of first instance has the leading role. Thus, although a district court's legal conclusion is subject to de novo review the court applies a deferential standard on review of the question whether the filing of a paper violated *Fed. R. Civ. P. 11*. Further, if the court holds the sanction was properly imposed, the court again reviews the amount or type of sanction imposed under an abuse of discretion standard.

Civil Procedure > Sanctions > Baseless Filings > General Overview

Civil Procedure > Sanctions > General Overview

HN10[] Sanctions, Baseless Filings

Fed. R.. Civ. P. 11provides two grounds for sanctions: namely, the frivolousness clause and the improper purpose clause. The frivolousness clause requires that the party or the attorney conduct a reasonable inquiry into the facts and the law relevant to the case. The improper purpose clause ensures that a motion, pleading, or other document may not be interposed for purposes of delay, harassment, or increasing the costs of litigation. The standard for imposing sanctions under either prong of *Fed. R. Civ. P. 11* is an objective determination of whether the sanctioned party's conduct was reasonable under the circumstances.

Civil Procedure > Appeals > Frivolous Appeals

Governments > Courts > Clerks of Court

Legal Ethics > Professional Conduct > Frivolous Claims & Conduct

HN11[] **Appeals, Frivolous Appeals**

Fed. R. App. P. 38 authorizes an appellate court to award attorneys' fees and costs if the court holds that an appeal is frivolous. Under *Fed. R. App. P. 38* the district court is not empowered to award fees for proceedings before an appellate court; thus, an appellate court must reverse the finding of a district court to the extent it is inconsistent with *Fed. R. App. P. 38*. However, an appellate court is free to impose sanctions on those who abuse the appellate procedure. Before such sanctions are imposed, in addition to finding an appeal frivolous, an appellate court must also determine whether the case is an appropriate one for the imposition of sanctions.

Counsel: Steven M. Kramer, for Plaintiff.

William D. Heinz, Jenner & Block, Reuben A. Bernick, Rudnick & Wolfe, for Defendants.

Judges: Coffey and Easterbook, Circuit Judges, and Grant, Senior District Judge. *

Opinion by: COFFEY

Opinion

[*1026] COFFEY, Circuit Judge.

Flip Side Productions, Inc. (Flip Side) alleged that the defendants, Jam Productions, Ltd., Chicago Jam, Inc., Jerry Mickelson, Arny Granat (collectively, JAM) and Tempo International, Inc., MFG International, Inc., Ralph Mickelson, Robert Martwick, Norman Finkel, Lee Stern, Al Granat (collectively, Tempo), exclusively controlled the Rosemont Horizon, an "essential facility" for the booking and promotion of pop, rock, and rhythm and blues (R&B) concerts in the Chicago metropolitan area in violation of *§§ 1* and *2* of the Sherman Act. *15 U.S.C. §§ 1*, *2*. Flip Side further contended that the defendants **[**2]** violated the Racketeer Influenced and Corrupt Organizations Act (RICO). *18 U.S.C. § 1961 et seq.* Flip Side appeals from the order of the district court granting JAM and Tempo's motions for summary judgment and imposing sanctions against Flip Side in favor of Tempo pursuant to *Rule 11 of the Federal Rules of Civil Procedure*. JAM cross-appeals from the order of the district court denying JAM's petition for attorneys' fees and costs. We affirm in part and reverse in part.

I

Facts

A. *Background*.

This appeal concerns the booking and promotion of pop, rock, and R&B concerts (collectively, concerts) in the Chicago metropolitan area during the past decade by various promoters and their relationships to the owners or managers of several facilities in which concerts are performed. Promoters contract with performing artists, purchasing their services. In return, the promoter is responsible for advertising the concert, selling tickets, and obtaining a suitable concert hall. Promoters present concerts for Chicago consumers in facilities in three size categories: the arena-level facility, seating 10,000 or more; the middle-level facility seating 3,000-4,500; **[**3]** and the lower-level facility which seats approximately 1,000. At least 35 lower-level facilities and 16 middle-level facilities are located in the Chicago metropolitan area.

Prior to 1980, at least two arena-level facilities competed with each other in the Chicago metropolitan area: the Chicago Stadium which seats approximately 19,000, and the International Amphitheatre, which seats approximately 10,500. The Amphitheatre was constructed during the late 1930s and closed its doors in December of 1982. In its heyday, the Amphitheatre hosted many concerts as well as other events (including the Chicago National Basketball

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

Association team "The Chicago Bulls"). The larger, privately owned Chicago Stadium is the current home arena of two Chicago-area professional sports teams: the Chicago Bulls and the Chicago Blackhawks of the National Hockey League. Throughout the year, the Stadium hosts other events, such as boxing, ice shows, circuses, and music concerts. Specifically, during fiscal years August 1, 1979, to July 31, 1983, at least 21 concerts were performed at the Stadium. Attendance at these concerts ranged from approximately 7,500 to 20,000, and only three of these concerts were attended **[**4]** by less than 10,000 persons. Presently, the Chicago Stadium is available for staging concerts subject only to the promoter's ability to provide the owner a satisfactory profit.

Since 1980, at least three additional arena-level facilities have been constructed in the Chicago metropolitan area: namely, the Rosemont Horizon, the Pavilion, and Poplar Creek.

In 1978 the Village of Rosemont, Illinois, decided to construct an 18,000-seat indoor **[*1027]** arena, the Horizon, which would compete with the International Amphitheatre and the Chicago Stadium. The Horizon was to stage sporting events, circuses, ice shows, and other entertainment events. The Village of Rosemont financed the project, issuing $ 19 million worth of revenue bonds. To ensure the marketability of these bonds, the Village contracted with Araserv, Inc. (a concessionaire), the Ringling Brothers Barnum & Bailey Circus, and MFG International, Inc. (the corporate entity now known as Tempo International, Inc.). Pursuant to these agreements, Araserv, Ringling Brothers, and Tempo received long-term contracts for the exclusive use of the Horizon. For example, Araserv received a ten-year exclusive right to sell beverages, **[**5]** food, programs, etc., at all Horizon events except circuses; Tempo received a ten-year exclusive right to present no less than 50 concerts annually at the Horizon (subsequently the agreement was renegotiated to reduce the number of concerts Tempo must present to 32), and Ringling Brothers acquired exclusive rights to present a yearly circus. In exchange, the Village was guaranteed substantial license fees which were essential to the sale of the revenue bonds. Araserv guaranteed the Village a minimum annual license fee of $ 300,000 and further contracted to install and maintain equipment at the Horizon at a potential cost of $ 365,000. The Ringling Brothers guaranteed the Village 11 1/2 percent of its annual gross receipts or an annual license fee of $ 150,000, whichever was greater. Under its agreements, Tempo was obligated to pay a *minimum* license fee of $ 6,000 per event or $ 300,000 annually, again, whichever was greater. The exclusive nature of these ten-year contracts protected the guarantors Araserv, Tempo, and Ringling Brothers, allowing them the opportunity to recoup their substantial fee guarantees and expenditures. The Horizon opened its doors in May 1980, and concerts, **[**6]** as well as an assortment of other events, have been staged very successfully.

The Board of Trustees of the University of Illinois embarked on a new enterprise opening the 11,000-seat Pavilion on their Chicago campus in April 1982. During the previous year (1981) the University had inquired of several promoters, including JAM, as to their interest in contracting for the use of the Pavilion for staging concerts. The University eventually entered into an agreement with JAM under which JAM had the exclusive rights to present at least 30 events or commercial performances per year. In exchange, JAM guaranteed the University $ 250,000 per year. Also note that the Pavilion has well in excess of 100 dates available annually for the presentation of concerts or other attractions.

Lastly, the construction of Poplar Creek, an outdoor, arena-level facility, was completed after 1980, and the facility is currently available for the presentation of concerts. The record neither revealed the exact date construction of Poplar Creek was completed nor the date concerts were initially staged.

B. *The Litigation*.

In June 1982 Flip Side, a corporation engaged in the business of booking and **[**7]** promoting [1] concerts in the Chicago metropolitan market since the mid-1970s, alleged that JAM, its competitor, entered into exclusive leases

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[1] The parties stipulated to the following definition of "promoter":

> "Promoter is defined as a person who presents live musical entertainment events (hereinafter referred to as concerts). Concerts are performed by artists. In order to promote a concert, a promoter conducts, *inter alia*, the following activities:

with co-defendants Village of Rosemont and the University of Illinois for the right to promote concerts at two "essential facilities," namely the Rosemont **[*1028]** Horizon and the Pavilion, owned by the co-defendants, respectively. [2] **[**9]** Flip Side alleged that the conduct of JAM, the Village of Rosemont and the University of Illinois, i.e., entering into exclusive leases for the use of the purported facilities, constituted monopolization of the promotion of concerts in the Chicago metropolitan area, an attempt to monopolize the relevant market, and a conspiracy, combination, and contract to unreasonably restrain trade in violation of §§ 1 and 2 of the Sherman Act. *15 U.S.C. §§ 1*, 2. In response and during August 1982, JAM filed a counterclaim, a "mirror image" [3] of Flip Side's complaint, and a third-party complaint contending that Flip Side and its principals, Lawrence and Carl Rosenbaum, also had violated §§ 1 and 2 of the Sherman Act by entering into an exclusive rights agreement to promote concerts at the International **[**8]** Amphitheatre, purported to be an essential facility from mid-1976 to mid-1980 (before the Horizon was constructed).

Subsequently, the University of Illinois filed a motion for summary judgment and on October 29, 1982, Judge Moran granted the University's motion for summary judgment, finding:

> "The Pavilion has well in excess of 100 dates available annually for the presentation of concerts. . . . [*Flip Side*] *has never requested permission to present a concert* or even inquired about the Pavilion's availability.
> * * *
>
> *Jam and other promoters have access for non-University events, such as rock groups. Any promoter* can arrange with [the University of] Illinois for a concert or performance by its artists or performers (who, necessarily, would not be artists or performers of JAM), with a **[**10]** possible consequent dimunition of JAM's obligation to schedule events."

(Emphasis supplied).

In April 1983, Flip Side filed its first amended complaint, joining as defendants Tempo International, Inc., a partnership specifically organized to enter into a licensing agreement with the Village of Rosemont for the presentation of concerts at the Rosemont Horizon, and Tempo International, Inc.'s owners, Ralph R. Mickelson, Alan Granat, [4] Lee B. Stern, Robert F. Martwick, and Norman D. Finkel (collectively, Tempo). Flip Side alleged that

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> (a) purchases the services of an artist;
>
> (b) contracts with an artist or his agent to obtain that artist's services for a particular location, date and time;
>
> (c) contracts with the owner of a facility in which the concert is to take place;
>
> (d) sells tickets to the public, either directly or through ticket outlets;
>
> (e) advertises the concert;
>
> (f) forms various other activities, all of which are designed to successfully present the entertainment event to the public."

[2] Flip Side further alleged that JAM had an exclusive contract with the Aragon, an "essential" mid-level facility and exclusives with the Riviera and Park West, lower-level "essential" facilities. On April 22, 1986, Judge Moran granted defendants' motion for summary judgment with respect to Flip Side's middle-level and lower-level antitrust claim, finding:

> "This claim borders on the frivolous. Defendants, in an almost humorous fashion, list the facilities in each size category which Flip Side has admitted exist. The list of middle-level facilities extend to 16. The list of lower-level facilities counts 35. No one person or company owns them all, so the issue of monopoly control, which is the key to essential facility doctrine, does not even appear."

Flip Side has not pursued its middle- and lower-level antitrust claim on appeal.

[3] JAM's counterclaim and third-party complaint recounted almost verbatim Flip Side's antitrust allegations and simply substituted itself as plaintiff and Flip Side as defendant. JAM asserted that the International Amphitheatre, rather than the Pavilion and Horizon, was the purported essential facility. Therefore, Judge Moran described JAM's counterclaim as a "mirror image" of Flip Side's complaint.

[4] Ralph Mickelson and Alan Granat are the respective fathers of JAM's two principals, Jerry Mickelson and Arny Granat.

Tempo, which had an exclusive license for the use of the Horizon, had provided JAM an exclusive sublicense of its exclusive contract with the Village for the promotion of concerts at the Horizon, an essential facility in violation of *§§ 1* and *2* of the Sherman Act. In its first amended complaint, unlike in its original complaint, Flip Side no longer alleged that the Pavilion was an essential facility for the promotion of concerts.

[11]** On May 11, 1984, Flip Side filed its second amended complaint, which now included a RICO claim, and added as defendants: Franklin Fried (sole shareholder of Fried & Assoc., Inc.), Fried & Assoc. (the business entity responsible for managing the Horizon), and Paul Johnson (an employee of Fried & Assoc.). In its RICO count Flip Side alleged that the Village of Rosemont, **[*1029]** Tempo, Fried & Assoc., Franklin Fried, and Johnson conspired to defraud recording artists performing at the Horizon by deducting phony expenses from the artists' compensation. Flip Side contended that "the JAM defendants and Tempo excluded Flip Side from the Horizon in order to prevent the performers from discovering the fraud by comparing JAM's fees with the assertedly lower fees that Flip Side would hypothetically have charged." Memorandum and Order, April 22, 1986. Flip Side further alleged that as a result of the defendants' conspiracy, it was injured "by being excluded from competition in the market."

Initially JAM moved for summary judgment and on June 12, 1984, Judge Moran denied the motion, without prejudice to its resubmission, noting that for the purposes of the motion JAM had not contested **[**12]** the plaintiff's allegation that the Horizon was an essential facility. In its summary judgment motion, JAM denied any liability, arguing that it had not violated the antitrust laws because it neither controlled nor excluded Flip Side from the Horizon. JAM asserted that Flip Side had access to the Horizon to promote concerts but had not attempted to contract with Tempo or the Village for the Horizon's use. Denying JAM's motion, the district court stated: "the denial is based less on any conviction that there are disputed facts than it is on the belief that the motion is premature," i.e., discovery was still open.

However, JAM was not to be outdone and filed an amended counterclaim and third-party complaint reasserting its antitrust allegations against Flip Side and adding a RICO claim. JAM alleged that in April 1980 the Rosenbaums, Flip Side's owners, along with others, were indicted by a federal grand jury for 12 counts of violations of *18 U.S.C. §§ 1341* and *1343* (mail and wire fraud). The indictment recounted the Rosenbaums' involvement in a scheme to defraud rock performers, the Chicago Park District, and the City of Chicago. According to the indictment, **[**13]** the Rosenbaums falsified ticket and expense information regarding four rock concerts they were promoting at Soldier Field in Chicago. Apparently, the Rosenbaums sold more tickets than they reported to the performers and the City of Chicago and kept the excess as "profit." Eventually, the Rosenbaums pleaded guilty to "knowingly, wilfully and unlawfully causing a wire communication to be transmitted in interstate commerce for the purpose of executing a scheme to defraud in violation of Title 18 [U.S.C. *§]1343*, as charged in count 10 of the indictment." In its RICO count JAM further alleged that the Rosenbaums used the "profits" derived from this illegal scheme to maintain and further Flip Side's purported unlawful exclusive agreement with the International Amphitheatre in order to obtain and maintain monopoly power in the arena-level market for the promotion of concerts in the Chicago metropolitan area. Based on these allegations, JAM contended that Flip Side violated RICO. 18 U.S.C. *§ 1961 et seq.* [5]

[14]** Subsequently, at the close of discovery, JAM and Tempo both submitted motions for summary judgment arguing that the Rosemont Horizon was not an "essential facility" for the promotion of arena-level concerts in the Chicago metropolitan area since other suitable facilities were available for staging concerts: namely, the Pavilion, the Stadium, and Poplar Creek. In his April 22, 1986, Memorandum and Order, Judge Moran granted the defendants' summary judgment motions and observed that Flip Side relied exclusively on the essential facilities doctrine for all its antitrust allegations. Thus, the district court applied the following legal framework taken from our decision in *MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081* (7th Cir.), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*:

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[5] Flip Side later brought a motion for summary judgment on the basis that the statute of limitations had run on the alleged RICO claim. The district court granted the motion concluding that JAM's RICO claim was untimely. Memorandum and Order, April 22, 1986.

> "Because a party which controls a facility -- be it power lines, telephone cables or stadiums -- which gives it a monopoly in one market can easily use this control to **[*1030]** further a monopoly in another market, courts have interpreted the antitrust laws as imposing an 'obligation [on the monopolist] to make the facility **[**15]** available on non-discriminatory terms.'"

Memorandum and Order at 3. The district court assumed that the relevant market was the promotion of pop, rock, and R&B arena-level concerts in the Chicago metropolitan area and stated that the "competition between Flip Side and JAM over the use of arena-level facilities is the real subject matter of this litigation." *Id.* at 8.

The district court noted that Flip Side originally relied on a "theory of a conspiracy 'triangle'" involving JAM, the Pavilion and the Horizon. *Id.* at 9. The court observed that because Flip Side no longer asserted that the Pavilion was an essential facility for the promotion of concerts, its contentions regarding the Horizon were "on very unsure footing" since it now had a "clear alternative to the Horizon, namely, the Pavilion." *Id.* Nevertheless, the court stated:

> ". . . that the Horizon could be considered an essential facility if due to natural advantage, custom, restrictions of scale, or an industry wide accrediting function *those who controlled the Horizon controlled the market in concert promotions in the Chicago area*. Given the dynamics of the concert promotion business, the **[**16]** Horizon could be considered an essential facility if most performing artists who could draw an 'arena-level' crowd would perform only at the Horizon."

Id. at 10-11 (emphasis supplied). The court then proceeded to summarize the "only evidence" produced by Flip Side relevant to the question of whether the Horizon "was an essential facility because artists of a certain kind customarily performed there only." *Id.* at 11. This evidence consisted of depositions taken by Flip Side but never referred to in its memorandum and opposition to Tempo and JAM's motions for summary judgment.

After reviewing these depositions, Judge Moran pointed out that Lawrence Rosenbaum's testimony provided "the kernel for a theory that custom has imbued the Horizon with monopoly drawing power." *Id.* Rosenbaum testified:

> "A. Also, another difference between the two facilities is the acceptance by the groups and agents of the Horizon and what appears to be developing as a dislike by those same people for the Pavilion.
>
> * * *
>
> Q. On what facts do you base the statement that some concerts -- some artists prefer the Horizon over the Pavilion?
>
> A. Information from agents."

[17]** However, relying on the deposition testimony of several promoters, the district court concluded:

> "At the most, this evidence from other promoters suggests that promoters who booked for performers with large draws saw the Horizon as a desirable facility. This evidence is not enough to find that plaintiff has met its burden to establish a genuine issue as to the Horizon's essential status. . . . We find, therefore, that the Horizon is not an essential facility." [6] **[**19]**

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[6] The district court further found that even if the Horizon was considered an essential facility for the promotion of concerts in the Chicago area, Flip Side failed to prove that it had been excluded from the Horizon. The court observed that Flip Side "while managing to produce documents which stack over two feet high, . . . has not produced a single copy of an alleged 'written' [exclusive] agreement" between Tempo and JAM. *Id.* at 14. The court pointed out that "the closest Flip Side goes to proving such an exclusive agreement is Zuckerman's [a promoter] testimony that a rumor existed that JAM had an exclusive at the Horizon. This does not satisfy Flip Side's burden of proof to produce evidence that would put its contentions in dispute." *Id.* at 15. Lastly, the district court found that Flip Side failed to produce any evidence "that the alleged [exclusive] agreement was intended to exclude competitors or that it had such an effect." *Id.* at 16.

Id. at 13-14. Significantly, Judge Moran concluded that Flip Side failed to produce any evidence that Tempo or JAM's alleged illegal conduct caused Flip Side an "anti-trust injury." *Id.* at 16. On this basis, the district court granted the defendants' motions **[*1031]** for summary judgment. On appeal Flip Side asserts that there is an issue of material fact as to whether the Horizon is an essential facility for the promotion of arena-level concerts in the Chicago metropolitan area. Initially, Flip Side argues that its contention that most performing artists who could draw an arena-level crowd prefer to perform at the Horizon if it was available puts at issue whether the Horizon was an essential **[**18]** facility. Secondly, Flip Side asserts that the testimony to the effect that the Pavilion was "not a viable facility for arena-level concerts" because it was approximately half the size of the Horizon and thus was not a practical substitute for the Horizon raises an additional question as to the Horizon's essentiality. Flip Side further contends that the Chicago Stadium was not a viable alternative because it was unavailable as a result of a third party's exclusive agreement for the promotion of concerts at that facility. Lastly, Flip Side asserts that the International Amphitheatre was neither viable nor a practical alternative to the Horizon because it "was considered 'a toilet' by JAM itself." [7] Plaintiff-Appellant's Brief, June 30, 1986.

After the district court granted the defendants' motions for summary judgment, it denied both JAM and Flip Side's petitions for fees. However, the district court granted Tempo's petition for fees "incurred in preparing material after [the time discovery was closed]" against Flip Side at the rates Tempo was actually billed during that period. Flip Side now also appeals from the order of the district court granting Tempo's petition for fees. JAM appeals from the district court's order denying its petition for fees and costs. [8]

[20]** II

Summary Judgment Standard

HN1[] Summary judgment is appropriate when there exists "no genuine issue as to any material fact and . . . the moving part[ies are] entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party bears the initial burden of establishing through affidavits or otherwise, the absence of a genuine issue as to any material fact, *Adickes v. S. H. Kress & Company, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970)*, but does not necessarily have to put on evidence which negates the opponent's claim. *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)*. Instead, the moving party may prevail by simply pointing out "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact.'" *Id.*

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[7] Flip Side apparently referred to the following deposition testimony of Jerry Mickleson, a JAM owner:

> "Q: [Steven Kramer --appellant's counsel] Have you ever stated that you would never do a show at the Amphitheatre?
>
> A: I may have stated that somewhere along the line.
>
> * * *
>
> Q: Okay. Have you ever referred to the Amphitheatre as a toilet?
>
> A: I may have."

[8] Oral argument was initially heard on December 10, 1986, while JAM's counterclaim and third-party complaint were still pending in the district court. Consequently, we dismissed appeal no. 86-1837 for lack of jurisdiction because the April 22, 1986, Memorandum and Order was not a final appealable order. Subsequently, on March 2, 1987, the district court granted Flip Side's motion for summary judgment on the counterclaim, finding that the International Amphitheatre was not an essential facility for the promotion of rock concerts in the Chicago metropolitan area. The court noted ironically that JAM had "jumped its own fence" to argue that the Amphitheatre was an essential facility despite having argued strenuously that the Stadium was and still is available for staging rock and other concerts. JAM has not appealed from the district court's granting of Flip Side's motion for summary judgment but appeals from the court's denial of JAM's petition for fees and costs. Flip Side appeals from the summary judgment order in favor of the defendants and also from the court's imposition of sanctions pursuant to *Rule 11* in favor of Tempo. By an order of this court on April 13, 1987, we consolidated these appeals and have decided the merits of the antitrust allegations on the basis of the briefs filed and argument heard in appeal no. 86-1837.

HN2[] After the moving party has identified **[**21]** portions of the record which demonstrate **[*1032]** the absence of a genuine issue of material fact, and the opposing party will have the burden of proof as to that fact at trial, the opposing party has "the responsibility of going beyond the pleadings and setting forth 'specific facts showing that there [is] a genuine issue for trial.'" *Valley Liquors Inc. v. Renfield Importers Ltd., 822 F.2d 656, 659 (7th Cir. 1987)*; *see* *Celotex Corp. v. Catrett, 106 S. Ct. at 2553*. "A genuine issue for trial only exists when there is sufficient evidence favoring the nonmovant for a jury to return a verdict for that party." *Id.* We will not weigh the evidence, *Id.*, but "if the evidence is merely colorable, or is not significantly probative," summary judgment is appropriately granted. *Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)*. If the opposing party fails to establish that the facts are in dispute, the court must enter judgment in favor of the moving party. *Celotex Corp. v. Catrett, 106 S. Ct. at 2553*. In such a situation, there can be "no genuine issue as to any material **[**22]** fact," since a complete failure of proof concerning a necessary element of the non-moving party's case renders all other facts immaterial.

HN3[] Thus, we will affirm the district court's grant of summary judgment in favor of the defendants

> "if we determine that there was no genuine issue of material fact for trial, which turns on our decision that there was insufficient evidence, taking into account the evidentiary standard of proof and drawing all reasonable inferences in [Flip Side's] favor, to allow a rational jury to decide for [Flip Side]."

Valley Liquors Inc. v. Renfield Importers Ltd., 822 F.2d at 659.

III

The Essential Facilities Doctrine

(The Bottleneck Theory)

At the outset, we observe that the essential facilities doctrine "is a relatively recent addition to antitrust jurisprudence." Note, *Unclogging the Bottleneck, A New Essential Facilities Doctrine*, *83 Colum. L. Rev. 441, 447 (1983)*. Initially the doctrine was used as a label, rather than as an independent tool of analysis, enabling courts and commentators to classify **[**23]** antitrust cases. *Id.; see also* P. Areeda & H. Hovenkamp, ***Antitrust Law***, para. 736.1 (Supp. 1986). HN4[] However, in *MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081* (7th Cir.), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*, and more recently in *Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)*, this court adopted a four-element test as an independent method of proving antitrust violations under certain circumstances. In *MCI Communications, 708 F.2d at 1133*, we stated:

> "The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."

In this case, Flip Side relies exclusively on the essential facilities doctrine to establish that JAM and Tempo violated *§§ 1* and **[**24]** *2* of the Sherman Act. Central to the essential facilities doctrine is the "control of the essential facility by a monopolist." *Id.* HN5[] By this we mean that before a defendant can sustain antitrust liability, the plaintiff must establish the defendant's market power, i.e., the "'power to raise prices significantly above the competitive level without losing all of one's business.'" *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 665 (7th Cir. 1987)* (quoting *Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982))*. Or as recently pointed out by a colleague: "Market power means the ability to injure consumers by curtailing output and raising price; no possible injury, no market power; no market power, no violation; injury to the consumers is therefore an essential ingredient of liability." *Fishman v. Estate of Wirtz, 807 F.2d at 568* (Easterbrook, J., dissenting in part); *see* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467* ***[*1033]*** *(1985)*. **[**25]** The threat to competition and ultimately to the consumer posed by a monopolist who controls and excludes its competitors from an essential facility ("sometimes called a 'bottleneck'") is that it "can extend monopoly power from one stage of production to another and from one market into another." *MCI Communications, 708 F.2d at 1132*. Under these circumstances, the essential facilities doctrine is used "to preserve horizontal competition at a level other than the bottleneck." *Fishman v. Estate of Wirtz, 807 F.2d at 575* (Easterbrook, J., dissenting in part). Needless to say, the threshold inquiry is whether JAM, Flip Side's competitor, has or had market power in the relevant market. [9] In other words, we determine whether the defendants' (JAM and Tempo's) alleged control of the Horizon created a "bottleneck," i.e., is the Horizon an essential facility?

[26]** The district court found, and neither appellants nor appellees challenge, that the relevant market in this case was the promotion of arena-level concerts in the Chicago metropolitan area. The district court proceeded to analyze Flip Side's essential facilities claim evaluating its evidence of "the Horizon's monopoly drawing power," i.e., that big-time recording artists performing out of arena-level facilities preferred to perform at the Horizon and not at other arena-level facilities, i.e., the Stadium, the Amphitheatre, and the Pavilion. This evidence consisted of a statement made by Lawrence Rosenbaum [10] and was the principal evidence Flip Side produced to establish that JAM, its direct competitor, exercised significant market power in the relevant market.

[27]** Further, Flip Side submitted evidence, attempting to establish that the Pavilion was not a viable facility, i.e., that it did not reasonably duplicate the Horizon. This evidence consisted of the affidavit of Danny Kresky, a concert promoter, in which he stated:

> "It is also my understanding that the . . . Pavilion is approximately nine-thousand in capacity, which in my opinion is not a competitive venue to the Horizon because it is about one-half the size of the Horizon."

This same affidavit included the following statement: "It is my understanding that the Chicago Stadium is not available." Carl Rosenbaum, in his affidavit, also asserted that the Stadium was unavailable, at least in 1976, because the owner of the Stadium, Arthur Wirtz, had provided, pursuant to a contract, another promoter exclusive concert promotion rights at the Stadium. On this basis Flip Side asserted that neither the Pavilion nor the Chicago Stadium could reasonably duplicate the Horizon as a concert facility. Lastly, Flip Side contended that the International Amphitheatre was more expensive and not suited for staging concerts in light of the fact that the "Amphitheatre was considered a 'toilet' **[**28]** by JAM itself." Thus, like the Pavilion and Stadium, the Amphitheatre did not reasonably duplicate the Horizon. In conclusion, Flip Side contended that access to the Horizon (an alleged essential facility) was necessary to promote arena-level concerts in the Chicago metro area. After years of discovery this is the extent of the evidence produced by Flip Side to establish that **[*1034]** JAM and Tempo violated the antitrust laws.

We affirm Judge Moran's finding that the Horizon was not an essential facility for the promotion of arena-level concerts in the Chicago metro area. From our review of the record, we concur with the trial court's finding that Flip Side failed to produce specific facts establishing that there was a genuine issue for trial. The undisputed facts demonstrate (1) that Flip Side, for a time, promoted concerts at the International Amphitheatre under an exclusive

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[9] Flip Side alleged that Tempo had an exclusive contract with the Village of Rosemont for the presentation of concerts at the Horizon and further alleged that JAM had an exclusive sublicense for the promotion of concerts at the essential facility. This is a form of vertical organization in that Flip Side and JAM compete for the use of arena-level facilities, i.e., compete with each other for the presentation of concerts to consumers in the Chicago metropolitan market. JAM and Flip Side also compete for different performing artists. On the other hand, Tempo does not compete directly with Flip Side because it neither recruits artists nor actually promotes concerts itself; rather, it sublicenses its exclusive agreement to present concerts at the Horizon to various promoters, including JAM.

[10] Lawrence Rosenbaum testified, *inter alia*:

> "A. Also, another difference between the two facilities is the acceptance by the groups and agents of the Horizon and what appears to be developing as a dislike by those same people for the Pavilion.
>
> * * *
>
> Q. On what facts do you base the statement that some concerts -- some artists prefer the Horizon over the Pavilion?
>
> A. Information from agents."

agreement to do so, (2) that Flip Side admitted that the Pavilion was an arena-level facility, and further conceded that the Pavilion was available to it for staging concerts (although Flip Side apparently chose not to promote concerts there), (3) that concerts were performed at the Stadium during the relevant **[**29]** time period, (4) that Poplar Creek, too, staged concerts and was available as an arena-level facility, and (5) that although some artists preferred performing at the Rosemont Horizon rather than at the Pavilion, artists performed at other arena-level facilities, including the Pavilion and Stadium. There is no evidence in this record, consisting of hundreds of pages, setting aside Flip Side's accusations, fulminations and speculations, which would demonstrate that Tempo's alleged exclusive agreement with the Village and JAM's alleged exclusive sublicense agreement with Tempo instilled in JAM market power in *any* market or that the concert-going consumer suffered *any detriment*. The record contains nothing but Flip Side's speculative accusations regarding the "essential" quality of the Horizon. Drawing all reasonable inferences in Flip Side's favor, at most Flip Side produced merely colorable evidence; thus, we hold that the Horizon was not an essential facility and affirm the grant of summary judgment against Flip Side and in favor of the defendants.

Further, assuming Flip Side's best scenario, the defendants would still be entitled to summary judgment as a matter of law. Flip **[**30]** Side contended (1) that JAM and Tempo had exclusive control of the Horizon for the promotion of concerts, (2) that neither the Pavilion nor the Amphitheatre (while open) reasonably duplicated the Horizon, and (3) that the Stadium was unavailable because another promoter had the exclusive concert promotion rights in that facility. Under these circumstances, absent collusion between JAM, Tempo, and the promoter of concerts at the Stadium, Flip Side failed to demonstrate an antitrust injury since competition for the concert-going consumer remained as the promoters controlling the Horizon and Stadium necessarily vied for the market. In other words, the Horizon was not a bottleneck (i.e., not an essential facility). Flip Side neither provided nor has our research discovered, authority for the proposition that two competitors, each holding exclusive rights to promote a product (here concerts) from competing facilities (here two arena-level facilities) constitutes a violation of the antitrust laws where a third competitor (Flip Side) becomes defunct. The record in this case reveals that Flip Side's business failure was probably the result of its principals' dishonest and criminal activity **[**31]** rather than the defendants' alleged anti-competitive conduct. This was truly an antitrust "non-event." *Fishman v. Estate of Wirtz, 807 F.2d at 563* (Easterbrook, J., dissenting).

IV

Flip Side's RICO Claim

Flip Side alleged that the defendants were engaged in a systematic "and widespread deduction of phony, artificial and false expenses from the compensation that would otherwise have been paid to the artists [who performed at the Horizon]." Flip Side contended that "as a result of the scheme, plaintiff was damaged by being excluded from competition in the market." The district court stated: "It is unclear whether Flip Side has standing to sue on a RICO claim" for the alleged scheme, and further noted that "the causal connection between the alleged scheme to defraud artists and plaintiff's harm is a tenuous one: that the JAM defendants and Tempo excluded Flip Side from the Horizon in order to prevent the performers from discovering **[*1035]** the fraud by comparing JAM's fees with the assertively lower fees that Flip Side would have hypothetically charged." The district court found Flip Side's RICO claim fatally infirm. [11] On appeal, Flip Side asserts, in **[**32]** one sentence, that under the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 105 S. Ct. 3275, 3285-86, 87 L. Ed. 2d 346 (1985)*, that it has standing to allege the RICO claim.

While observing that such perfunctory treatment does not generally suffice as argument before this court, we reject Flip Side's contention that it had standing to bring the RICO claim. ***HN6***[] In *Sedima* the Supreme Court stated:

> "The plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. As the Seventh Circuit has stated: '[a] defendant who

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[11] The court further noted that even if Flip Side did have standing, it had failed to produce *any evidence* of fraud.

violates § 1962 is not liable for trebled damages for everyone he might have injured by other conduct, nor is the defendant **[**33]** liable to those who have been injured.'"

Id. at 3285-86 (quoting *Haroco, Inc. v. American National Bank & Trust Company of Chicago, 747 F.2d 384, 398 (7th Cir. 1984)*, *aff'd*, *473 U.S. 606, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985))*. In *Haroco* we stated that:

"This holding by no means renders superfluous the requirement in § 1964(c) that the plaintiff be injured 'by reason of' a violation of § 1962. As we read this 'by reason of' language, it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of § 1962 must, directly or indirectly, have injured the plaintiff's business or property.

Flip Side alleges that its business was injured because it was excluded from the Horizon. Flip Side's only possible basis for arguing that it had a right to promote concerts at the Horizon rests on our holding that the Horizon is an essential facility for the promotion of concerts in the Chicago metro area. In light of our contrary holding, Flip Side could not have suffered an injury to its business and thus had no standing to bring the RICO claim.

V

Rule 11

The district court stated: **[**34]** "All this litigation -- better termed 'warfare' -- between the parties has generated its own line of attack: *Rule 11* and *28 U.S.C. § 1927*." On March 2, 1987, the district court denied JAM and Flip Side's petitions for fees and granted Tempo's petition for fees. [12] Both JAM and Flip Side appeal from the order of the district court.

HN7[] "*Rule 11 of the Federal Rules of Civil Procedure* provides that if an attorney **[**35]** files pleadings that are not reasonably based on the law or in fact, or that are meant to harass, then 'the Court upon motion or upon its own initiative, *shall* impose . . . an appropriate sanction.'" [13]

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[12] Tempo moved for sanctions under both *28 U.S.C. § 1927* and *Rule 11*. *§ 1927* provides only for the imposition of sanctions against counsel while *Rule 11* provides for sanctions against both parties and their attorneys. *See* *Ordower v. Feldman, 826 F.2d 1569, 1573 (7th Cir. 1987)*. The district court assessed fees against Flip Side only; thus, we proceed with our analysis treating the district court's imposition of sanctions under *Fed. R. Civ. P. 11*.

[13] *Rule 11* provides:

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed properly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

Fed. R. Civ. P. 11 (1986).

Brown v. Federation of State Medical Boards of the United States, 830 F.2d 1429, 1433 [*1036] (7th Cir. 1987). HN8[] In *Brown* we adopted the following analysis to determine whether a district court properly imposed Rule 11 sanctions. Initially, we review the district court's findings of fact with respect to the imposition of sanctions under the clearly erroneous standard. Id. at 1434. Subsequently, we review *de novo* the court's "*legal conclusion* that conduct in a particular case constitute[s] a violation of Rule 11." *Id.* (emphasis added). HN9[] However, "the *decision* whether there has been a violation is a judgment call." Matter of Central Ice Cream Co., 836 F.2d 1068, 1072 (7th Cir. 1987) (emphasis added). This significant **[**36]** distinction exists because:

> "The Rule speaks of 'reasonable' pre-filing inquiry, the language of tort law. And although the definition of a frivolous legal position is itself a question of law, there will often be factual questions concerning the actual position the litigant took -- questions on which the court of first instance has the leading role."

Id. Thus, although the district court's "legal conclusion" is subject to *de novo* review "we apply a deferential standard on review of the question whether the filing of a paper violated Rule 11." *Id.* Further, if we hold the sanction was properly imposed, we again review the amount or type of sanction imposed under an abuse of discretion standard. Brown, 830 F.2d at 1434.

[37]** HN10[]

Rule 11 provides two grounds for sanctions: namely, the "frivolousness clause" and the "improper purpose" clause. Id. at 1435. The frivolousness clause requires that the party or the attorney conduct a reasonable inquiry into the facts and the law relevant to the case. *Id.* The improper purpose clause ensures "that a motion, pleading, or other document may not be interposed for purposes of delay, harassment, or increasing the costs of litigation." Id. at 1436. The standard for imposing sanctions under either prong of Rule 11 is an "objective determination of whether the sanctioned party's conduct was reasonable under the circumstances." Id. at 1435.

In imposing sanctions against Flip Side in favor of Tempo, the district court stated:

> "Added by amendment to the original complaint, Tempo was accused of having a licensing agreement with the Horizon, but no theory or evidence was ever raised as to how such an agreement was illegal, either *per se* or as administered by Tempo. In fact, as Tempo states in its fees petition, **[**38]** 'its principal' sin appears to be a 'partial familial relationship with the JAM principals.' . . . We find that Flip Side should have learned that it had no evidence of any antitrust behavior on Tempo's part by the time discovery was closed."

Implicit in the district court's finding is that it imposed sanctions under Rule 11's frivolousness clause because the court concluded that once discovery was closed, Flip Side should have known that the facts and the law then known clearly established that Tempo had not violated either the antitrust laws or RICO. As our earlier analysis of Flip Side's essential facility claims demonstrates, the district court found that at the close of discovery Flip Side had failed to produce any evidence that the alleged Tempo-JAM agreements had given JAM market power in any market. Further, Flip Side admitted that the Pavilion was an arena-level facility to which it had access to promote concerts. As previously noted, these factual findings are not clearly erroneous. At the close of discovery, because Tempo was not implicated in an antitrust or RICO violation, Flip Side was obligated to dismiss Tempo or suffer the consequences. Flip Side apparently **[**39]** chose the latter, and the district court, in its discretion, based upon "the actual position" Flip Side took, imposed sanctions. We hold that under these circumstances the district court properly imposed sanctions pursuant to Rule 11.

[*1037] As we pointed out in *Brown*, the most important purpose of Rule 11 sanctions is to deter frivolous litigation and the abusive practices of attorneys. 830 F.2d at 1438. We recognized that "to avoid prolonging and complicating . . . Rule 11 satellite litigation" the district court should provide specific findings when awarding substantial compensatory sanctions. Id. at 1440. In this case the district court specifically stated: "We assess those fees incurred in preparing material after that time [the close of discovery] against Flip Side at the rates Tempo was actually billed during that period." We are convinced that these findings and conclusions are sufficiently specific and allow us to "follow the path" taken by the district court. Id. at 1438. Tempo submitted a bill to the district court totaling $ 42,496.25 for fees incurred after the close of discovery. Flip Side asserts that **[**40]** this amount is excessive and unsupported. However, the district court reviewed the record and the fee requests, and we cannot say that the district court abused its discretion in imposing this sanction. It appears that Tempo expended considerable effort preparing and submitting its motion for summary judgment. Thus, we affirm the district court's imposition of *fees* in favor of Tempo in the amount of $ 42,496.25. [14]

However, the district court additionally imposed a sanction of $ 37,373.75 for Tempo's fees incurred responding to Flip Side's initial appeal (No. 86-1837) to this court from the order of the district court granting summary judgment for the defendants. Flip Side argues that the district court did not have jurisdiction to award fees and costs for proceedings **[**41]** pending in the appellate court. We agree.

HN11[] *Rule 38 of the Fed. R. App. P.* authorizes this court to award attorneys' fees and costs if we hold that an appeal is frivolous. [15] Under *Rule 38* the district court is not empowered to award fees for proceedings before this court; thus, we must reverse the finding of the district court to the extent it is inconsistent with *Rule 38*. However, this court is free to impose sanctions on those who abuse the appellate procedure. Before we impose sanctions, in addition to finding an appeal frivolous, we must also determine whether the case is an "'appropriate one for the imposition of sanctions.'" *Spiegel v. Continental Illinois National Bank, 790 F.2d 638, 650 (7th Cir. 1986)* (quoting *Indianapolis Colts v. Mayor and City Council of Baltimore, 775 F.2d 177, 184 (7th Cir. 1985))*; *see also* *Sparks v. NLRB, 835 F.2d 705, 707 (7th Cir. 1987)*. Therefore, we order Tempo, if it so chooses, to submit to the clerk of this court within fifteen (15) days a brief limited to ten (10) pages addressing whether either **[**42]** Flip Side's appeal from the order of the district court granting summary judgment for Tempo, or its appeal from the court's order imposing sanctions, or both, are frivolous and whether sanctions would be appropriately awarded. Further, if Tempo seeks *Rule 38* sanctions, it should attach to its brief a verified, itemized statement for the time expended briefing and responding to Flip Side's appeal from: (1) the order of the district court granting Tempo's motion for summary judgment, or (2) the order of the district court imposing sanctions, or both. If Tempo seeks *Rule 38* sanctions, Flip Side will be allowed five (5) days to submit a responsive brief (limited to ten (10) pages).

Lastly, we summarily reject JAM's appeal from the district court's denial of its petition for attorneys' fees and sanctions pursuant to *Rule 11* and *28 U.S.C. § 1927*. **[**43]** The district court found, and the record clearly demonstrates, that JAM responded to Flip Side's essential facility and RICO claims, utilizing "mirror" counterclaims and third-party complaints. Judge Moran stated:

> "While we are unwilling to hold that Flip Side's pleadings against JAM groundless **[*1038]** or to find a lack of competence on the part of Flip Side's attorneys, their behavior comes perilously close to harassment. However, we are reluctant to grant either side fees since, as Flip Side was arduously pursuing its claims, JAM (at least in theory) was likewise pursuing its counterclaims."

Mem. and Order, March 2, 1987. Although we observe that JAM has not appealed from the district court's grant of Flip Side's summary judgment motion on the essential facilities claim, to the extent JAM pursued its bogus claims, its conduct did not differ qualitatively from Flip Side's. As we noted, "the *decision* whether there has been a [*Rule 11*] violation is a judgment call," *Matter of Central Ice Cream Co., 836 F.2d at 1072* (emphasis added), better left to the discretion of the district court who has a bird's eye view of "the actual positions" **[**44]** taken by the litigants. *Id.* Under these circumstances, JAM is not entitled to an award of sanctions since we hold that the district court properly exercised its discretion.

For the reasons discussed above, we affirm in part and reverse in part.

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[14] The district court found that Tempo only requested fees and not costs. Tempo does not challenge the district court's finding; thus, we affirm the award of $ 42,496.25 (rather than the $ 44,253.05 total including costs noted in Tempo's brief).

[15] ***Rule 38*** provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

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Pope v. Mississippi Real Estate Com.

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

April 5, 1988, Decided

Civil Action No. EC 84-265-D-D

Reporter

695 F. Supp. 253 *; 1988 U.S. Dist. LEXIS 9815 **; 1988-1 Trade Cas. (CCH) P67,953

JAMES WILLIAM POPE, SR. and MARY ANN POPE, d/b/a CENTURY 21, POPE'S REALTY, Plaintiffs, v. MISSISSIPPI REAL ESTATE COMMISSION, ET AL., Defendants

Core Terms

membership, summary judgment, plaintiffs', conspiracy, Realtors, antitrust, genuine issue of material fact, advertising, matter of law, entitled to judgment, sufficient evidence, complaints, interstate commerce, anti trust law, defendants', non-moving, Realty, sub judice, brokers, real estate, violations, plaintiff's claim, price fixing, summary judgment motion, trademark, multiple listing service, antitrust claim, notice, probative evidence, rule of reason

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

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

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Fed. R. Civ. P. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims or defenses have no factual basis.

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

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

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

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

HN2[] **Discovery, Methods of Discovery**

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

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

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

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

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

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

HN3[] **Entitlement as Matter of Law, Appropriateness**

When a motion for summary judgment is made an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

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

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

HN4[] **Summary Judgment, Evidentiary Considerations**

The party with the burden of proof must respond to motions for summary judgment with sufficient evidence to support its prima facie case. The party opposing a motion supported by affidavits cannot discharge his burden by alleging legal conclusions. There is no sound reason why conclusory allegations should suffice to require a trial when there is no evidence to support them even if the movant lacks contrary evidence.

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

HN5[] **Summary Judgment, Opposing Materials**

Evidence in opposition to a summary judgment motion that clearly is without any probative force is insufficient to raise a genuine issue.

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

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

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

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

HN6[] **Summary Judgment, Burdens of Proof**

Denials or allegations by the non-moving party in the form of legal conclusions which are unsupported by specific facts have no probative value and are thus insufficient to create genuine issues of material fact that would preclude summary judgment.

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

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

HN7[] **Summary Judgment, Opposing Materials**

The non-moving party cannot successfully defeat a summary judgment motion by unsworn statements or the suggestion that proof might be forthcoming at trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

HN8[] **Summary Judgment, Evidentiary Considerations**

A court must first examine the evidentiary record to determine if a genuine issue of material fact exists. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial. In other words, whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. A court is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. The United States Supreme Court has repeatedly indicated that there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Summary judgment should be granted if the evidence is merely colorable or is not significantly probative.

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

HN9[] **Summary Judgment, Entitlement as Matter of Law**

Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

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

HN10[] **Summary Judgment, Entitlement as Matter of Law**

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

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

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

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

HN11[] **Summary Judgment, Entitlement as Matter of Law**

The plain language of *Fed. R. Civ. P. 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of the element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

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

HN12[] **Private Actions, Remedies**

A plaintiff seeking damages for antitrust violations must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

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

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

HN13[] **Entitlement as Matter of Law, Appropriateness**

Although summary judgment procedures should be used sparingly in complex antitrust litigation where motive and intent play leading rolls, summary judgment may be granted where plaintiff can aver no significant probative facts in support of its conclusory allegations of conspiracy against defendants' specific averments to the contrary.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN14[] **Summary Judgment, Evidentiary Considerations**

In an antitrust conspiracy case ambiguous evidence is to be treated skeptically on a motion for summary judgment, since an inference of unlawful conduct which arises only from ambiguous evidence will be of no use to the plaintiff at trial.

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

HN15[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A court should apply the rule of reason in determining whether an antitrust violation occurred. Per se treatment is not proper in such a situation. Price fixing and other antitrust violations are treated as per se illegal, but non-price restrictions are judged under the rule of reason. The rule of reason analysis requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition.

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

HN16[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A stock purchase requirement and sizeable membership fee are financial barriers that have anti-competitive potential that they should be held unreasonable.

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**

Membership criteria which are reasonably necessary and narrowly tailored toward a valid interest may be justified in competitive terms and satisfy the rule of reason.

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**

With regard to the rule of reasoning, the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its conditions before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

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

Insurance Law > ... > Insurance Company Operations > Company Representatives > Brokers

Real Property Law > Brokers > Brokerage Agreements

Insurance Law > ... > Insurance Company Operations > Company Representatives > General Overview

HN19[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Real estate brokers may require some insurance that they will not be endangered legally or ethically by brokers with whom they enter a listing-sharing agreement. Membership criteria reasonably necessary to insure this protection, and narrowly tailored to this end, may thus be justified in competitive terms and able to survive at least facial review.

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

HN20[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A sizeable membership fee which bears no relation to the cost factors outlined above may not only create a significant barrier to new entry into the association, but may create a strong inference that the amount has been set up as a barrier against new applications.

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

HN21[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A private organization may limit its services to its members as long as there is no arbitrary exclusion from membership, even where the services are economically necessary.

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

Business & Corporate Law > Unincorporated Associations

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

HN22[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Members of a voluntary trade association may properly exclude any non-member from participation in its activities. Such exclusion does not constitute a violation of the antitrust laws.

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

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

HN23[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In a summary judgment posture, the arbitrary exclusion from membership in an association providing services and facilities essential to effective competition is unlawful, but that an association may lawfully limit its services and facilities to its members where there are no restrictive membership arguments.

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

Governments > Courts > Authority to Adjudicate

HN24[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A court has the power to void any significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination's legitimate needs.

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

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

HN25[] **Regulated Practices, Market Definition**

The legality of arguable anti-competitive conduct should be judged primarily by its market impact.

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

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

HN26[] **Private Actions, Remedies**

Under the rule of reason, a showing of anti-competitive market effect is an essential predicate for antitrust liability.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Antitrust & Trade Law > Sherman Act > General Overview

HN27[] **Sherman Act, Jurisdiction**

The federal antitrust laws regulate interstate commerce and not local intra-state commerce. Jurisdiction may not be invoked under the Sherman Act unless the relevant aspect of interstate commerce is identified; it is not sufficient to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN28[] **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 > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN29[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The refusal to deal becomes unlawful only when it produces an unreasonable restraint on trade and there exists an anti-competitive purpose or effect in selecting those with whom one will deal.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Clayton Act > General Overview

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

HN30[] **Antitrust & Trade Law, Sherman Act**

A plaintiff must prove five elements to establish liability for a boycott conspiracy under *§ 1* of the Sherman Act and Section 4 of the Clayton Act. A plaintiff must prove: (1) that a conspiracy to boycott existed; (2) that the defendants participated in a conspiracy; (3) that the conspiracy had a sufficient nexus with interstate commerce; (4) that the conspiracy injured the plaintiff; and (5) the approximate amount of damages.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN31[] **Remedies, Damages**

Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* of the Sherman Act must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

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

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

HN32[] **Private Actions, Standing**

Injury is the sine qua non for stating a cause of action by a private antitrust plaintiff.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

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

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

HN33[] **Clayton Act, Claims**

A private plaintiff's standing to sue for antitrust damages is governed by § 4 of the Clayton Act, *15 U. S. C. § 15*, which confers standing only on those persons who have been injured in their business or property by reason of anything forbidden in the antitrust laws.

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

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

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

HN34[] **Standing, Requirements**

The target area test for determining antitrust standing arose as a means of limiting the class of potential treble damage plaintiffs to those persons who could most adequately vindicate the purpose of the antitrust laws. To attain standing a person (whether corporation or individual) must be one against whom the conspiracy is aimed.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

HN35[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The antitrust laws do not apply to private efforts to petition governmental agencies.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

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

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

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Sherman Act > General Overview

HN36[] **Scope, Exemptions**

Neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action.

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

Trademark Law > ... > Registration Procedures > Federal Registration > Degree of Protection

Trademark Law > Trademark Cancellation & Establishment > Registration Procedures > General Overview

HN37[] **Regulated Practices, Trade Practices & Unfair Competition**

The acts of registering and enforcing a trademark merely represents fair and aggressive competition which does not constitute a violation of the antitrust laws.

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Advertising

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

Constitutional Law > ... > Freedom of Speech > Commercial Speech > General Overview

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Misleading Speech

HN38[] **Commercial Speech, Advertising**

The Supreme Court adopted a four-part test for determining the validity of government restrictions on commercial speech. This test was as follows: (1) the *First Amendment* protects commercial speech only if that speech concerns lawful activity and is not misleading; (2) a restriction on otherwise protected commercial speech is valid if it seeks to implement a substantial governmental interest, and (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN39[] **Constitutional Law, Substantive Due Process**

Due process is a flexible standard which has been refined for different situations. In some contexts, due process procedural protection requires that the accused receive notice prior to termination of a property right, that written notice of the reasons for the suspension be given, and that an effective opportunity to rebut those reasons be provided. In other contexts, due process protections are satisfied by a post-deprivation hearing which provides an opportunity for the accused to correct any errors in the accusations. In other contexts, due process protections require a full-blown hearing with notice prior to any governmental action.

Administrative Law > ... > Formal Adjudicatory Procedure > Impartial Decisionmaker > Participation in Prosecution

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN40[] **Impartial Decisionmaker, Participation in Prosecution**

The combination of investigative and judicial functions within an agency does not in itself violate due process.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Torts > ... > Defamation > Public Figures > Voluntary Public Figures

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Qualifications for Federal Office

HN41[] **Fundamental Rights, Procedural Due Process**

Persons may sometimes possess a liberty interest in their reputation. However, not every act of a public official resulting in defamation creates a deprivation of liberty under the *Fourteenth Amendment*, *U.S. Const. amend. XIV*.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN42[] **Equal Protection, Nature & Scope of Protection**

The United States Supreme Court has held in an unlawful administration context that a denial of equal protection has not occurred unless there is an element of intentional or purposeful discrimination by government officials.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

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

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN43[] **Dismissal, Involuntary Dismissals**

A judge has wide discretion to dismiss a pendent state claim after the dismissal of federal claims. In exercising this discretion, the district court should look to considerations of judicial economy, convenience and fairness to litigants and should avoid needless decisions of state law.

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Reed Hillen, Tupelo, Mississippi, Attorney for Defendants Monroe County Board of Realtors, Jack Francis and Mary Lib Francis.

John L. Maxey, II, Jackson, Mississippi, Attorney for Mississippi Real Estate Commission.

Elizabeth Ann Odom, Aberdeen, Mississippi, Attorney for Joyce B. Murphy.

Robert D. Butters, Chicago, Illinois, Attorney for National Association of Realtors.

Judges: Glen H. Davidson, United States District Judge.

Opinion by: DAVIDSON

Opinion

[*256] MEMORANDUM OPINION

GLEN H. DAVIDSON, UNITED STATES DISTRICT JUDGE

James William Pope, Sr. and Mary Ann Pope ("Popes", "plaintiffs" or "non-movants") have brought this action against both private and government defendants [1] **[*257]** claiming violations of both federal and state law. The plaintiffs' claims against the private defendants include federal antitrust violations and the following state law claims: state antitrust violations; interference with economic relations, business relations, and business contacts in violation of state laws; and libel, slander, and defamation. Plaintiffs' **[**2]** claims against the government defendants include federal antitrust claims and violations of the *First Amendment, due process clause*, and *equal protection clause*, as well as state law claims which include state antitrust violations; interference with economic relations, business relations, and business contacts violations; libel, slander and defamation; violation of the public record statute; and violation of separation of powers requirement of the Mississippi Constitution. The government and private defendants have separately moved for summary judgment. The government and private defendants have shown the absence of material issues of fact and argue that they are entitled to judgment as a matter of law. The plaintiffs responded by amending their complaint and providing a brief, an affidavit, and several depositions in opposition to both motions for summary judgment.

[3]** The court has reviewed the extensive evidentiary record, the plaintiffs' pleadings and brief, the defendants' pleadings and numerous briefs in support of their motions for summary judgment, and has carefully considered the record as a whole. The court has gone to great lengths to consider each claim of the plaintiffs and the evidence presented by the plaintiffs in support of their claims. The court is now convinced that the record in the case *sub judice* justifies the granting of the motions for summary judgment, even though the court recognizes that a full blown trial will often serve a useful purpose in such a complex action. The plaintiffs fail to set forth sufficient evidence to establish a genuine issue of material fact and the court accordingly finds that the defendants are entitled to judgment as a matter of law.

Factual Background

A. Plaintiffs' Allegations

The Popes are engaged in the real estate business in Amory, Mississippi which is located in Monroe County. The plaintiffs allege that they began work in the real estate business in 1978 after they obtained broker's licenses from the Mississippi Real Estate Commission ("MREC"). The plaintiffs maintain that they **[**4]** have set their own sales commission rates and have refused to abide by price fixing and other anti-competitive practices which have been utilized by the defendants. To be more specific, plaintiffs allege that certain of the local private defendants [2] have denied the plaintiffs access to the multiple listing service which lists property available for sale in Monroe County, Mississippi. Plaintiffs also allege that the other private defendants [3] are jointly liable for these alleged antitrust violations because they encouraged, enticed, and joined in this activity through their constitutions and by-laws.

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[1] The government defendants include the Mississippi Real Estate Commission and persons acting on behalf of the Mississippi Real Estate Commission. The other government parties include John L. Kennedy, Sharon F. Abide, J. B. McGehee, Daniel L. Bland, and Harry J. Joachim who are all members of the Mississippi Real Estate Commission. These government defendants also include Phillip D. Hardwick, Administrator of the Mississippi Real Estate Commission, and Kenneth Ammons, Chief Investigator of the Mississippi Real Estate Commission. The private defendants include the Monroe County Board of Realtors, Inc., Mississippi Association of Realtors, Inc., and the National Association of Realtors, Inc., and persons associated with these entities. These additional persons include Joyce B. Murphy, Phil Roberts, Jack Francis, and Mary Lib Francis, who are sued both individually and in their capacities as members of the Monroe County Board of Realtors, Inc. One other private defendant is Thad I. Vann, who is sued both individually and in his capacity as a member of the Mississippi Association of Realtors, Inc.

[2] Local private defendants include the Monroe County Board of Realtors, Inc. ("MCBR" or "Board of Realtors"), Joyce B. Murphy, Phil Roberts, Jack Francis, and Mary Lib Francis.

[3] National Association of Realtors ("NAR") and Mississippi Association of Realtors, Inc. ("MAR").

The plaintiffs allege that the local private defendants who are realtors have engaged in a group boycott of the plaintiffs by collectively **[**5]** refusing to permit the plaintiffs to show property listed by the defendants, or by placing unfair restrictions on **[*258]** such showing. The plaintiffs further allege that this activity impacts interstate commerce and has an anti-competitive effect on the business of buying and selling real estate in Monroe County.

Plaintiffs allege that government and private defendants have utilized the complaint procedures of the MREC to punish the plaintiffs for competitively engaging in the real estate business. The plaintiffs allege that the defendants have unreasonably restrained trade by placing arbitrary limitations on the use of the term "realtor". Plaintiffs allege that unnamed defendants have prohibited plaintiffs from discussing employment of salesmen employed by other agencies and prohibited plaintiffs from bringing real estate courses to the Amory area. Plaintiffs allege that Jack Francis and Phil Roberts have sold insurance and listed property by unlawful "tying arrangements."

In Count II, the plaintiffs allege that the government defendants have violated the plaintiffs' *First Amendment* rights as follows: the defendants have purported to punish the plaintiffs for engaging in business **[**6]** advertising; the defendants have purported to punish the plaintiffs for advertising real estate schools and encouraging persons to attend; the defendants have punished the plaintiffs for advertising the giving of vacuum cleaners to past customers; the defendants have punished the plaintiffs for giving away tee shirts and the defendants have prohibited the plaintiffs from using the term "realtor".

In Count III, the plaintiffs allege that the government defendants have violated the due process clause as follows: defendants failed to provide plaintiffs with notice of charges and a fair and impartial hearing on charges brought before that governing body; defendant MREC is both prosecutor and judge and had ex parte communications concerning the hearing; defendants have found the plaintiffs guilty of ethical violations without a hearing; and the defendants allegedly communicated the resulting decision to the public in violation of the plaintiffs' "liberty interest".

In Count IV, the plaintiffs allege that the government defendants violated the *equal protection clause* by arbitrarily enforcing certain ethical regulations.

In Count V, plaintiffs allege that all of the defendants have violated **[**7]** state law by interfering with the plaintiffs' rights to engage in business.

In Count VI, the plaintiffs allege that private defendants Hardwick and Murphy libeled, defamed, and slandered the plaintiffs causing untrue articles to be placed in the *Aberdeen Examiner*. Similar claims were made against government defendant Vann.

In Count VII, the plaintiffs allege that the government defendants have refused to disclose various information as required by Mississippi law.

In Count VIII, the plaintiffs allege that the government defendants are in violation of the Mississippi Constitution because they combined the functions of judicial, legislative, and executive branches in one entity.

In Count IX, the plaintiffs allege that the government defendants have retaliated against the plaintiffs in violation of the *First Amendment* because of an earlier antitrust case brought by Century 21.

B. Defendants' Summary Judgment Motions

The private defendants moved for summary judgment on all claims brought against the private defendants. The private defendants supported their motion with a 76 page memorandum brief, a 31 page reply brief, an 11 page supplemental memorandum, attached authorities, **[**8]** exhibits, depositions, and affidavits. These documents attack the plaintiffs' complaint count by count in an attempt to show the court the absence of a genuine issue of material fact that would preclude a grant of summary judgment. At this point, the court will simply outline the points raised by the private defendants.

In response to Count I, the defendants concede that they have denied plaintiffs participation in the multiple listing service **[*259]** ("MLS") but they state that this is only because the plaintiffs have voluntarily withdrawn from participation in the Monroe County Board of Realtors ("MCBR"). The private defendants maintain that it is appropriate and legal to limit services to members of a private organization as long as there is no arbitrary or discriminatory exclusion from membership in that organization. Defendants further assert that the plaintiffs have no standing to bring this action because they voluntarily withdrew from the board. As to the complaints filed with the MREC and the response of the MREC, the private defendants maintain that the *Noerr - Pennington* doctrine exempts their activities from the antitrust laws. The private defendants also assert **[**9]** that the plaintiffs have shown no evidence of a conspiracy to boycott the plaintiffs' business.

The private defendants did not challenge the *First Amendment*, (Count II), due process (Count III), equal protection (Count IV), public record statute (Count VII), separation of powers (Count VIII), or the unlawful retaliation (Count IX) claims. The private defendants did challenge the claims which were directed at them. As to the pendent state claims which relate to the non-government defendants, they have attempted to show that there is no factual basis for Counts V or VI which involve interference with business relations, libel, defamation, and other such claims.

The government defendants have challenged all claims brought against them. The government defendants supported their motion for summary judgment with a 39 page brief, an 11 page reply brief, exhibits, depositions, affidavits, and James Pope's official file, and a transcript of a hearing at issue. The court will outline the points raised by the government defendants.

As to Count I, the government defendants point out that the plaintiffs lack standing for a claim against the MREC because of the state action exemption to the **[**10]** Sherman Act. Government defendants also assert that the plaintiffs have failed to demonstrate that the alleged antitrust activity related to any *inter-state* commerce. Government defendants claim that the plaintiffs have not shown that the government defendants acted outside their official capacities or acted contrary to their legislatively mandated responsibilities, and that the plaintiffs have not established the existence of any trusts, combinations, contracts, or agreements with other persons in violation of the antitrust laws.

The government defendants claim that the due process, equal protection and *First Amendment* claims brought against the government defendants, apparently brought pursuant to *42 U. S. C. § 1983*, may not be brought against the MREC itself because of *Eleventh Amendment* immunity and that the other government defendants have qualified immunity or a good faith immunity defense to each of these claims. As to the substance of the due process claim, the government defendants maintain that the official procedures and the procedures actually implemented assured the plaintiffs of their due process rights. As to the substance of the equal **[**11]** protection claims, the government defendants claim that the plaintiffs have not shown arbitrary enforcement of regulations or any intentional or purposeful discrimination in its investigation of complaints. As to the substance of the *First Amendment* claims, the government defendants maintain that they were preventing misrepresentations in advertising and avoided taking actions that inhibited true freedom of speech. As to the plaintiffs' *First Amendment* and retaliation claim of Count IX, the government defendants assert that there was no factual showing that there was any connection between the unrelated case and the alleged actions of the MREC.

The government defendants' response to the pendent state law claims is to suggest that the court should simply dismiss these claims from federal court. The government defendants then set out sovereign immunity and public official immunity defenses. As to the libel, slander, and defamation claim, the government defendants point out that privileged communications may not establish the plaintiffs' claims. The government defendants apparently **[*260]** concede the dual investigative and judicial roles of the commission, but dispute the legal **[**12]** argument that this is a violation of Mississippi's constitutional separate of powers requirement. As to the denial of public access to records claim, the government defendants maintain that these investigative materials were exempt, but that the defendants subsequently turned these records over to the plaintiffs, thereby eliminating this minor claim.

C. Plaintiffs' Argumentative and Evidentiary Responses

The plaintiffs' response to the summary judgment motions was minimal at best. Plaintiffs presented one brief in opposition, along with an affidavit from James Pope and part of the depositions of Kenneth Ammons, Phillip Hardwick, Jack Francis, Mary Lib Francis, Joyce B. Murphy, and Phillip E. Roberts. The 20 page brief submitted by the plaintiffs was very general and failed to address most of the issues raised by the government and private defendants in their motions for summary judgment.

The only antitrust claims adequately addressed by the plaintiffs were the denial of access to the multiple listing service and price fixing by the private defendants. Plaintiffs claim a factual issue exists concerning some aspect of the group boycott claim. Plaintiffs boldly assert that the government **[**13]** defendants are not entitled to summary judgment. Plaintiffs claim that there is a factual issue as to the denial of liberty without due process of law and conclude that the government defendants are not entitled to summary judgment on either the *First Amendment* or due process issues. Plaintiffs also maintain that there are factual issues concerning the alleged violations of *First Amendment* rights.

Plaintiffs failed to point out the pertinent parts of exhibits, depositions and affidavits which created these genuine issues of material fact claimed to exist. The court nonetheless closely reviewed the affidavit and depositions relied on by the plaintiffs, as well as the remaining court record.

D. Defendants Reply

The government and private defendants responded to the plaintiffs' brief in a detailed manner. The private defendants claimed that the plaintiffs do not have standing to sue for price fixing and they have not shown sufficient evidence to support this claim. The private defendants also maintain that there are no material factual issues concerning the plaintiffs' non-participation in the MLS. The government defendants assume that the plaintiffs have abandoned the many claims **[**14]** on which they failed to respond. The government defendants responded point by point to the due process, *First Amendment*, and separation of powers claims asserted by the plaintiffs in their brief. The private defendants presented a supplemental memorandum which again addressed the standing issue and the basis upon which associations may charge membership fees.

E. Uncontested Facts

The parties have set out 47 facts in the pretrial order that were established by the pleadings, stipulations, or admissions. [4] The court will bring attention to the more pertinent facts contained in the pretrial order.

The established facts that affect the antitrust claim include A-R, FF-VV. Particularly important are the following: the MCBR membership requirements (F, GG, II); requirements for MLS participation (D, E, JJ); absence of evidence of price fixing (PP, UU); evidence refuting boycott claim and market **[**15]** effect (L, M, N, O, LL, VV); and the use of term "Realtor" (II, QQ, RR).

The established facts that affect the *First Amendment* claims include possible retaliation (K, U, X, Y), non-enforcement of the Code of Ethics (EE), and the existence of a federally registered trademark (RR). The established facts that affect the due process claims (P-DD) indicate the following: the MREC acted within the scope of its official duties (P, Q, R); the MREC acted pursuant to complaints (S, Y); the **[*261]** MREC gave notice (T, X); the MREC held hearings (V, AA, DD); plaintiffs failed to appeal (W, BB); and the MREC did not publish the information which allegedly defamed the plaintiffs (CC).

Conclusions of Law

The plaintiffs have set forth a multitude of issues against both the government and private defendants based upon the factual situation outlined above. Both the government and private defendants have moved for summary judgment in this action. In this opinion, the court will address the standard to be applied to claims presented in a summary judgment posture and then will apply this standard to each of the claims brought against the defendants.

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[4] *See* pretrial order at 8-12.

Summary Judgment Standard

Summary judgment **[**16]** re-enforces the purpose of the rules to achieve a "just, speedy, and inexpensive determination" of actions. *Fed. R. Civ. P. 1*. Summary judgment is no longer considered a "'peculiar procedural short cut,' but an integral part of the 'framework' of the Rules, closely related to other provisions which are similarly intended to permit the early elimination of claims and defenses that the proponents cannot support." *Fontenot v. Upjohn Co., 780 F.2d 1190, 1197 (5th Cir. 1986)*. Summary judgment has filled in the gaps left by the abandonment of other procedural devices and is the most efficient means of testing the sufficiency of factual allegations. *Fontenot, 780 F.2d at 1196*. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Fed. R. Civ. P. 56*, advisory committee note on the 1963 amendments to *rule 56(e)* (quoted in *Fontenot, 780 F.2d at 1196*).

A trial serves no useful purpose "when everything that can be adduced at trial is before the judge on motion and the parties, while urging conflicting ultimate facts and conclusions, **[**17]** have no evidentiary disputes." The proper use of *Rule 56* "affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot, 780 F.2d at 1197*. However, the court must be cautious and properly balance the need for expediency with the demands of justice. The court will not casually deny a party the protections inherent in a full blown trial.

> ***HN1***[] *Rule 56* must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims or defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 276, 106 S. Ct. 2548 (1986).

A. Movant's Initial Responsibility

The moving party must make a minimal showing of an absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

> [**[**18]** A] ***HN2***[] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323, 91 L. Ed. 2d at 274. In *Celotex*, the Supreme Court distinguished the earlier decision of *Adickes v. S. H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*, and held that the moving party had only the burden "to show initially the absence of a genuine issue concerning any material fact." The Supreme Court held that the *Adickes* language should not be construed to mean that the moving party has the burden to produce evidence that establishes the absence of a genuine issue of material fact. Instead, the Supreme Court held that the "burden on a moving party may be discharged by 'showing' - **[*262]** that is pointing out to the district court - that there is an absence of evidence **[**19]** to support the non-moving party's case." *Celotex, 477 U.S. at 325, 91 L. Ed. 2d at 275*. The Supreme Court clearly held in *Celotex* that even where the movant's showing was meager and failed to fully negate the opponent's claims, summary judgment should still be granted where the evidence produced by the non-movant was insufficient as to a necessary element of the claim on which the non-movant bore the burden of proof.

B. Non-Movant's Evidentiary Burden

Once the moving party has met its initial responsibility, the non-moving party must shoulder a heavy burden in order to survive summary judgment and bring its case to trial. The summary judgment scheme provides for a shifting burden between the movant and non-movant as to the existence of genuine issues of material fact. The movant must initially "show" the absence of material issues of fact and then the non-movant has the burden to "go forward" with sufficient evidence to establish the existence of material issues of fact. *Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1112 (5th Cir. 1979)*. *Rule 56(e)* provides in pertinent part that:

> **[**20]** ***HN3***[] When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must *set forth specific facts* showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(emphasis added). The Supreme Court has stated that the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 552, 106 S. Ct. 1348 (1986)*. The Supreme Court followed this statement with the observation that *Rule 56(d)* requires "specific facts" from the non-movant and then stated that if the non-movant's claim appeared implausible the non-movant must come forward with even more persuasive evidence to support the claim than would otherwise be necessary. *Matsushita*, 475 U.S. at 587, 89 L. Ed. at 552. *Celotex* also held that *Rule 56* **[**21]** requires the opposing party to go beyond the pleadings to make a sufficient showing on the essential elements of its case. *Celotex, 91 L. Ed. 2d at 273*. [5]

HN4[] The party with the burden of proof must respond **[**22]** to motions for summary judgment with sufficient evidence to support its prima facie case. "The party opposing a motion supported by affidavits cannot discharge his burden by alleging legal conclusions. There is no sound reason why conclusory allegations should suffice to require a trial when there is no evidence to support them even if the movant lacks contrary evidence." *Fontenot, 780 F.2d at 1195-1196*.

Although the court does not assess the probative value of the material presented, ***HN5***[] evidence in opposition to the motion that clearly is without any probative force is insufficient to raise a genuine issue. *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 20 L. Ed. 2d 569, 593, 88 S. Ct. 1575 (1968)*. ***HN6***[] Denials or allegations by the non-moving party in the form of legal conclusions which are unsupported by specific facts have no probative value and are thus insufficient to create genuine issues of material fact that would preclude summary judgment. **[**23]** **[*263]** *Broadway v. City of Montgomery, Alabama, 530 F.2d 657, 660 (5th Cir. 1976)*; *see also* *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc., 479 F.2d 135, 139 (5th Cir. 1973)*. "Allegations that one 'might could' show certain facts at trial are simply insufficient under *Rule 56(e)*." *Pelotto v. L & N Towing Co., 604 F.2d 396, 403 (5th Cir. 1979)*. ***HN7***[] The non-moving party cannot successfully defeat a summary judgment motion by unsworn statements or the suggestion that proof might be forthcoming at trial. *See* *Oglesby v. Terminal Transport Co., Inc., 543 F.2d 1111, 1112 (5th Cir. 1976)*.

C. The Court's Duty and the Summary Judgment Standard

Rule 56 expressly provides that the court should grant summary judgment if (1) there is no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

HN8[] The court must first examine the evidentiary record to determine if **[**24]** a *genuine* issue of material fact exists. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 213, 106 S. Ct. 2505 (1986)*. The court is not to "weigh the evidence and determine the truth of the matter

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[5] The plaintiffs' brief seems to imply that the movant has the burden of establishing the absence of material issues of fact. This is clearly wrong. The movant must "show" the absence of evidence to support the non-movant's case, but it is only the non-movant which must actually come forward with evidence to demonstrate the existence of material issues of fact. If this goes against the "familiar teachings" of *United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1360 (5th Cir. 1980)*, then the court takes comfort in the fact that this view is consistent with more recent Fifth Circuit and Supreme Court decisions. *Celotex, 477 U.S. at 325, 91 L. Ed. 2d at 275*.

but to determine whether there is a genuine issue for trial." The Supreme Court has repeatedly indicated that "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson, 477 U.S. at 249, 91 L. Ed. 2d at 212*. Summary judgment should be granted if the evidence is "merely colorable or is not significantly probative." *Anderson, 477 U.S. at 249, 91 L. Ed. 2d at 212*.

The Supreme Court has repeatedly emphasized that the availability of summary judgment turns in part on whether a proper jury question is presented. The non-moving party need not conclusively **[**25]** establish its factual allegations, but it is required to provide sufficient evidence on the claimed factual dispute to require a jury or judge to resolve the party's differing versions of the truth at trial. *Anderson, at 249, 91 L. Ed. 2d at 212*. ***HN9***[] "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita, 475 U.S. at 587, 89 L. Ed. 2d at 552*.

> If there is 'a complete absence of probative facts' to support a particular inference, or, if 'the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at [but one] verdict,' 'the court may bypass the jury.'

Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 (5th Cir. 1978) (citations omitted).

The court must also determine if the factual issues in dispute are *material*. ***HN10***[] "Only disputes over facts that **[**26]** might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson, 477 U.S. at 248, 91 L. Ed. 2d at 211*; *Celotex, 91 L. Ed. 2d at 273*.

After determining that there are no genuine issues of material fact, the court must determine whether the moving party is entitled to judgment as a matter of law. The standard to be applied in granting summary judgment is the same standard applied in granting directed verdicts under *Fed. R. Civ. P. 50(a)*. The court "must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson, 477 U.S. at 250, 91 L. Ed. 2d at 213*.

Summary judgment motions should be granted "so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in *Rule 56(c)* is satisfied." **[*264]** *Celotex, 477 U.S. at 323, 91 L. Ed. 2d at 274*.

> ***HN11***[] The plain language **[**27]** of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of the element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 477 U.S. at 322-23, 91 L. Ed. 2d at 273. The non-movant is not entitled to a full dress trial notwithstanding the absence of any significant probative evidence tending to support the allegations in their complaint. "To permit the pleadings themselves to carry a case to trial when they rest only on the invention of counsel would permit ultimate circumvention of [the Federal Rules of Civil Procedure]." *Fontenot, 780 F.2d at 1196*. **[**28]**

D. Summary Judgment Applied to AntiTrust Litigation

The Supreme Court has recently considered the standard which district courts should apply when deciding whether to grant summary judgment in antitrust cases. These decisions have signaled a marked change from the court's prior reluctance to grant summary judgment, as established in *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. The Supreme Court has held that the requirements of *Rule 56* are not to be read out of antitrust cases and has refused to hold that "anyone who files an antitrust complaint setting forth a valid cause of action [is thereby automatically] entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." Cities Services, 391 U.S. at 290, 20 L. Ed. 2d at 593. Subsequent Supreme Court cases, as well as Fifth Circuit decisions, have followed the admonishment of *Cities Services* and have granted summary judgment motions in cases where the plaintiffs have utterly failed to adduce any evidence of conspiratorial conduct.

The Supreme Court has, in a summary **[**29]** judgment context, addressed the issue of the conspiracy elements in antitrust litigation on two recent occasions. Conduct which is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 785-786, 104 S. Ct. 1464 (1984). The Supreme Court stated that ***HN12***[] a plaintiff seeking damages for antitrust violations must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Monsanto, 465 U.S. at 764, 79 L. Ed. 2d at 785. "Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents." Matsushita, 475 U.S. at 588, 89 L. Ed. 2d at 553.

The Fifth Circuit has clearly held that summary judgment may be appropriate in antitrust cases.

> **[**30]** ***HN13***[] Although summary judgment procedures 'should be used sparingly in complex antitrust litigation where motive and intent play leading rolls,' summary judgment may be granted where plaintiff can aver no significant probative facts in support of its conclusory allegations of conspiracy against defendants' specific averments to the contrary.

Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017, 1027 (5th Cir. 1983). (citations omitted)

The court is most persuaded by the reasoning of Apex Oil Co. v. DiMauro, 641 F. Supp. 1246, 1986-2 Trade Cases (CCH) P67,225 (S.D.N.Y. 1986). The *Apex* **[*265]** court granted summary judgment against the antitrust plaintiff who claimed that he was the victim of a conspiracy among his competitors. The court recognized that *Matsushita, Monsanto*, and *Cities Service* made summary judgment available in the context of large complex antitrust conspiracy cases. "In fact, the authorities indicate that the nature of such a case demands that the district court, in considering summary judgment, give searching scrutiny to the inferences available from the **[**31]** typically ambiguous mass of evidence." *Apex*, at 1255, 1986-2 Trade Cases (CCH) at 61,121. The *Apex* court reasoned as follows:

> In *Matsushita*, the Supreme Court made it clear that ***HN14***[] in an antitrust conspiracy case ambiguous evidence is to be treated skeptically on a motion for summary judgment, since an inference of unlawful conduct which arises only from ambiguous evidence will be of no use to the plaintiff at trial. In *Monsanto*, the court warned that a standard which permitted trial on the basis of such inferences presented a "considerable danger" that pro-competitive conduct would be discouraged.
>
> The test enunciated in *Matsushita* also dictates that ambiguous evidence, because it is by definition incapable of a dominant inference, will not alone defeat a motion for summary judgment.
>
> In this case, defendant's sworn denials are more than sufficient to shift the burden to plaintiff under Fed. R. Civ. P. 56(e). Thus, to survive defendants' motion for summary judgment, [the plaintiff] must establish that there is a genuine issue of material fact **[**32]** as to whether defendants entered into a conspiracy. To make such a showing, [the plaintiff] must offer significant probative evidence which tends to exclude the possibility that the alleged conspirators acted independently.

Apex, at 1257, 1986-2 Trade Cases (CCH) at 61,123 (citations omitted).

The *Apex* court recognized that "the sheer volume and desultory organization of the facts presented makes dissection of [the plaintiffs] evidence an unenviable task, but it is an effort mandated by *Matsushita*."

> It must be remembered throughout this exercise that an assumption of conspiracy is not the starting point after which each event must be explained away by the defendants. Rather, it is [the plaintiffs], now faced with unequivocable sworn denials, that must demonstrate that the evidence, construed in its favor, supplies an

> inference of conspiracy that is reasonable in light of any competing inference of independent conduct proffered by the defendants.

Apex, at 1259, 1986-2 Trade Cases (CCH) at 61,124. The record in the case *sub judice* is also large and difficult, but the court must perform its duty under the **[**33]** applicable law.

II.

Substantive Antitrust Claims Against Defendants [6]

The court will address each of the plaintiffs' claims against the defendants. The court will address these claims in the order that they appear in the plaintiffs' amended complaint. Count I of the plaintiffs' amended complaint alleges antitrust violations against both the government and non-government defendants.

The court will first look at the nature of the legal claim, then detail the defendants' summary judgment challenges to this claim, and then finally analyze the plaintiffs' response of either making a legal argument or establishing specific evidence sufficient to create a genuine issue of material fact. After these steps are complete, the court will determine whether summary judgment is appropriate on that claim for the defendants or whether **[**34]** the plaintiffs have made a sufficient showing to preclude summary judgment.

A. Denial of Access Claim

The first claim under Count I is that **[*266]** the private defendants [7] have denied the plaintiffs access to the multiple listing service in violation of antitrust laws. The plaintiffs allege that the National Association of Realtors, Inc. ("NAR") and the Mississippi Association of Realtors, Inc. ("MAR") should be held jointly liable for this antitrust violation because they have encouraged and enticed this behavior through their constitutions and by-laws.

1. No Denial of Board Membership

The private defendants responded to this claim by showing the court that the plaintiffs were not denied membership in the Monroe County Board of Realtors ("MCBR" or "Board of Realtors"), that the Popes voluntarily withdrew and are free to rejoin the Board of Realtors, and that membership in the Board **[**35]** of Realtors is non-discriminatory. The private defendants argue that the MCBR may condition participation in the MLS upon membership in the MCBR without violating the federal antitrust laws.

The private defendants assert that the plaintiffs voluntarily withdrew from the Monroe County Board of Realtors and would again qualify for membership if they paid the required membership fees. The private defendants point out that Pope admitted in his deposition that he has no reason to believe that he fails to satisfy membership criteria. [8] The Popes unilaterally decided to leave the Monroe County Board of Realtors in 1981 over a dispute regarding dues assessments and their failure to be appointed to leadership positions within the Board of Realtors. [9] The parties have stipulated that the MCBR policy is that only members of the Monroe County Board of Realtors may participate in the multiple listing service.

The plaintiffs have **[**36]** not created an issue of material fact as to the availability of membership on the Board of Realtors for the Popes. Based upon the record before the court and the complete failure of the plaintiffs to provide sufficient evidence to support their position, the court finds that a genuine issue of material fact is absent concerning the Popes access to the Monroe County Board of Realtors.

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[6] Plaintiffs allege both federal and state antitrust claims. The court will only consider federal antitrust claims at this juncture. All State claims will be addressed in a subsequent section.

[7] Defendants Monroe County Board of Realtors, Inc., Joyce B. Murphy, Phil Roberts, Jack Francis, and Mary Lib Francis.

[8] *See* deposition of James Pope at 157.

[9] *See* deposition of James Pope at 157.

2. Membership Requirements Satisfy Rule of Reason

The Fifth Circuit has held that a concerted denial of access to a multiple listing service, when board members have agreed to pool and share their listings, amounts to a group boycott of the non-member. *Realty Multi-List, 629 F.2d at 1361*. However, in the case *sub judice*, the plaintiffs have failed to establish sufficient evidence that they were in fact denied participation in the multiple listing service.

The plaintiffs are not in a good position to argue that the membership requirements of the MCBR are unreasonable or discriminatory. The plaintiffs have failed to establish that they would be excluded from board membership or denied participation in the multiple listing service if they were willing to pay membership dues assessments.

[37]** The court's inquiry is whether membership on the Board of Realtors is available to the Popes on a non-discriminatory basis. The defendants argue that the plaintiffs have in essence conceded this issue by voluntarily withdrawing from the board and that the membership criteria are entirely fair and reasonable, including the pro rata dues formula. In response, the plaintiffs claim that they were "forced out" of membership and did not voluntarily withdraw. [10] Pope concluded that the pro-rata membership dues were intended to exclude him from membership and were discriminatory. [11] Conclusory statements, even those in the form of an affidavit, do not satisfy *rule 56*'s requirement of specific facts. The plaintiffs have not shown that they were **[*267]** "forced out" in a discriminatory manner or that the dues formula is discriminatory.

[38]** ***HN15***[] The court should apply the "rule of reason" in determining whether an antitrust violation occurred by virtue of MCBR requirements. "Per se" treatment is not proper in such a situation. *See Realty Multi-List, 629 F.2d at 1362*. Price fixing and other antitrust violations are treated as per se illegal, but non-price restrictions are judged under the "rule of reason". The "rule of reason" analysis requires a "weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition." *Monsanto, 465 U.S. at 761, 79 L. Ed. 2d at 784*.

In *Realty Multi-List*, the Fifth Circuit found that the challenged membership criteria of a favorable credit report and a favorable business reputation were antitrust violations under the rule of reason. *See Realty Multi-List, 629 F.2d at 1376-1381*. *Realty Multi-List* also held that ***HN16***[] a stock purchase requirement and sizeable membership fee were financial barriers that had such anti-competitive potential that they should be held unreasonable. **[**39]** *Realty Multi-List, 629 F.2d at 1386*. However, ***HN17***[] membership criteria which are reasonably necessary and narrowly tailored toward a valid interest may be justified in competitive terms and satisfy the rule of reason.

"The fact finder weighs all of the circumstances of a case in determining whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 580, 97 S. Ct. 2549 (1977)*. The Supreme Court noted a popular statement of the rule of reason using the words of Justice Brandeis as follows:

> ***HN18***[] The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its conditions **[**40]** before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 687, 38 S. Ct. 242 (1918).

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[10] *See* affidavit of James Pope at 3-6.

[11] *See* affidavit of James Pope at 3-5.

Realty Multi-List recognized that ***HN19***[] "brokers may require some insurance that they will not be endangered legally or ethically by brokers with whom they enter a listing-sharing agreement. . . . Membership criteria reasonably necessary to insure this protection, and narrowly tailored to this end, may thus be justified in competitive terms and able to survive at least facial review." *Realty Multi-List, 629 F.2d at 1377*.

Pope admits that he has no reason to believe that he **[**41]** would be denied membership, [12] thus, any claim of denial on a discriminatory basis is severely diminished. This indicates to the court that the plaintiffs do not have a sufficient evidentiary basis under *Rule 56* for their claim of discriminatory exclusion from membership. It is undisputed that the Popes would be allowed board membership and that they meet all membership requirements. [13]

The plaintiffs claim that, even though they could become members of the MCBR, they are still discriminated against because of the dues formula used by the board. The plaintiffs' basic claim is that because of the large size of their realty organization, they bear a heavy burden under the **[*268]** dues formula. [14] The Board of Realtors decided to charge a certain fee for each realtor member and also for each realtor associate member and sales person instead of charging one set fee for each **[**42]** realty organization. Pope claimed that this was an attempt to discriminate against him and that "the economic burden was being shifted to my shoulders alone" and was being done to exclude him from membership. [15] Pope's conclusory opinion is insufficient to satisfy *Rule 56*'s requirements of specific facts and sufficient evidence.

Realty Multi-List addressed the issue of whether membership fees could be considered a barrier to membership in a private realty organization. **[**43]**

> Noting that RML has established no objective criteria for determining a reasonable purchase price [for the stock required to be a RML member], the Government argues that this rule is invalid on the theory that, in cases such as this one, the unrestricted power to set an entrance fee which is unrelated to either the cost of the service provided or the cost of maintaining the service as a going concern is the power to exclude, and hence to destroy competition. We agree. Doubtlessly, RML must be allowed to establish fee schedules which allow it to recoup its costs of operation and to maintain its viability as a going concern. Among these costs which it must be allowed to recover are the start-up costs involved in serving a new member. In addition, it is reasonable to assess a new member a *pro-rata* contribution toward the maintenance and the development of RML, including the accumulation of reasonable reserves. To require more than this, however, is to create problems. ***HN20***[] A sizeable membership fee which bears no relation to the cost factors outlined above may not only create a **[**44]** significant barrier to new entry into the association, but may create "a strong inference that the amount has been set up as a barrier against" new applications.

Realty Multi-List, 629 F.2d at 1385-1386.

Private organizations often charge membership fees on a pro-rata basis. This practice distributes the organizations' expenses among all persons who receive either direct or indirect benefits of the organization. Both NAR and MAR assess dues to benefits of the organization. Both NAR and MAR assess dues to member boards of realtors, such as the MCBR, based upon the number of persons who benefit from the national and state associations. Each

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[12] *See* deposition of James Pope at 157.

[13] *See* deposition of James Pope at 157 and affidavit of Joyce Murphy at para. 8.

[14] The plaintiffs have stated that they, or their sales people, will have to pay a total of approximately $ 2,000 in annual membership dues under the MCBR fee schedule and that this amount is approximately 50% of the MCBR dues revenue. When the plaintiffs first joined the MCBR, the membership fee was $ 146 for every Realtor (principle broker) and $ 121 for every member associate and non-member salesperson (all sales persons working for the principle broker's firm). *See* affidavit of James Pope at 3.

[15] *See* affidavit of James Pope at 3.

realtor, realtor associate who belongs to the local board, and salesperson licensee affiliated with the realtor's firm, who is not even a member of the board of realtors, increases the liability of the member boards. [16] The dues formula chosen by the local board of realtors is reasonable given their own dues requirements from the state and national organization and the nature of their local expenses. The plaintiffs have failed to produce probative evidence sufficient to establish that the dues formula was unreasonable **[**45]** or discriminatory. The plaintiffs have asserted that the local dues formula did change during this period, but this fails to establish evidence that the dues were unreasonable and it is uncontested that both the NAR and MAR dues formulae were adopted in their current form in 1972. [17]

The MCBR's membership dues formula charged real estate firms an amount based upon their actual size as measured by the **[*269]** number of realtors and sales people with a realtor's firm. The plaintiffs have not established sufficient evidence to create an issue of fact concerning exclusion from MCBR or the reasonableness of membership fees. The plaintiffs have not shown the court that the membership dues **[**46]** schedule was anti-competitive by being discriminatory or unreasonable. *Realty Multi-List* expressly allowed for a "pro-rata contribution toward the cost of the maintainence and the development of [the private realty organization], including the accumulation of reasonable reserves." *Realty Multi-List, 629 F.2d at 1386*. In a similar antitrust case, a court stated that the "plaintiff's claim is thus not that it was excluded from membership in [the private organization] completely, but that it was excluded at anything but the [desired] price." [18] *Ralph C. Wilson Indus., Inc. v. American Broadcasting Companies, Inc., 598 F. Supp. 694, 709 (N. D. Cal. 1984)*; *aff'd*, *794 F.2d 1359 (1986)*. The evidentiary record in this case does not establish a conspiracy to exclude the Popes or any discrimination in the membership fee schedule or other requirements for membership of the MCBR. The court finds that the plaintiffs have not produced sufficient evidence to establish a genuine issue of material fact concerning whether they were discriminated against or denied membership in the case *sub judice*.

[47]** 3. MLS is Exclusive Service of MCBR

The court's next inquiry is whether board membership may be required for participation in the MLS under the antitrust laws. There is no material issue of fact on this requirement because the defendants admit that only board members may participate in the multiple listing service. The plaintiffs claim that limiting the service to board members violates the antitrust laws.

A multiple listing service is only a vehicle through which real estate brokers invoke cooperation in the sale of real estate by extending offers of sub-agency to one another.

> More fundamentally, the sharing of listings is the essence of the multiple listing concept. The listing broker retains the primary fiduciary responsibility, with its legal and ethical ramifications, to the property owner. (citations omitted) Without some insurance that the brokers who act as sub-agents to the listing broker through the listing service are responsible and competent, it is possible that neither brokers nor the public will utilize the service, thus forfeiting the benefits it may yield to all.

Realty Multi-List, 629 F.2d at 1369.

The undisputed facts are **[**48]** established. The critical legal question is whether requiring board membership to participate in MLS satisfied the "rule of reason" standard or is a violation of the antitrust laws. May the MCBR

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[16] *See* affidavit of Thad Vann, ex. B, By-laws, Art. X, *§ 1*, p. 15 ($ 65 per Realtor and $ 40 per other salesperson licensee); affidavit of William North, ex. A., By-laws, Art. II, *§ 1 (A)*, p. 15 ($ 41 per Realtor and licensee).

[17] *See* supplemental affidavits of William North at para. 24 and Thad Vann at para. 4.

[18] In *Wilson*, the defendants offered evidence to show the absence of a conspiracy and the court granted summary judgment. The court concluded by stating that "the record shows that plaintiff is unwilling to pay the going market price [for services], and is seeking redress from this grievance by means of an antitrust suit. This is not the purpose of antitrust laws. Antitrust laws were designed to protect free market competition, not the financial success of any particular competitor." *598 F. Supp. at 710*. *Wilson*,

provide the MLS as an exclusive service for members and deny MLS participation to non-members? ***HN21***[] A private organization may limit its services to its members as long as there is no arbitrary exclusion from membership, even where the services are economically necessary. *Associated Press v. United States, 326 U. S. 1, 21-23, 89 L. Ed. 2013, 2031, 65 S. Ct. 1416 (1944)*; *aff'g*, *United States v. Associated Press, 52 F. Supp. 362 (S. D. N. Y. 1943)*.

A number of sister courts have addressed this issue. "The defendant realtors are all ***HN22***[] members of a voluntary trade association and as such may properly exclude any non-member from participation in its activities. Such exclusion does not constitute a violation of the antitrust laws." *Martin Trigona v. National Association of Realtors, 1978-1 Trade Cases (CCH) P61,915 (E. D. Ill. 1978)*. **[**49]** *See also* *Brown v. Indianapolis Board of Realtors, 1977-1 Trade Cases (CCH) P61,435 (S. D. Ind. 1977)*; **[*270]** *Murphy v. Alpha Realty, Inc., 1978-2 Trade Cases (CCH) P62,388 (N. D. Ill. 1978)*.

The reasoning of these district court cases is derived in part from *Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416*. *Associated Press* concluded, ***HN23***[] in a summary judgment posture, that the arbitrary exclusion from membership in an association providing services and facilities essential to effective competition is unlawful, but that an association may lawfully limit its services and facilities to its members where there are no restrictive membership arguments. *Associated Press, 326 U.S. at 8-12, 21-23, 89 L. Ed. at 2023-2026, 2031-2032*. *Associated Press* temporarily enjoined the observance of the agreement restricting services to members until the private organization complied with the court decree requiring non-restrictive membership requirements. *Associated Press, 326 U.S. at 22, 89 L. Ed. at 2031*. **[**50]**

In the underlying district court decision, Judge Learned Hand reasoned that "taken by themselves, and apart from restrictions upon membership, both agreements [limiting services to members] would be valid; it is essential to the protection of the main purpose that the members who [participate in this service] shall not destroy the value of [the service by making it available to non-members]." *Associated Press, 52 F. Supp. at 374*. The Supreme Court upheld the district court, indicating that an organization may lawfully limit its services and facilities to its members. *Associated Press, 326 U.S. at 21-23, 89 L. Ed. at 2031-2032*. The Supreme Court did not allow competing non-members to by-pass membership but required the private organization to open up membership to these non-members.

Many state courts which have addressed this issue have held that a board of realtors may limit participation in its MLS to its members so long as membership on the board is open to all persons licensed as brokers on reasonable and non-discriminatory terms. The court finds one such case very persuasive. *State ex rel Miller v. Cedar Rapids Board of Realtors, 300 N.W.2d 127 (Iowa 1981)*. **[**51]** In the *Cedar Rapids* case, the state attorney general sued a realtor organization alleging that the board's requirement that MLS participants must be members of the local Board of Realtors violated the state antitrust laws, which were patterned after the federal antitrust laws. The attorney general took the position that the board's membership requirements were illegal, even if board membership was freely available to any real estate broker willing to join the board and pay membership dues. The Iowa Supreme Court applied the "rule of reason" of antitrust case law and held that the realty organization was not required by the antitrust laws to provide services to non-members. The court's reasoning is very persuasive:

> The alleged evil the State identifies is that a few [local] brokers - two were produced at trial - want access to the MLS without the "unnecessary barrier" of Board membership. The remedy sought is removal of "the price of admission to a non-related activity," i.e., Board membership and fees, because one broker testified MLS access is an "economic necessity." . . . The State's proposed solution would give a few competitors a monetary advantage over the MLS **[**52]** brokers whose organizing ability, money, and volunteer time has made the service a viable tool for effective selling. Judge Learned Hand's admonition is relevant: "The successful competitor, having been urged to compete must not be turned upon when he wins." *United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2nd Cir. 1945)*.

> A different case would be presented if brokers were unreasonably denied membership in the board and, consequently, access to the MLS. But here, unlike the government in United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1358 (5th Cir. 1980), the State conceded the membership requirements of the board were reasonable.
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> . . . .
>
> **[*271]** So long as board membership is available to all on a non-discriminatory basis as this record indicates, we will not compel this private trade association to share one of its membership benefits with brokers who, for whatever personal or business reasons, declined to join.

Cedar Rapids, 300 N.W.2d at 129-130, 131.

In opposing summary judgment on this issue, the plaintiffs rely heavily on *Realty Multi-List*. The court finds this case very **[**53]** instructive but cannot agree that it precludes summary judgment in the case *sub judice*. *Realty Multi-List* held that "[a] concerted denial of access to RML's listing service, when RML members have agreed to pool and share their listings, amounts to a group boycott of the non-member." Realty Multi-List, 629 F.2d at 1361. However, the real issue presented in the case *sub judice* is not whether the membership requirements are discriminatory against the Popes or exclude the Popes, but whether simply requiring membership to participate in the MLS violates the "rule of reason." [19]

[54]** *Realty Multi-List* did rely on a Supreme Court decision which allowed non-members to use the facilities of a private organization on just and reasonable terms, but failed to indicate that this separation of membership from services might be required in the context of a multiple listing service. [20] Instead, the Fifth Circuit emphasized that the private organization must permit applicants to become members.

> Moreover, RML must be allowed to recover the actual cost of its continuing services to *members*, just as it does now. RML's present stock purchase rule, however, is without justification in its competitive needs, and the district court erred in approving it. (emphasis added)

Realty Multi-List, 629 F.2d at 1387. The Court was mandating open membership and requiring that the membership fees not be a barrier to participation in the multiple listing service. Realty Multi-List, 629 F.2d at 1387. The Fifth Circuit has not indicated that the requirement of membership should be thrown out entirely but instead held that membership requirements must be reasonable.

[55]** Other courts have applied *Realty Multi-List* in a limited way or have recognized that *Realty Multi-List* does not control when the reasonableness of membership criteria is not at issue. Cedar Rapids, 300 N.W.2d at 130; *see also* Pomanowski v. Monmouth County Board of Realtors, 89 N.J. 306, 446 A.2d 83, 91 (N.J.); *cert. denied 459*

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[19] The exclusion of non-members from MLS participation need only satisfy the rule of reason. The requirement of membership to enjoy MLS participation is not a per se antitrust violation.

> A practice is "plainly anticompetitive" and lacking in "any redeeming virtue" under the Sherman Act, therefore, when it can further none of the Act's goals - when it operates to deny to consumers the opportunity to choose among alternative offers without offering the possibility of any joint, efficiency-producing economic activities.

Realty Multi-List, 629 F.2d at 1364 (citing Broadcast Music, Inc. v. Columbia Broadcasting Co., 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)).

[20] The organization in the case mentioned voluntarily provided services to some non-members, but did so in a discriminatory manner. The Supreme Court ordered the reform of organizational rules to allow competitors to use the facilities on equal terms. United States v. St. Louis Terminal Railroad Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912) (explained in Realty Multi-List, 629 F.2d at 1386).

U.S. 908, 74 L. Ed. 2d 170, 103 S. Ct. 213 (1982); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n., Inc., 672 F.2d 1280, 1286-1287 (7th Cir. 1982)*.

The plaintiffs have attempted to rely upon California state cases which hold that where MLS access has been shown to be a practical economic necessity for survival in a real estate brokerage market, the MLS must automatically be made available without the requirement of board membership. *Marin County Board of Realtors v. Palsson, 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976)*. Even if the Fifth Circuit adopted the California reasoning that board membership should not be required where MLS participation is a practical economic necessity, the plaintiffs have failed to show **[**56]** **[*272]** that participation in the MLS is a practical economic necessity for the survival of their business. In fact, the plaintiffs have failed to produce evidence of any meaningful impact upon their ability to do business in the case *sub judice*. [21]

Associated Press, Realty Multi-List and other decisions guiding this court do not indicate that MCBR membership and participation in the MLS should be separated from each other. The court recognizes that the MLS is a service provided by MCBR. Considering the entire evidentiary record, the court finds that the plaintiffs have failed to produce sufficient evidence to establish a genuine issue of material fact to preclude summary judgment. The court therefore finds that the requirement of membership to participate in the MLS is not a violation of the antitrust laws in the case *sub judice*.

4. No Showing of Market Power

Under the rule of reason, the court must not only consider the validity **[**57]** of the competitive justification given for the restraint imposed, but it also must determine the market power of the combination. [22] Therefore, ***HN24***[] the court has the power to void "any significantly restrictive rule of a combination or trade association with *significant market power, which lacks competitive justification* or whose reach clearly exceeds the combination's legitimate needs." *Realty Multi-List, 629 F.2d at 1370* (emphasis supplied). The plaintiffs have not established that the MLS has significant market power in the case *sub judice*.

The plaintiffs have conceded that they sell 70% to 80% of their own listings "in house" because it is more profitable to sell their own listings. [23] These "in house" sales have no connection to either the MLS or the private defendants. The plaintiffs have also conceded that they **[**58]** have access to the listings of Murphy and Roberts completely apart from any participation in the MLS. [24] The parties have stipulated that Pope's Realty-Century 21 has provided monthly financial information to a regional Century 21 office. Based upon this information, Raymond Micsan, director of the Century 21 regional office, stated that the plaintiffs enjoy a "normal" ratio of "in house" to cooperative sales for similarly situated Century 21 francises, [25] despite their non-participation in the board's MLS.

The plaintiffs have not come forward with specific evidence to demonstrate that their non-participation in the MLS has had any appreciable effect on their ability to engage in cooperative sales or to remain generally competitive in the Monroe County real estate market. The Supreme Court has emphasized that **[**59]** ***HN25***[] the legality of arguable anti-competitive conduct should be judged primarily by its "market impact." *Monsanto, 465 U.S. at 762, 79 L. Ed. 2d at 784*; *see also* *Realty Multi-List, 629 F.2d at 1370*. The plaintiffs have failed to show any market effect from these allegedly anti-competitive restraints. [26] **[**60]** The court also recognizes that participation in the MLS

[21] *See* discussion of market effect below at II(A)(4).

[22] The market power requirement applies to other antitrust claims as well.

[23] *See* deposition of James Pope at 174-175.

[24] *See* deposition of James Pope at 219, 221-222.

[25] *See* deposition of Raymond Micsan at 22-23.

[26] The plaintiffs have also failed to show an antitrust injury from these allegedly anti-competitive restraints. They have not come forward with specific probative evidence of sales which they have lost and they have not shown any statistical evidence to

does not insure cooperation with each participant of the MLS. Even if participation in the MLS was open to the plaintiffs without the standard fee or membership in MCBR, the individual participants could still decline to cooperate with the plaintiffs or to cease their MLS participation altogether. [27] This possibility would clearly have an anti-competitive impact on the real estate market.

[*273] ***HN26***[] Under the rule of reason, a showing of anti-competitive market effect is an essential predicate for antitrust liability. *Monsanto, 465 U.S. at 762, 79 L. Ed. 2d at 784*; *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 687, 38 S. Ct. 242 (1918)*. The Seventh Circuit has stated the rule as follows:

> It is by now well established that any rule of reason analysis requires a showing of anti-competitive market effect. To hold otherwise would ignore the very purpose of the anti-trust laws which were enacted for the protection of competition, not competitors.

Phil Tolkan Datsun, 672 F.2d at 1287 (quoting *Lektro-Vend Corporation v. The Vendo Co., 660 F.2d 255, 268 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982))*.

The **[**61]** plaintiffs have failed to provide specific evidence to demonstrate an anti-competitive market effect. The plaintiffs have not created an issue of fact regarding this challenge to their claim. The defendants are entitled to summary judgment on the denial of MLS participation claim and all antitrust claims on the ground that the plaintiffs have failed to establish market effect. *Celotex, 91 L. Ed. 2d at 273*.

5. No Effect on Interstate Commerce

HN27[] The federal antitrust laws regulate interstate commerce and not local intra-state commerce. [28]

> Jurisdiction may not be invoked under [the Sherman Act] unless the relevant aspect of interstate commerce is identified; *it is not sufficient to rely on identification of a relevant local activity and to presume an interrelationship* with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted *must proceed to demonstrate by submission of evidence* beyond the pleadings either that the defendants' **[**62]** activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce. *Gulf Oil Corp. v. Copp Paving Co*., supra, [419 U.S. 186] at 202, [*42 L. Ed. 2d 378, 95 S. Ct. 392]*.

McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 242, 62 L. Ed. 2d 441, 450, 100 S. Ct. 502 (1980) (emphasis supplied). The plaintiffs do not have to show that the alleged activity effected interstate commerce, but they must "demonstrate a substantial effect on interstate commerce generated by [the defendants'] brokerage activity." *McLain, 444 U.S. at 242, 62 L. Ed. 2d at 451*.

The plaintiffs had the responsibility of coming forward with evidence to demonstrate that the defendants' activity was either in interstate commerce or had a substantial effect on interstate **[**63]** commerce, because the defendants expressly challenged jurisdiction on this basis. The plaintiffs have failed to come forward with any evidence to demonstrate an effect on interstate commerce.

McLain did hold that the broker organization in the case before the court had an effect on interstate commerce through the utilization of out-of-state bank financing and national title insurance. *McLain*, 44 U.S. at 245, 62 L. Ed. 2d at 452. However, the plaintiffs have not demonstrated that the broker organization in Amory will have the same "substantial effect" on interstate commerce as did the large New Orleans organization in *McLain*. The plaintiffs have

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indicate an injury. To the contrary, the evidence tends to show that the plaintiffs' sales ratio has been unaffected. *See* deposition of Raymond Micsan at 22-23. *See also* discussion at II.C.2.

[27] *See* affidavit of William North at para. 9; *see* discussion of *Colgate* doctrine at II.B. below.

[28] The requirement of a substantial effect on interstate commerce applies to other antitrust claims as well.

not established that out-of-state banks or title insurance companies were used or that this connection to interstate commerce would be sufficient in the case *sub judice*.

The Fifth Circuit refused to broaden the holding of *McLain* to presume a substantial effect on interstate commerce by every real estate organization.

> **[*274]** In the present action, appellants seek to employ *McLain* as an umbrella underneath which any business having the most tangential relationship with the real estate business **[**64]** would be presumed to have a substantial effect on interstate commerce. *McLain* does not stand for that proposition, and that is not the law.

Alabama Homeowners, Inc. v. Findahome Corp., 640 F.2d 670, 673 (5th Cir. 1981). The Fifth Circuit recognized that *Realty Multi-List* presented the issue of whether or not the local multiple listing service had a "sufficient connection to interstate commerce to invoke Sherman Act jurisdiction" but found it unnecessary to decide the issue. *Realty Multi-List, 629 F.2d at 1389*. These authorities indicate to the court that antitrust plaintiffs continue to have a responsibility to present evidence on this issue and that plaintiffs may not "presume an inter-relationship" with interstate commerce. The plaintiffs have not produced evidence to create a genuine factual dispute on this issue pursuant to *Rule 56*. The defendants are entitled to judgment as a matter of law on all antitrust claims on the ground that interstate commerce was not involved and therefore the court has no "Sherman Act jurisdiction." *Celotex, 91 L. Ed. 2d at 273*.

B. Group Boycott Claim

The plaintiffs' second claim **[**65]** of Count I is that the private defendants instituted a group boycott against the plaintiffs by collectively refusing to permit the plaintiffs to show property listed with these private defendants. The defendants challenge this allegation as devoid of evidentiary support and demand that the plaintiff prove that the defendants' alleged refusal to deal with him, or boycott of him, was the result of joint or concerted action undertaken pursuant to a common scheme, understanding, or grievance.

The defendants did allow the plaintiffs to show listed properties during this time period and did cooperate with the plaintiffs, except for Mr. and Mrs. Francis. The plaintiffs' own depositions fail to establish specific facts that the defendants have unilaterally refused to deal with the plaintiffs, much less boycotted the plaintiffs. Even if such activity did exist, the plaintiffs would be required to prove that this activity was the result of a common scheme, understanding, or agreement and not the result of independent action.

Each individual defendant had a "unilateral right" to refuse to deal with the plaintiffs for reasons sufficient to themselves. *Aladdin Oil, 603 F.2d at 1113*. **[**66]** The Supreme Court has held as follows:

> ***HN28***[] 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.

United States v. Colgate and Co., 250 U.S. 300, 307, 63 L. Ed. 992, 997, 39 S. Ct. 465 (1919). Although somewhat narrowed through the years, the *Colgate* doctrine remains viable in ***antitrust law*** and still allows "individual sellers to refrain from dealing, even though the condition for dealing would otherwise violate the antitrust laws." *Aladdin, 603 F.2d at 1114*. **[**67]** ***HN29***[] The refusal to deal becomes unlawful only when it produces an unreasonable restraint on trade and there exists "an anti-competitive purpose or effect in selecting those with whom one will deal." *Aladdin, 603 F.2d at 1115*. [29]

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[29] The Fifth Circuit has noted that:

[68]** **[*275]** The Fifth Circuit has clearly held that ***HN30***[] the plaintiff must prove five elements to establish liability for a boycott conspiracy under *Section 1* of the Sherman Act and Section 4 of the Clayton Act. *Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1059 (5th Cir. 1985)*, *cert. denied*, *474 U.S. 1102, 88 L. Ed. 2d 919, 106 S. Ct. 884 (1986)*. "[A] plaintiff must prove: (1) that a conspiracy to boycott existed; (2) that the defendants participated in a conspiracy; (3) that the conspiracy had a sufficient nexus with interstate commerce; (4) that the conspiracy injured the plaintiff; and (5) the approximate amount of damages."

The Fifth Circuit upheld a summary judgment in *Aviation Spec., Inc. v. United Technologies Corp., 568 F.2d 1186 (5th Cir. 1978)* in which the plaintiff failed to show a conspiracy. In that case, the plaintiff stipulated that they had no direct evidence that the refusal to deal was anything more than a unilateral business decision or that there were any agreements beyond typical distributorship agreements. **[**69]** As in the case *sub judice*, the defendants denied the existence of a conspiracy and thus shifted the burden to the plaintiffs to produce significant probative evidence of a conspiracy and participation by the defendants in the conspiracy. As in the case *sub judice*, the plaintiffs relied upon circumstantial evidence. *See First National Bank v. Cities Service Co., 391 U.S. 253, 291, 20 L. Ed. 2d 569, 593, 88 S. Ct. 1575 (1968)*; *Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 396 (5th Cir. 1976)*. The Fifth Circuit held that the plaintiffs had to do far more than show parallel business behavior to establish evidence of a violation of the Sherman Act and thereby avoid summary judgment. The court then proceeded to point out that the plaintiffs' assertion rested upon its own "unsupported assessment of the situation, which is insufficient to raise a genuine issue of material fact concerning whether the refusal was premised upon a good faith business judgment." *Aviation Specialties, 568 F.2d at 1192*.

The plaintiff has the burden of coming forward with specific evidence of a conspiracy in order to survive summary judgment on **[**70]** the boycott claim. Conspiratorial conduct may not be proven by circumstantial evidence unless such circumstantial evidence excludes the possibility of independent action. *Monsanto, 465 U.S. at 764, 79 L. Ed. 2d at 785*.

The uncontroverted testimony of Raymond G. Micsan, the director of the Century 21 regional office, establishes that Century 21-Popes' Realty engaged in cooperative transactions with other brokers throughout the period at issue in this litigation. [30] The plaintiffs admit that Murphy and Roberts have not boycotted the plaintiffs or refused to deal with the plaintiffs. [31] In addition, the plaintiffs admit that they do not have any direct evidence of any conspiracy or agreement between any two defendants to refuse to do business with Century 21 - Popes' Realty. [32]

The plaintiffs have failed to provide sufficient probative **[**71]** evidence to create a genuine issue of fact on the conspiracy element or the other four elements necessary to the boycott claim. *Park, 764 F.2d at 1059*. The defendants are entitled to judgment as a matter of law on the boycott claim.

C. Price Fixing Claim

The plaintiffs have claimed that the defendants have conspired to fix prices, i.e., set commission rates, although such a charge is not found in one particular charge of the amended complaint. The defendants challenge this claim

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> [A] company, acting unilaterally, has the right to select its customers and to refuse to sell its goods to anyone for reasons sufficient to itself. Proof of parallel behavior alone does not establish a prima facie case of a violation of the Sherman Act. In order to avoid a motion for summary judgment, a claimant must come forward with significant probative evidence supporting its theory of conscious parallelism with, as it has been stated, some "plus" factor which tends to indicate that the asserted unilateral behavior was not such in fact, e.g., that the decisions not to deal were contrary to defendants' economic self interest so as to raise an issue of good faith business judgment.

Paul Kadair, 694 F.2d at 1027. (citations omitted)

[30] *See* deposition of Raymond Micsan at 22-23.

[31] *See* deposition of James Pope at 219, 221-222.

[32] See deposition of James Pope at 224-225.

of the plaintiffs because they failed to produce any evidence of price fixing and because the **[*276]** plaintiffs lack standing to sue for price fixing. The plaintiffs have supported their price fixing claim by attempting to show retaliatory conduct, tossing out the *Monsanto* case, *465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464*, and arguing that standing requires nothing more than "injury in fact" in an antitrust situation. [33]

1. No Evidence of Price Fixing **[**72]** Agreement

The starting point for the court is the recognition that the plaintiffs bear the burden of producing probative evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy.

> On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.
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> . . .
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> Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the [defendant] manufacturer and [defendant] nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

Monsanto, 465 U.S. at 763-764, 79 L. Ed. 2d at 785-786.

In *Monsanto*, the Supreme **[**73]** Court held that the direct and inferential evidence was sufficient to enable the fact-finder to conclude that there was an agreement for conspiracy to maintain prices. However, in the case *sub judice* plaintiffs have failed to make a sufficient showing of either a conspiracy or the participation of these defendants in such a conspiracy. The plaintiffs themselves have stipulated the following: "Plaintiffs are aware of no written or oral agreement between Roberts, Murphy, and Jack and Mary Lib Francis to charge a uniform rate of six percent for the commissions or to charge a uniform split among participating salesmen" and that the MAR "does not have any written policy that fixes, establishes, or recommends a rate of commission that its members should charge sellers, or that fixes, establishes or recommends a rate of commission split that members should pay to each other or other real estate licensee." [34] The plaintiffs offer no specific facts to demonstrate the existence of a conspiracy or price agreement. Pope's conclusory statement that the defendants' had made "statements" that they would not cooperate with the plaintiff unless the plaintiff stopped advertising their "cut rates" **[**74]** is insufficient to create a genuine issue of material fact. [35]

In contrast, the defendants' affidavits prove that the NAR, MAR, and MCBR strictly forbid price fixing by their members. [36] The plaintiffs have admitted that they do not have any evidence to suggest otherwise. [37] Murphy, Roberts, and Francis state in their affidavits that these defendants have never conspired to fix real estate brokerage commissions. [38] The plaintiffs concede the absence of proof of a conspiracy among the individual defendants. [39]

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[33] *See* plaintiffs' brief at 11-12.

[34] *See* pretrial order at 11-12 (UU, PP).

[35] *See* affidavit of James Pope at 1, 6-7.

[36] *See* affidavit of William North at para. 20; Thad Vann at paras. 6, 7, 8, 9; and Joyce Murphy at para. 12.

[37] *See* deposition of James Pope at 172-174.

[38] *See* affidavits of Joyce Murphy, para. 19, exs. D-F; Phillip Roberts, paras. 6, 9, exs. A-F; Mary Lib Francis, paras. 7, 9 exs. A-C.

[39] *See* deposition of James Pope at 171.

[75]** The plaintiffs have failed to establish a price fixing conspiracy or price fixing agreements between parties. The circumstantial evidence of parallel behavior does not exclude the possibility of independent action and is not sufficient probative evidence of conspiratorial conduct. *Monsanto, 465 U.S. at 768, 79* ***[*277]*** *L. Ed. 2d at 788*. The Supreme Court made itself perfectly clear when it stated that:

> [*Monsanto*] held that ***HN31***[] conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy (citations omitted). To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. (citations omitted) Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed respondents. **[**76]**

Matsushita, 475 U.S. at 588, 89 L. Ed. 2d at 553. The plaintiffs must also show the defendants individual participation in the conspiratorial conduct. The Fifth Circuit has found the existence of a conspiracy but then found the testimony wholly inadequate to support an inference of conspiracy between the supplier and distributors other than the plaintiff. *Joe Regueira, Inc. v. American Distilling Co., 642 F.2d 826, 832 (5th Cir. 1981)*. The plaintiffs have failed to show either the existence of a conspiracy or participation by any of these defendants in a conspiracy.

The plaintiffs have failed to establish proof of conspiratorial conduct as required by the Sherman Act. Parallel business behavior does not, as a matter of law, prove a conspiracy. *Aviation Specialties, 568 F.2d at 1192*. The plaintiffs have not proved that individual private defendants have conspired to set uniform commission rates and the circumstantial evidence produced does not "exclude the possibility of independent action." The plaintiffs have also failed to produce any evidence to dispute the express policies of the NAR, MAR, and MCBR which forbid "fixing" **[**77]** commissions or commission splits.

The plaintiffs have not produced sufficient evidence to create a genuine issue of material fact on this claim. The defendants are entitled to judgment as a matter of law on the price-fixing claim.

2. Standing Requires Antitrust Injury [40]

The defendants also challenge the plaintiffs' price-fixing claim on the basis of the plaintiffs' failure to show an antitrust injury and therefore to show the existence of standing. The defendants point out that the plaintiffs could not possibly have been injured by any such conspiracy to raise commission rates. The simple economics of the situation indicate that the plaintiffs are actually benefitted because they are placed in a better competitive position with customers in relation to other brokers.

HN32[] Injury is "the *sine qua non* for stating a cause of action **[**78]** by a private antitrust plaintiff." *Southern Concrete Co. v. U. S. Steel Corp., 535 F.2d 313, 318 (5th Cir. 1976)*, *cert. denied*, *429 U.S. 1096, 51 L. Ed. 2d 543, 97 S. Ct. 1113 (1977)*.

HN33[] A private plaintiff's standing to sue for antitrust damages is governed by Section 4 of the Clayton Act, *15 U. S. C. § 15*, which confers standing only on those persons who have been "injured in their business or property by reason of anything forbidden in the antitrust laws . . . ." The Supreme Court has recognized further limitations on private antitrust claims for damages. *Hawaii v. Standard Oil Co., 405 U.S. 251, 262, 31 L. Ed. 2d 184, 193 n.14, 92 S. Ct. 885 (1972)*; *Southern Concrete, 535 F.2d at 316*.

The Fifth Circuit uses the "target area" test to determine antitrust standing. Standing is different in an antitrust context.

[40] The requirement of antitrust injury applies to other antitrust claims as well.

> ***HN34***[] The "target area" test arose as a means of limiting the class of potential treble **[**79]** damage plaintiffs to those persons who could most adequately vindicate the purpose of the antitrust laws. To attain standing a person (whether corporation or individual) must be one against whom the conspiracy is aimed.

Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975). The Fifth Circuit has applied the test to deny standing to persons who cannot establish that they **[*278]** paid the allegedly fixed price. *Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 547 (5th Cir. 1980)*, *cert. denied*, *454 U.S. 927, 70 L. Ed. 2d 236, 102 S. Ct. 427 (1981)*. The Fifth Circuit has applied the "target area" test in *Park v. El Paso Board of Realtors, 764 F.2d 1053 (5th Cir. 1985)*, *cert. denied*, *474 U.S. 1102, 88 L. Ed. 2d 919, 106 S. Ct. 884 (1986)*, to a case involving real estate brokers just as in the case *sub judice*.

> The plaintiff alleged that the defendant-brokers set an artificially high price for commissions. However, it is difficult to see how this price-fixing, in itself, could have injured the plaintiff. Setting an artificially high price for a product potentially **[**80]** harms consumers; but normally one would not expect it to harm competitors who try to undercut the set price. Quite the reverse: price fixing ordinary helps these competitors by allowing them to capture a larger share of the market than they would if the prevailing price were lower.

Park, 764 F.2d at 1069.

The Supreme Court has used this same reasoning to reinstate summary judgment for defendants.

> Respondents cannot . . . recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act . . ., but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price . . . . Such restrictions, though harmful to competition, actually benefit competitors by making supracompetitive pricing more attractive. Thus, [these various claims cannot] by themselves give respondents a cognizable claim against petitioners for antitrust damages.

Matsushita, 475 U.S. at 582-583, 89 L. Ed. 2d at 549-550.

The plaintiffs have not produced sufficient evidence to create a genuine **[**81]** issue of fact on the standing challenge. The court finds that the plaintiffs do not have the necessary antitrust standing to bring this claim of an alleged conspiracy to fix real estate brokerage commissions and commission splits.

D. Claims Related to the Private Defendants' Complaints to MREC and the Action taken by the Government Defendants

The plaintiffs' third claim under Count I is that the government defendants conspired with the private defendants to "punish" the plaintiffs for their competitive activities by way of the complaint procedure of the MREC. The plaintiff sets out specific complaints made to the MREC and the subsequent action taken by the MREC. The existence of these administrative complaints and the action taken by the government defendants are not in dispute. The private defendants claim that these complaints were not filed in order to "punish" the plaintiffs and that, even if they were, this action would be immune under the *Noerr-Pennington* doctrine. The government defendants claim to be immune.

1. Challenge by Private Defendants

Defendants Murphy, Roberts, and the Francises do not dispute that the complaints were filed with the MREC and that the MREC **[**82]** took action based upon these complaints. However, these defendants point out that the record is utterly devoid of any evidence that any defendants improperly utilized the complaint procedures of the MREC to "punish" the plaintiffs for competing in the Monroe County real estate market or for any other reason. The plaintiffs have not set forth sufficient probative evidence to challenge the defendants' claim, but even if the plaintiffs had shown that this action was taken to "punish" the plaintiffs' behavior, or for other anti-competitive reasons, this conduct would still be expressly protected from antitrust attack by the *Noerr-Pennington* doctrine.

The Supreme Court has long recognized that *First Amendment* considerations compel the conclusion that antitrust laws do not apply to concerted action for the purpose of petitioning or attempting to influence governmental authorities. *Eastern **[*279]** Railroad Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135, 5 L. Ed. 2d 464, 470, 81 S. Ct. 523 (1961)*, *United Mine Workers v. Pennington, 381 U.S. 657, 669-670, 14 L. Ed. 2d 626, 636, 85 S. Ct. 1585 (1965)*. The reasoning in these cases that **[**83]** concerted actions designed to influence governmental authorities is immune from antitrust challenge has come to be known as the *Noerr-Pennington* doctrine.

The Fifth Circuit interprets the *Noerr-Pennington* doctrine to exempt proceedings initiated before governmental agencies from the antitrust laws even if the proceedings are initiated for the express purpose of eliminating competition. *Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1363 (5th Cir. 1983)*. ***HN35***[] The antitrust laws do not apply to private efforts to petition governmental agencies.

> The Supreme Court established the basic principle of antitrust petitioning immunity, that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."

Coastal States, 694 F.2d at 1363.

The Supreme Court has created an exception to the *Noerr-Pennington* doctrine, but this so-called "sham" exception **[**84]** is limited in scope. *Noerr, 365 U.S. at 144, 5 L. Ed. 2d at 475*; *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 646-647, 92 S. Ct. 609 (1972)*. "While the precise contours of these exceptions are as yet ill-defined, there appears to be agreement that both vexatious litigation and unlawful conspiracies with governmental officials are sham activities." *Greenwood Utilities Commission v. Mississippi Power Company, 751 F.2d 1484, 1498 (5th Cir. 1985)*. The Fifth Circuit declared that "only where evidence shows that the defendant knew or should have known that the action he sought was improper would a court be justified in labeling his petitions a "sham" . . ." *Greenwood Utilities, 751 F.2d at 1500*.

The plaintiffs have not produced any specific evidence that the "sham" exception should apply to deny *Noerr-Pennington* immunity to these private defendants. There is no indication in the record that the defendants acted in a vexatious manner or that they conspired with government defendants in any way.

The plaintiffs have not provided evidence to create a genuine issue of material **[**85]** fact concerning the *Noerr-Pennington* challenge. The private defendants are entitled to judgment as a matter of law on this claim.

2. Challenge by Government Defendants

The MREC investigated the complaints and took disciplinary action against the plaintiffs based upon the private defendant's complaints. [41] The MREC, and the other government defendants who act for the MREC, have a mandate to enforce the standards of conduct that govern all persons licensed by the commission. *Miss. Code Ann. § 73-35-21* (1972). The commission is required to follow specific procedures **[*280]** in enforcing these standards to insure due process protections at the administrative level. *Miss. Code Ann. § 73-35-23* (1972). In addition, a licensee disciplined by the commission is afforded a right of appeal to the Mississippi state courts. *Miss. Code Ann.*

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[41] The plaintiffs' claims against the MREC, undisputedly a state agency, are barred by *Eleventh Amendment* immunity. *See* *Edelman v. Jordan, 415 U.S. 651, 662-663, 39 L. Ed. 2d 662, 672, 94 S. Ct. 1347 (1974)*; *Pennhurst State School v. Halderman, 465 U.S. 89, 100, 79 L. Ed. 2d 67, 78, 104 S. Ct. 900 (1984)*; *McDonald v. Board of Mississippi Levee Com'rs., 832 F.2d 901, 906 (5th Cir. 1987)*. The MREC commissioners are absolutely immune for acts that were quasi-judicial. Part of their functions are analogous to those of judges and prosecutors. *Nixon v. Fitzgerald, 457 U.S. 731, 747, 73 L. Ed. 2d 349, 362, 102 S. Ct. 2690 (1982)*; *see also* *Johnson v. Wells, 566 F.2d 1016, 1018 (5th Cir. 1978)* (parole board immunity); *United States v. Irving, 684 F.2d 494, 496 (7th Cir. 1982)*. The MREC commissioners and staff also may utilize the protection of qualified immunity. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410, 102 S. Ct. 2727 (1982)*; *Scheuer v. Rhodes, 416 U.S. 232, 247, 40 L. Ed. 2d 90, 103, 94 S. Ct. 1683 (1974)*; *Baddour, Inc. v. United States, 802 F.2d 801, 806-808 (5th Cir. 1986)*. Immunity defenses apply to the *First Amendment*, due process, and equal protection claims as well.

§ 73-35-25 (1972). The plaintiffs have failed to produce sufficient evidence that the government defendants conspired with anyone to "punish" the plaintiffs for any reason whatsoever.

[86]** The government defendants argue that they are not subject to federal antitrust laws because of state action immunity. The Supreme Court has stated that the Sherman Act does not restrain state action or official action and established the state action exemption to the antitrust laws. *Parker v. Brown, 317 U.S. 341, 350-351, 87 L. Ed. 315, 325-326, 63 S. Ct. 307 (1943)*. The Fifth Circuit has long recognized that "neither **HN36**[] the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action." *Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973)*; *Alabama Power Co. v. Alabama Electric Coop., 394 F.2d 672, 675* (5th Cir.), *cert. denied*, *393 U.S. 1000, 21 L. Ed. 2d 465, 89 S. Ct. 488 (1968)*. This shield of immunity protects governmental agencies as well as officers and agents of the state who are acting within the scope of their authority. *Saenz, 487 F.2d at 1028*.

The plaintiffs have failed to provide evidence to create genuine issues of material fact to **[**87]** preclude summary judgment for the government defendants on this critical element. [42] The government defendants are entitled to judgment as a matter of law on all federal antitrust claims.

E. Claim that Private Defendants Prohibited the Use of the Term "Realtor" [43]

[88]** The plaintiffs' fourth claim is that certain private defendants [44] have engaged in the unreasonable restraint of trade by placing "arbitrary limitations" upon the use of the term realtor. Plaintiffs claim that they are qualified to use the term realtor and that the defendants' actions preventing such use violated the *First Amendment* and antitrust laws. The plaintiffs claimed in their brief that realtor is a generic term which is not subject to copyright laws.

The parties have subsequently stipulated that NAR owns the federally registered trademark "realtor" and "realtors" which are proprietary trademarks that refer solely to persons who are members of NAR and who have subscribed to NAR's Code of Ethics. NAR licenses the right to use these terms to its member boards (such as MCBR) who in turn sub-license the right to use these terms to their individual members.

[89]** Securing registration of a trademark pursuant to the Lanham Act and endeavoring to police and protect one's rights in that trademark is not a violation of the antitrust laws. Under any possible set of facts, **HN37**[] "the acts of [defendants] in registering and enforcing the trademark in issue . . . merely represent fair and aggressive competition which does not constitute a violation of the antitrust laws." *Car-Freshner Corp. v. Auto Aid Manufacturing Corp., 438 F. Supp. 82, 87 (S. D. N. Y. 1977)*. The argument that the use and protection of a copyright under the Federal Trademark Statute, *15 U. S. C. §§ 1051-1127*, violates the federal antitrust laws is clearly erroneous.

[*281] The Popes have admitted that they were not members of the MCBR and were thus unable to be members of the MAR or NAR. [45] Therefore, the Popes' unauthorized use of the term "realtor" infringes upon NAR's trademark rights and these private defendants may take appropriate steps to enforce their trademark. The plaintiffs have not established a genuine issue of material fact **[**90]** sufficient to preclude summary judgment on this antitrust claim.

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[42] The court notes that the type of "anti-competitive restraint" challenged must be within the legislative intent. Although this is a factual determination, the plaintiffs have failed to come forward with either specific evidence or arguments to dispute the availability of a state action exemption. *Lafayette v. Louisiana Power and Light, 532 F.2d 431, 434 (5th Cir. 1976)*, *aff'd*, *435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*.

[43] The terms "Realtor" and "Realtors" are federally registered trademarks that refer solely to NAR members, according to the parties' stipulations. The court will use these terms with this definition in mind but will not use the registered trademark symbol of a circled R.

[44] These defendants include the Monroe County Board of Realtors, Inc., Mississippi Association of Realtors and the National Association of Realtors.

[45] *See* deposition of James Pope at 157 and party stipulations.

The defendants are entitled to judgment as a matter of law on the issue of attempting to prevent the plaintiffs from using the protected trademark term "realtor".

The plaintiffs also claim that the enforcement of this trademark by private defendants violates the *First Amendment*. Private action cannot be the basis for a violation of the right to free speech, only government action. The plaintiffs have not shown that the private defendants' trademark is invalid because it is a generic term, or that, if it were, the result of this trademark's enforcement would be a *First Amendment* violation. *See* *San Francisco Arts and Athletics v. U.S.O.C., 483 U.S. 522, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987)*. The private defendants are entitled to judgment as a matter of law on the *First Amendment* claim.

F. Claim that Defendants Prohibited Employment Discussions With Their Sales **[**91]** People

The plaintiffs' fifth claim of Count I is that the defendants have prohibited discussions by the plaintiffs with their sales people and that this violates antitrust laws and the *First Amendment*. The private defendants have challenged the factual basis of this claim through their affidavits. In response, the plaintiffs have failed to produce sufficient probative evidence to establish these allegations. The plaintiffs have not come forward with any specific facts that establish that any of the plaintiffs' activities concerning employment or employee communication policies are in violation of antitrust laws or the *First Amendment*. The court does not find it necessary to exhaustively address a claim which has no factual or legal support. The defendants are entitled to judgment as a matter of law.

G. Claim that Defendants Restricted Locations for Real Estate Courses

The plaintiffs' sixth claim of Count I is that the defendants have somehow prevented real estate courses from being taught at convenient locations. Although this allegation was challenged by the defendants through affidavits, the plaintiffs have not come forward with specific facts to support this allegation. The **[**92]** private defendants have asserted that they have no control over licensing requirements, the approval of real estate courses, or the location of these courses. Pursuant to *Mississippi Code Annotated § 73-35-7*, the courses must be approved by either the Southern Association of Colleges and Schools or the Realtors' Institute of Mississippi. The plaintiffs have not come forward with any specific facts to support this claim and have failed to create a genuine issue of material fact. The plaintiffs have also failed to articulate a colorable *First Amendment* or antitrust claim. The defendants are entitled to judgment as a matter of law.

H. Claim of Tying Arrangement Between Sales of Insurance and Real Estate

The plaintiffs allege that Francis and Roberts have tied the selling of insurance to the listing of real property in violation of antitrust laws. Both defendants Roberts and Francis have expressly denied this allegation in their sworn affidavits. [46] The plaintiffs have not come forward with sufficient probative evidence to create a genuine issue of material fact on this claim. The court finds that the defendants are entitled to judgment as a matter of law. In a summary judgment posture, **[**93]** the plaintiffs must produce specific evidence to substantiate **[*282]** their claim in order to continue to trial.

III.

First Amendment Claims Against Government Defendants

The plaintiffs have alleged violations of the *First Amendment* by the government defendants in Count II. The court will give due consideration to each of these claims in the order in which they are presented.

Not all speech is constitutionally protected by the *First Amendment*. The Supreme Court has distinguished between commercial price and product advertising and ideological communication and has demanded a greater degree of protection for the latter form of speech. *Young v. American Mini Theatres, Inc., 427 U.S. 50, 68, 49 L. Ed. 2d 310, 325, 96 S. Ct. 2440 (1976)*. In *Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557,*

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[46] *See* affidavits of Roberts at para. 20 and J. Francis at para. 7.

65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980), **[**94]** ***HN38***[] the Supreme Court adopted a four-part test for determining the validity of government restrictions on commercial speech. This test was as follows: (1) the *First Amendment* protects commercial speech only if that speech concerns lawful activity and is not misleading; (2) a restriction on otherwise protected commercial speech is valid if it seeks to implement a substantial governmental interest, and (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. *Central Hudson, 447 U.S. at 566, 65 L. Ed. 2d at 351*. The defendants have made an initial showing that the speech involved was misleading and that the government response was narrowly tailored to prevent such false advertising and was to protect the public. [47]

A. Claim of Punishment for Advertising Services

The plaintiffs claim that the defendants have **[**95]** "punished" them in some way for advertising their business. The government defendants argue that the only action taken against the plaintiffs related to advertising was the investigation of complaints and the enforcement of the law. The government defendants claim that, in each instance in which the plaintiffs were subject to commission investigation and action related to advertising, the misrepresentative nature of the the content of the plaintiffs' advertisement was the focus of attention. The plaintiffs have in essence admitted this as to the brochure used by the plaintiffs. [48] In another advertisement, the plaintiffs compared their services to those of other brokers in Monroe County. A complaint was filed with the MREC, the MREC investigated the matter, and the MREC found that the advertisement did contain false and misleading information. The MREC's actions were directed toward the misrepresentations by a licensed real estate broker and did not improperly infringe the plaintiffs' rights to commercial speech.

[96]** The plaintiffs have failed to establish specific probative evidence sufficient to create a genuine issue of material fact on essential elements of this claim. The plaintiffs have not established facts to indicate either retaliation or "punishment" by MREC or that their speech would be protected by the *First Amendment* as truthful advertising. The defendants are entitled to judgment as a matter of law.

B. Claim Concerning Advertising and Encouraging Attendance at Real Estate Schools

The plaintiffs claim that the MREC has punished the plaintiffs for encouraging persons to attend real estate schools and for advertising the programs at such schools. The plaintiffs admitted in a letter to the defendants that an error was made in the publication at issue. [49] The defendants argue that the letter of reprimand **[*283]** addressed misrepresentations in the advertisement and did not violate the *First Amendment*. The plaintiffs have not produced sufficient evidence to create a factual issue and have failed to establish that a *First Amendment* violation occurred as to the advertisements concerning real estate courses. The defendants are entitled to judgment as a matter of law.

[97]** C. Claim Concerning the Use of Gifts in Advertising

The plaintiffs' third and fourth claims of Count II involved the use of vacuum cleaners and tee shirts as part of advertising efforts. The plaintiffs advertised the fact that they gave vacuum cleaners to purchasers of real estate. Apparently, the plaintiffs also gave away "Century 21" tee shirts as a form of advertising. The government defendants argue that the complaint involving the vacuum cleaner did not primarily concern the advertisement of the vacuum cleaner but the fact that the vacuum cleaner given as a reward for the purchase of property did not work. The letter of reprimand also cautioned the plaintiffs about improper gifts and pointed out the pertinent statute, *Miss. Code Ann. § 73-35-21(j)* (1972). The MREC's investigation and letter of reprimand during the vacuum

[47] The government defendants also have immunity defenses. *See* II.D.2. footnote.

[48] The plaintiffs stated that 95% of the information was true, therefore 5% must have been false. *See* affidavit of James Pope at 9.

[49] *See*, Government defendant's exhibit 3, letter from John E. Johnson dated May 15, 1981.

cleaner incident has not been shown to infringe the plaintiffs' right to free speech. The plaintiffs have not produced specific evidence to establish that the MREC took any action that inhibited truthful advertising. [50] The Popes did not advertise that they gave away faulty vacuum cleaners but they apparently did give a customer a defective vacuum cleaner **[**98]** as an inducement for the sale of real estate.

The plaintiffs have not produced sufficient evidence to establish that the MREC has prohibited or discouraged the use of tee shirts in advertising. This claim would raise a legitimate *First Amendment* issue if the plaintiffs could set forth evidence to substantiate this claim. However, the plaintiffs have failed to meet the summary judgment standard.

The plaintiffs have failed to produce sufficient evidence to create genuine issues of material fact on the use of gifts in advertising claim. The defendants are entitled to judgment as a matter of law.

D. Plaintiffs' Use of the Term "Realtor" as Claim

The plaintiffs claim that the government defendants have prohibited them from using the term "realtor" in violation of the *First Amendment*. [51] The government defendants claim that they have not taken any **[**99]** action to prohibit or discourage the plaintiffs' use of the term realtor. The plaintiffs have not come forward with any specific evidence showing that the government defendants took steps to prohibit such speech by the plaintiffs in violation of the *First Amendment*. Even if the MREC had taken such action, the enforcement of trademark rights would not be a violation of the *First Amendment*. *See* *San Francisco v. U.S.O.C., 483 U.S. at 522, 97 L. Ed. 2d at 427*.

The plaintiffs have not produced sufficient evidence to create a genuine issue of material fact in order to preclude summary judgment. The government defendants are entitled to judgment as a matter of law.

IV.

Due Process Claims Against the Government Defendants

Plaintiffs claim that the MREC, Harwick, and government investigators have violated the plaintiffs' due process rights in several respects. **[**100]** [52]

A. Procedural Due Process Claim

Plaintiffs' first claim of Count III is that the government defendants violated **[*284]** procedural due process by denying plaintiffs the right to a fair and impartial due process hearing. Specifically, they allege that plaintiffs were "found guilty" of charges without notice, that the decision relied in part on the existence of prior complaints, and that the MREC relied upon personal knowledge in reaching its decision. [53]

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[50] The plaintiffs concede that they have no information of formal action taken by the MREC to enforce ethical guidelines of the NAR. *See* pretrial order at 8.EE.

[51] Realtor is a federally registered trademark which the private defendants have sought to protect. *See* discussion above at II.E. generally.

[52] The government defendants have immunity defenses. *See* II.D.2. footnote.

[53] The plaintiffs also allege that prohibiting plaintiffs from providing "gifts" to customers violated substantive due process. However, the plaintiffs have not presented specific evidence sufficient to establish that the government defendants prohibited such activity by the plaintiffs. The defendants did inform the plaintiffs of the state statutes involved but did not take steps toward enforcement. The court therefore does not need to decide whether or not such a prohibition would violate substantive due process requirements in addition to *First Amendment* requirements. See discussion at III.C. above. However, the court notes that prohibiting gifts between a merchant and his own customer is different from prohibiting "gifts" from a seller's *agent* to a purchaser to induce a real estate sale. *See* *Miss. Code Ann. § 73-35-21(j)* (1972).

[101]** Hearings are not automatically provided in every instance where letters of reprimand or "caution" are issued. [54] **[**102]** The defendants do not dispute the fact that the plaintiffs were not given full due process hearings before private letters of reprimand were sent. The defendants do challenge, however, the plaintiffs' contention that they were not given notice of charges against them. The defendants claim that the plaintiffs received notice of each complaint and an opportunity to respond to the substance of the complaint before any reprimand was ever given and argue that this satisfies due process. The plaintiffs have stated they were not given a hearing or notice of a hearing but they have not created a genuine issue of fact as to whether or not the plaintiffs were given notice and the opportunity to respond to the complaints which led to the letters of reprimand. [55] The defendants concede that a full-blown hearing was not held on these complaints but they claim that the plaintiffs were given notice and the opportunity to respond to the complaints. [56]

The commission has acknowledged that the MREC must afford constitutional protections and show care and concern for the ability of a person to pursue a livelihood before it jeopardizes the license of a real estate broker. *In re Ruffalo, 390 U.S. 544, 550, 20 L. Ed. 2d 117, 122, 88 S. Ct. 1222 (1968)*; *Mississippi Real Estate Commission v. Ryan, 248 So. 2d 790, 793 (Miss. 1971)*.

HN39[] Due process is a flexible standard which has been refined for different situations. *Schweiker v. McClure, 456 U.S. 188, 200, 72 L. Ed. 2d 1, 11, 102 S. Ct. 1665 (1982)*. In some contexts, due process procedural protection requires that the accused receive notice prior to termination of a property right, that written notice of the reasons for the suspension be given, and that an effective opportunity to rebut those reasons be provided. *See* **[**103]** *Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970)*. In other contexts, due process protections are satisfied by a post-deprivation hearing which provides an opportunity for the accused to correct any errors in the accusations. In other contexts, due process protections require a full-blown hearing with notice prior to any governmental action.

The court applies a four-part test to determine whether the government defendants provided adequate due process safeguards in the context of informal letters of reprimand. *Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893 (1976)*. [57] **[**104]** The court holds that due process is satisfied in this context when the accused is given notice, a copy of the complaint, and the opportunity to respond. The plaintiffs have failed to set forth sufficient **[*285]** evidence to establish that the defendants failed to give notice of the complaint, a copy of the complaint, and a reasonable opportunity to respond. [58]

The plaintiffs have not produced sufficient evidence to establish that the MREC officials relied on personal knowledge or prior complaints in their decision and have not shown the court precisely how such problems would violate due process requirements and how such claims would avoid *Eleventh Amendment* immunity and qualified immunity for these defendants. The plaintiffs did not use their opportunity to appeal these decisions by the government defendants. The plaintiffs have not met the summary judgment standard, so the court finds for the defendants on this issue as a matter of law.

B. MREC's Dual Role as Prosecutor and Judge as Due Process Claim

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[54] *See* depositions of Phillip Hardwick at 20 and Kenneth Ammons at 12-13.

[55] *See* affidavit of James Pope at 7.

[56] *See* deposition of Kenneth Ammons at 12-13 and Phillips Hardwick at 20, 24-26.

[57] The court considers the private interest affected by the official action, the risk of erroneous deprivation of such interest by the procedures used, the probable value of additional safeguards, and the government's interest. *Matthews, 424 U.S. at 335, 47 L. Ed. 2d at 33*.

[58] The plaintiffs had a right to request a hearing and had an opportunity to appeal any adverse decision of the MREC to a circuit court. *Miss. Code Ann. § 73-35-25(1)* (1972). Even if the notice and opportunity to respond were insufficient and the letter of reprimand could be said to violate due process, the plaintiffs had an adequate post-deprivation opportunity to assert their due process rights.

The plaintiffs' second claim of Count III is that **[**105]** the MREC's role as both prosecutor and judge violates due process because it fails to insure fair and impartial hearings. The plaintiffs also allege that the MREC relied upon information which is not available to the plaintiffs and communicated with its investigative and administrative officers outside the presence of the plaintiffs.

The defendants have not disputed that the MREC has both investigatory and judicial functions and that it acted in both roles toward the plaintiffs. However, ***HN40***[] the combination of investigative and judicial functions within an agency does not in itself violate due process. *Gibson v. FTC, 682 F.2d 554, 560 (5th Cir. 1982)*, *cert. denied*, *460 U.S. 1068, 75 L. Ed. 2d 945, 103 S. Ct. 1521 (1983)*. In the case *sub judice*, the plaintiffs have not made a showing of specific facts to indicate the existence of bias or prejudice from these dual roles. Due process demands impartiality on the part of those who act in a judicial role. However, the decision maker is presumed unbiased unless proven otherwise. *Schweiker, 456 U.S. at 195, 72 L. Ed. 2d at 8*. **[**106]**

In *Withrow v. Larkin, 421 U.S. 35, 58, 43 L. Ed. 2d 712, 730, 95 S. Ct. 1456 (1975)*, the Supreme Court failed to find a due process violation where a medical examining board served as both the investigative and adjudicative body when it warned and reprimanded a physician, temporarily suspended his license and instituted criminal license revocation proceedings. In the case *sub judice*, the defendants' undisputed claim is that the investigation is done by the staff, that a commissioner from outside the congressional district of the accused reviews the staff recommendation to determine whether or not the complaint should be carried forward, and that the hearings by the MREC are conducted by members of the commission who did not participate in the investigation.

The plaintiffs have not produced specific evidence to establish the existence of bias or prejudice or the denial of a fair and impartial due process hearing because of the dual functions of the MREC. Likewise, the defendants have failed to set forth specific evidence sufficient to establish that the plaintiffs were denied access to MREC information or that ex parte communications between MREC officials occurred, **[**107]** or shown that this action would have violated the plaintiffs' due process rights by denying a fair and impartial hearing.

The plaintiffs have not produced sufficient evidence to create a genuine issue of material fact. The government defendants are entitled to judgment as a matter of law on this due process claim.

C. Claim of Deprivation of Liberty Without Due Process by the Publication of Information Damaging Plaintiffs' Reputation

The plaintiffs allege that they have been denied liberty without due process **[*286]** because the statements of the government defendants harmed the plaintiffs' reputation when they were "published" by a local newspaper. [59]

HN41[] Persons may sometimes possess a liberty interest in their reputation. **[**108]** *Board of Regents v. Roth, 408 U.S. 564, 573, 33 L. Ed. 2d 548, 558, 92 S. Ct. 2701 (1972)*. However, not every act of a public official resulting in defamation creates a deprivation of liberty under the *Fourteenth Amendment*. *Paul v. Davis, 424 U.S. 693, 702, 47 L. Ed. 2d 405, 414, 96 S. Ct. 1155 (1976)*.

The Supreme Court has refused to recognize a liberty interest in one's reputation apart from some more tangible interest and official removal of that interest. *Paul v. Davis, 424 U.S. at 701, 711, 47 L. Ed. 2d at 414, 420*.

> Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by a state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" **[**109]** nor "property" guaranteed against state deprivation without due process of law.

[59] The statements attributed to Hardwick are privileged if they occurred in a judicial context. *See* *Netterville v. Lear Siegler, Inc., 397 So. 2d 1109, 1113 (Miss. 1981)*.

Paul v. Davis, 424 U.S. at 712, 47 L. Ed. 2d at 420. The plaintiffs do not have a constitutionally protected liberty interest in their reputation in the case *sub judice*. [60]

The plaintiffs have failed to produce evidence to create a genuine issue of material fact on this challenge to the due process claim. The defendants are entitled to judgment as a matter of law or the injury to reputation claim.

V.

Claim of Equal Protection Violation From Arbitrary Enforcement

Count IV of **[**110]** the plaintiffs' amended complaint claims that the government defendants have enforced the law in an arbitrary manner. The only incident pointed out by the plaintiffs involves information concerning Joyce Murphy developed before the Board of Realtors. [61] The plaintiffs have produced no evidence to indicate that the commission has failed to act upon complaints actually filed with the MREC. [62]

HN42[] The Supreme Court has held in an unlawful administration context that a denial of equal protection has not occurred unless there is an element of intentional or purposeful discrimination by government officials. *Snowden v. Hughes, 321 U.S. 1, 8, 88 L. Ed. 497, 503, 64 S. Ct. 397 (1944)*. [63]

[111]** The plaintiffs have not produced sufficient evidence to establish discrimination in the enforcement of the law by the defendants, either purposeful or otherwise. The plaintiffs were the object of a relatively large number of complaints, but each of these complaints, except one, began with complainants making sworn statements **[*287]** and filing complaints with the commission. The MREC operates under a statutory mandate to receive and investigate all complaints. Although the plaintiffs claim that there were violations by other licensees, the plaintiffs admitted that they did not file any complaints with the commission regarding such violations. The plaintiffs are now in the awkward position of alleging selective enforcement when they themselves failed to take advantage of the mechanism provided for MREC prosecution of license violations. The court notes that the MREC took enforcement action based upon many of the complaints filed against the plaintiffs. The plaintiffs have not produced sufficient evidence to establish that the defendants were unfairly targeting the plaintiffs for enforcement actions or that the defendants were overlooking violations by other licensees.

The plaintiffs **[**112]** have failed to produce evidence sufficient to create a genuine issue of fact to preclude summary judgment on the equal protection claim. The defendants are entitled to judgment as a matter of law.

VI.

Claim that *First Amendment* Rights Violated by Retaliation For Prior Litigation

In Count IX, the plaintiffs claim that the government defendants have violated the plaintiffs' *first amendment* rights by retaliating against them for bringing an earlier antitrust action against the MREC in Hinds County, Mississippi. The defendants argue that the plaintiffs were not part of the prior law suit and had no connection to the law suit other than their general affiliation with Century 21. The prior litigation in Hinds County involved commission

[60] The plaintiffs have also failed to set forth specific evidence to establish that the government's own actions injured the plaintiffs' reputations and have not shown any denial of due process. The government defendants would not have violated any possible liberty interest by holding a public hearing on a complaint. The government defendants apparently did not "publish" the disputed information or initiate its publication.

[61] *See* deposition of James Pope at 292.

[62] The government defendants also have immunity defenses. *See* II.D.2. footnote.

[63] The situation in *Snowden* involved the unlawful administration of a state statute by state officials that resulted in the unequal application of a facially fair statute. Similarly situated persons may be treated differently in the application of the law without violating the *equal protection clause*.

regulations prescribing the size of lettering on advertising signs. The plaintiffs did not respond to the defendants' challenge to Count IX.

The plaintiffs have not established specific acts of retaliation which might relate in any way to the apparently unconnected law suit. The plaintiffs have not set forth specific evidence sufficient to create a genuine issue of material fact regarding retaliatory conduct and this antitrust claim. The court finds **[**113]** that the defendants are entitled to judgment as a matter of law on Count IX.

VII.

Pendent State Law Claims

The plaintiffs have made numerous pendent state law claims against the various defendants. These include the state antitrust allegations in Count I, interference with economic relations, business relations, and business contracts in Count V, libel, slander, and defamation in Count VI, the violation of the public record statute in Count VII, and the violation of separation of powers in Count VIII. [64] Having dismissed the federal claims, the court finds it appropriate to also dismiss these state law claims so that these pendent claims may be brought in the most appropriate forum.

The courts have long recognized that ***HN43***[] a judge has wide discretion to dismiss a pendent state claim after the dismissal of federal **[**114]** claims. In exercising this discretion, the district court should look to "considerations of judicial economy, convenience and fairness to litigants" and should avoid needless decisions of state law. *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 228, 86 S. Ct. 1130 (1966)*. "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Gibbs, 383 U.S. at 726, 16 L. Ed. 2d at 228*. *Gibbs* has been followed consistently by the Supreme Court. *See* *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988)*. The *Gibbs* doctrine "is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *Carnegie-Mellon, 484 U.S. at 350*.

[*288] "In the absence of a federal claim, a district court may in its discretion, and generally should, dismiss pendent state law claims." *Slaughter v. Allstate, Inc., 803 F.2d 857, 859 (5th Cir. 1986)*. The court does not find that considerations **[**115]** of judicial economy, convenience, and fairness to the litigants requires the exercise of pendent jurisdiction on these state law claims. Although this action has been pending for quite some time, the heart of the case is the federal antitrust and constitutional claims which are being dismissed. The part remaining would form a practically new case. The plaintiffs' pendent state claims will be dismissed without prejudice. *Pharo v. Smith, 621 F.2d 656, 674 (5th Cir. 1980)*.

VIII. SUMMARY OF LEGAL CONCLUSIONS

The case *sub judice* presents antitrust, constitutional, and pendent state claims in a summary judgment posture. Once the defendants have properly challenged the plaintiffs' claims, the plaintiffs must produce sufficient evidence to establish a genuine issue of material fact in order to preclude summary judgment. If the plaintiffs have not established an essential element of their claim, or have not adequately defended against the defendants' attacks on their claim, the court should determine that the defendants are entitled to judgment as a matter of law.

The plaintiffs' antitrust claims fail because of the failure to establish an effect on inter-state commerce, **[**116]** the market power of the realty organization, the antitrust injury necessary for standing, or the essential elements of their specific antitrust claims. The plaintiffs failed to establish the essential elements of their *First Amendment* claims, failed to create genuine issues of material fact, and failed to dispute the defendants' challenges to their claims. The plaintiffs failed to establish sufficient evidence to support and defend their due process claims and equal protection claim, as well. Additionally, the government defendants established immunity defenses. Given the failure to

[64] The court notes that the plaintiffs have produced little evidence to support these challenged claims.

establish their antitrust and constitutional claims, the court will dismiss the pendent state law claims for the sake of comity, judicial economy, and fairness to the litigants.

The plaintiffs failed to advance any genuine issue in the case *sub judice*. Instead, the plaintiffs have used the shotgun approach to litigation and thereafter created a great deal of smoke, but no fire. The court painstakingly examined each claim and found them all wanting. The case should be dismissed at this juncture to avoid the further waste of judicial resources.

An order in accordance with this opinion will this day **[**117]** be issued.

THIS 5th day of April, 1988.

Harkins Amusement Enterprises, Inc. v. General Cinema Corp.

United States Court of Appeals for the Ninth Circuit

September 16, 1987, Argued and Submitted ; April 6, 1988, Filed

Nos. 86-2553, 86-15046, 87-1740

Reporter

850 F.2d 477 *; 1988 U.S. App. LEXIS 19363 **; 12 Fed. R. Serv. 3d (Callaghan) 486

Harkins Amusement Enterprises, Inc.; Daniel E. Harkins, individually and dba Tower Plaza Cinema I and II, Plaintiffs/Appellants, v. General Cinema Corporation, Defendant, and The Harry Nace Company; United Artists Theatres, Inc.; American Multi-Cinema, Inc.; Paramount Pictures Corporation; Twentieth Century-Fox Film Corporation; Universal Film Exchanges, Inc.; Warner Bros. Distributing Corp.; Columbia Pictures Industries, Inc.; Avco Embassy Pictures Corp.; Metro-Goldwyn-Mayer, Inc.; United Artists Corporation; Buena Vista Distributing Co., Inc., Defendants/Appellees; Harkins Amusement Enterprises, Inc.; Daniel E. Harkins, individually and dba Tower Plaza Cinema I and II, Plaintiffs/Appellants, v. General Cinema Corporation, Defendant, and The Harry Nace Company; United Artists Theatres, Inc.; American Multi-Cinema, Inc.; United Artists Corporation, Defendants/Appellees; Harkins Amusement Enterprises, Inc.; Daniel E. Harkins, individually and dba Tower Plaza Cinema I and II, Plaintiffs/Appellants, v. General Cinema Corporation, Defendant, and The Harry Nace Company; American Multi-Cinema, Inc.; United Artists Corporation, Defendants/Appellees

Subsequent History: [1]** As Amended April 19, 1988; As amended July 19, 1988.

Prior History: Appeal from the United States District Court for the District of Arizona, D.C. Nos. CV-77-736-P-CLH, CV-77-736-CLH.

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

distributors, exhibitors, films, split, bid, licensing, theatre, district court, summary judgment, clearances, picture, conspiracy, partial summary judgment, monopoly, blind, circuit-wide, discovery, allegations, antitrust, moveovers, deals, Sherman Act, continuance, deposition, advances, rigging, terms, illusory, monopolization, restraint of trade

LexisNexis® Headnotes

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

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

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

HN1[] **Standards of Review, De Novo Review**

A district court's grant of summary judgment is reviewed de novo.

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

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

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

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

HN2[] **Entitlement as Matter of Law, Genuine Disputes**

Under *Fed. R. Civ. P. 56(c)*, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The materiality of a fact is determined by the substantive law governing the claim or defense.

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

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Immigration Law > Admission of Immigrants & Nonimmigrants > Visa Eligibility & Issuance > Visa Application Denials

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Pretrial Matters > Continuances

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN3[] **Summary Judgment, Appellate Review**

The appellate court reviews a denial of a *Fed. R. Civ. P. 56(f)* motion for continuance for abuse of discretion. The appellate court cannot simply substitute its judgment for that of the district court to reverse under this standard, but must have a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

HN4[] **Standards of Review, De Novo Review**

Although an appellate court reviews a grant of summary judgment de novo, it is limited to consideration of issues of fact presented to the district court.

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

HN5[] **Summary Judgment, Burdens of Proof**

A plaintiff cannot create a "genuine" issue of material fact by merely submitting an affidavit that conflicts with prior sworn statements.

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

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, prohibits every contract, combination or conspiracy, in restraint of trade. But 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.

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

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

HN7[] **Summary Judgment, Entitlement as Matter of Law**

Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendant becomes proper.

Antitrust & Trade Law > Sherman Act > General Overview

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

The type of specific factual support necessary to support a conspiracy finding under 15 U.S.C.S. § 1 is evidence that tends to exclude the possibility of independent action by the alleged conspirators.

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

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

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

HN9[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A film exhibitor has a claim when distributors participate in the split and deny the exhibitor access to films. Such an arrangement creates an impermissible horizontal conspiracy among the exhibitors operating the split and a vertical conspiracy between them and the participating distributors. It is a type of group boycott that violates the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

Explicit agreement is not a necessary part of a conspiracy under the Sherman Act, *15 U.S.C.S. § 1 et seq.* Concerted action may be inferred from circumstantial evidence of the defendant's conduct and course of dealings.

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

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

HN11[] **Entitlement as Matter of Law, Materiality of Facts**

In order to withstand summary judgment, an issue of material fact need not be conclusively resolved; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

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

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

HN12[] **Per Se Rule & Rule of Reason, Sherman Act**

Some courts hold split agreements to be horizontal restraints on competition that are per se illegal under *15 U.S.C.S. § 1*. Other courts apply the rule of reason where the economic impact of the challenged practice is not obvious. Per se treatment is appropriate, however, where joint efforts by firms disadvantage competitors by inducing suppliers or customers to deny relationships the competitors need in order to compete.

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

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Regulated Practices, Price Fixing & Restraints of Trade**

Film licensing provisions that discriminate against small independent exhibitors in favor of large circuits are included among the restraints of trade condemned by the Sherman Act, *15 U.S.C.S. § 1 et seq.*

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 > Vertical Restraints > General Overview

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

HN14[] **Antitrust & Trade Law, Sherman Act**

Clearance is a contract term allowing an exhibitor a degree of exclusivity within a particular market. Clearances preclude distributors from licensing other theaters, either specifically named or encompassed in a named geographic area, from showing a movie while it is being exhibited by the theater whose bid is accepted. As vertical non-price restraints, clearances are evaluated under the rule of reason. Clearances that are unduly extended as to area or duration, or granted over theatres not in substantial competition, may be unreasonable under *§ 1*, *15 U.S.C.S. § 1*.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Regulated Practices, Price Fixing & Restraints of Trade**

A moveover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre. Moveovers also occur when an exhibitor is allowed to shift a picture to a different screen at a multiplex theatre. These allowances are not inherently anticompetitive, but distributor discrimination against small, independent exhibitors in granting moveovers is prohibited by the Sherman Act, *15 U.S.C.S. § 1 et seq.*

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

HN16[] **Summary Judgment, Burdens of Proof**

The nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Regulated Practices, Price Fixing & Restraints of Trade**

Concerted action to eliminate competitive bidding violates the Sherman Act, *15 U.S.C.S. § 1 et seq.*

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

Master agreements or circuit-wide deals are unlawful restraints of trade. They eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. Distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade. Circuit-wide deals are evaluated under the rule of reason.

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

HN19[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Blind bidding, requiring exhibitors of films to submit bids before viewing films, is not illegal per se.

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN20[] Scope, Monopolization Offenses

Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and conspiracy to monopolize. 15 U.S.C. S. § 2.

Civil Procedure > Pretrial Matters > Continuances

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN21[] Pretrial Matters, Continuances

Fed. R. Civ. P. 56(f) provides that a court may order the continuance of a party's summary judgment motion to allow the nonmoving party to obtain affidavits, take depositions, or conduct other discovery.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN22[] **Preclusion of Judgments, Law of the Case**

The law of the case rule ordinarily precludes a court from reexamining an issue previously decided by it or a higher appellate court in the same case.

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Judges: William C. Canby, Jr. and Robert Boochever, Circuit Judges, and James M. Ideman, * District Judge.

Opinion by: BOOCHEVER

Opinion

[*480] BOOCHEVER, Circuit Judge:

Harkins Amusement Enterprises, Inc., and Daniel E. Harkins (Harkins) appeal district court judgments in favor of numerous antitrust defendants. This case involves an alleged agreement **[**2]** between certain motion picture exhibitors in the Phoenix, Arizona area regarding film licensing. Seven distributors are accused of cooperating in this conspiracy, resulting in competitive injury to Harkins, an independent exhibitor.

The United States District Court for the District of Arizona denied Harkins' request for a continuance of a partial summary judgment motion filed by the film distributors. The motion was granted on each of Harkins' claims, and a separate judgment was entered for the distributors pursuant to *Fed. R. Civ. P. 54(b)*. The court later entered summary judgment in favor of the exhibitors.

We affirm the district court's grant of partial summary judgment to the film distributors and exhibitors on Harkins' claims of unreasonable clearances, discriminatory moveovers, illusory advances and/or guarantees, blind bidding, and shared monopoly. We reverse and remand for trial, however, Harkins' market splitting, bid rigging, and circuit-wide deals claims. We also hold that the district court did not abuse its discretion by denying Harkins' continuance request.

I. BACKGROUND

Appellant Harkins owned and operated five independent movie theatres in the Phoenix area **[**3]** in the 1970s. In 1977, Harkins sued nine national film distributors and seven regional exhibitors, alleging various theories of conspiracy to restrain trade and monopolization under *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2 (1982)*.

Phoenix and its suburbs, including Chandler, Glendale, Mesa, Paradise Valley, and Tempe constitute the relevant geographic market in this case. The relevant product markets are the distribution and indoor exhibition of high-quality, first-run motion pictures. The damage period is between 1973 and 1977.

The appellees in No. 86-2553 are film distributors Columbia Pictures Industries, De Laurentis Entertainment Group (formerly Avco Embassy), Paramount Pictures Corp., Twentieth Century Fox Film Corp., Universal City Studios, Warner Bros. Distributing Corp. and United Artists Corp. (the distributors). The appellees in Nos. 86-15046 and 87-

* Honorable James M. Ideman, United States District Judge, Central District of California, sitting by designation.

1740 are film exhibitors American Multi-Cinema, Inc., The Harry Nace Co., and United Artists Communications, Inc. (the exhibitors). [1] The appeals were consolidated.

[4]** Harkins' suit centers on the alleged anticompetitive effects of a motion picture "split." Splits are exhibitor agreements that divide a normally competitive market by allocating pictures to particular members **[*481]** and prohibiting bidding for licensing rights to the films assigned. *Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 576 (9th Cir. 1986)*; *Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971)*. Phoenix exhibitors met regularly in the mid-1970s and divided rights to films on a picture-by-picture basis. Harkins was not a split member.

The distributors have repeatedly acknowledged the existence of the Phoenix exhibitor split. Harkins' amended complaint alleged that rather than being mere observers, the distributors "agreed to, acquiesced in, aided and abetted the Exhibitor Defendants in implementing and effectuating this 'split' arrangement." The distributors deny any participation, and argue that they -- not an exhibitor such as Harkins -- were victimized by the market division scheme.

Harkins alleges seven types of conspiracies in restraint of trade under *section 1* of the Sherman Act. They center **[**5]** on a common premise: that unlawful preferential treatment granted by the distributors prevented Harkins from having a fair opportunity to compete with the split member exhibitors. In addition to an unreasonable restraint on competition resulting from licensing films according to the split, Harkins asserts that these concerted preferences included unreasonable clearances, discriminatory moveovers, bid rigging, circuit-wide deals, illusory advances and/or guarantees, and blind bidding.

This conduct also served as the basis of Harkins' endeavor to extend the monopolization prohibition of *section 2* to claims of shared monopoly by the exhibitors and distributors.

In April 1979, this action was transferred by the Judicial Panel on Multidistrict Litigation to the Southern District of Texas as part of a nationwide movie antitrust case. *In re Motion Picture Licensing Antitrust Litigation, 468 F. Supp. 837 (J.P.M.L. 1979)*. Harkins' suit was one of eight consolidated by the Panel.

During the next four years, discovery on issues of a national conspiracy in the motion picture industry was conducted. In July 1983, District Judge John V. Singleton, Jr., on a motion to consolidate **[**6]** the cases for trial, instead remanded them to their original districts.

The clerk's record indicates that this case was not formally remanded to Arizona District Judge Walter E. Craig until late December 1983. Harkins, which admits "the parties had accomplished very little discovery" of a local nature in the eighteen months between the original filing of the suit and the transfer, served document production requests in May 1984. During the next nineteen months, the parties argued by telephone and by mail regarding discovery.

The distributors filed a motion for partial summary judgment on each of Harkins' claims in October 1985. Harkins responded in late November by filing a motion to compel document production. Following a hearing before a magistrate, the parties entered into a discovery stipulation in January 1986. In March 1986, Harkins filed its opposition to the distributors' partial summary judgment motion, consisting largely of discovery from the multi-district litigation proceedings. In the alternative, Harkins sought a continuance of the motion under *Fed. R. Civ. P. 56(f)* pending completion of additional local discovery.

The motions were argued before Judge Craig on April 4, 1986. Ruling **[**7]** from the bench, he first denied the continuance and then granted partial summary judgment to the distributors on each of Harkins' claims. Judge Craig died in June 1986, without issuing written findings of undisputed fact and conclusions of law. The case was

[1] Distributor defendants Metro-Goldwyn-Mayer, Inc. and Buena Vista Distributing Co. and exhibitor defendants General Cinema Corp., General Cinema of Arizona, Plitt Inter-Mountain Theaters, Inc., and Mann Theaters Corp. of California are no longer parties.

transferred to Judge Charles L. Hardy, who entered a formal judgment pursuant to *Fed. R. Civ. P. 54(b)* in July based on Judge Craig's oral ruling.

Exhibitors American Multi-Cinema and United Artists filed motions for summary judgment in June 1986, shortly before the case was transferred to Judge Hardy. The Harry Nace Co. filed a similar motion in August. Judge Hardy granted the exhibitors' motions by minute order in November 1986 and entered a formal judgment in January 1987.

[*482] II. STANDARD OF REVIEW

HN1[] We review a district court's grant of summary judgment de novo. *Hernandez v. Johnston, 833 F.2d 1316, 1317 (9th Cir. 1987)*. "Therefore . . . this court sits in the same position as the district court and applies the same summary judgment test that governs the district court's decision." *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)*. **[**8]**

HN2[] Under *Fed. R. Civ. P. 56(c)*, summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The "materiality" of a fact is determined by the substantive law governing the claim or defense. *Hernandez, 833 F.2d at 1317-18*.

HN3[] This court reviews a denial of a *Fed. R. Civ. P. 56(f)* motion for continuance for abuse of discretion. *Visa Int'l Serv. Ass'n v. Bankcard Holders of America, Inc., 784 F.2d 1472, 1475 (9th Cir. 1986)*; *see* *Landmark Dev. Corp. v. Chambers Corp., 752 F.2d 369, 373 (9th Cir. 1985)*. We cannot simply substitute our judgment for that of the district court to reverse under this standard, *Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1331 (9th Cir. 1981)*, but must have a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant **[**9]** factors. *Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1337 (9th Cir. 1985)*.

III. DISCUSSION

A. THE RECORD ON APPEAL

HN4[] Although we review a grant of summary judgment de novo, this court is limited to consideration of issues of fact presented to the district court. *See* *Morrison v. Char, 797 F.2d 752, 757 (9th Cir. 1986)*; 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716, at 650-51 (2d ed. 1983). Because the distributors challenge some of Harkins' proffered evidence and the record is largely the same in both appeals, it is necessary as a threshold matter to determine what papers were presented to Judge Craig.

Harkins' memorandum in response to the distributors'partial summary judgment motion stated that it was supported "by the entire record on file in this action." Harkins therefore contends that *every* exhibit, document, deposition page, or other piece of discovery in this case -- including twenty-six boxes of papers submitted with its district court memorandum -- was "presented" to Judge Craig, and is subject **[**10]** to de novo review in this case.

The distributors argue that only those items referred to in the parties' partial summary judgment memoranda below may be considered. We agree. In a complex case such as this, the judge was not required to examine thousands of additional pages of record even if they were physically presented to him. For this reason, our analysis is limited to the factual assertions raised in Harkins' district court papers, and additional items cited in its appellate briefs have not been considered.

The distributors request that we go a step further, and disregard affidavits filed by Daniel Harkins and his film buyer, Carl Smiley, on the theory that they contradict prior deposition testimony. In *Radobenko v. Automated Equipment Corp., 520 F.2d 540, 544 (9th Cir. 1975)*, this court held ***HN5***[] that a plaintiff could not create a "genuine" issue of material fact by merely submitting an affidavit that conflicted with prior sworn statements.

We believe the *Radobenko* rule is inapplicable here. Harkins and Smiley were deposed in 1978, shortly after the suit was filed, **[**11]** and both stated that they were testifying without having reviewed the defendants' documents. With one exception, these alleged contradictions are in fact instances where Harkins and Smiley simply were unable to respond with certainty to specific deposition questions.

Smiley stated in his deposition that the "only clearance problem" he had encountered in Phoenix related to Harkins' Tower Plaza theatre. Yet in his affidavit, Smiley condemned split members' clearance requests **[*483]** generally as being "totally unwarranted and unreasonable." Because this matter was within his personal knowledge in 1978, Smiley's later statement has been disregarded with respect to clearances over any of Harkins' other theatres.

B. SUMMARY JUDGMENT TO THE DISTRIBUTOR DEFENDANTS

Harkins predictably cites the Supreme Court's decision in *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, in support of its appeal:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile **[**12]** 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.

368 U.S. at 473 (footnote omitted). We have noted, however, that *Poller* does not preclude summary judgment in the proper antitrust case. "The language merely teaches caution." *Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 680 (9th Cir. 1985)*.

Section 1 of the Sherman Act ***HN6***[] prohibits "every contract, combination . . . or conspiracy, in restraint of trade." *15 U.S.C. § 1 (1982)*. The Supreme Court made it clear very early that the antitrust laws still recognized the trader's prerogative:

> 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.

United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919).

The supplier's right to set **[**13]** terms and choose customers under the *Colgate* doctrine is considered so important that antitrust plaintiffs are required to do more than merely allege conspiracy and unequal treatment in order to take a case to trial. In the Ninth Circuit:

> ***HN7***[] Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendant becomes proper.

Barnes, 759 F.2d at 680 (quoting *ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52, 55 (9th Cir. 1975))*.

The Supreme Court has defined ***HN8***[] the type of specific factual support necessary to support a conspiracy finding under *section 1*:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [alleged conspirators]. That is, there **[**14]** must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); *see* Barnes, 759 F.2d at 680. On this summary judgment appeal, applying the *Monsanto* standard, we must ultimately determine whether Harkins has presented specific factual support "such that a rational or reasonable jury might return a verdict in its favor based on that evidence." T.W. Elec. Serv., 809 F.2d at 631.

1. Active Participation in the Exhibitors' Market Split

Under the *Colgate* doctrine, the distributors possessed the absolute right to refuse to license films to Harkins as long as their decisions were based on independent business judgment. Wilder Enters., Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1140 (4th Cir. 1980); *see* Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971). **[**15]** ***HN9***[] An exhibitor has a claim, however,

> when distributors *participate in the split* and deny the exhibitor access to films. Such an arrangement creates an **[*484]** impermissible horizontal conspiracy among the exhibitors operating the split and a vertical conspiracy between them and the participating distributors. It is a type of group boycott that violates the antitrust laws. Klor's v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct 705, 3 L. Ed. 2d 741 (1959). *See* Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971).

Wilder, 632 F.2d at 1140 (emphasis added).

Harkins contends that it was excluded from fairly competing for films as a result of active participation by the distributors in the Phoenix split. Of course, if the only function of the split was to eliminate competitive bidding by the split members for the distributors' films, it makes no sense to say that the distributors participated in the split. If the split members, in addition to their agreeing not to bid against each other, also agreed to secure the cooperation of distributors in excluding Harkins from the first-run market, then such **[**16]** a combination would constitute a Sherman Act violation. *See* United States v. Paramount Pictures, 334 U.S. 131, 155, 92 L. Ed. 1260, 68 S. Ct. 915 (1948); United States v. Crescent Amusement Co., 323 U.S. 173, 183 n.5, 89 L. Ed. 160, 65 S. Ct. 254 (1944).

Although Harkins has not presented direct evidence of a vertical combination between the distributors and exhibitors, "it has long been settled that ***HN10***[] explicit agreement is not a necessary part of a Sherman Act conspiracy . . . ." United States v. General Motors Corp., 384 U.S. 127, 142-43, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966). Moreover, "concerted action may be inferred from circumstantial evidence of the defendant's conduct and course of dealings." Dimidowich v. Bell & Howell, 803 F.2d 1473, 1479 (9th Cir. 1986).

Harkins presents four statistics as evidence of active distributor participation:

> 1) films were licensed to the split-designated exhibitor 85% of the time;
>
> 2) Harkins was awarded licenses to only 17 of the 435 film (4%) that were allocated **[**17]** by the split, although it operated 22% of the theatres in the market; [2]
> 3) films were licensed to split members in ninety instances when Harkins had submitted the only written bid;
> 4) on eighty-nine occasions, the split member's winning bid was undated or dated after offers were formally due.

The distributors insist that their conduct was dictated by prudent business judgment. Licensing films according to the split could have been the natural and intended result of the exhibitors' collective refusal to bid against each other. The distributors would have been victimized by the decreased competition if Harkins' bids were so consistently bad as to leave them no rational economic choice other than to accept split members' **[**18]** bids. On the other hand, if Harkins' bids were often lucrative in light of the anticompetitive nature of the Phoenix market,

[2] Although Harkins states that it was awarded 3% of the films, the actual allocation was 3.9%. The 22% figure for theatre operations assumes, for summary judgment purposes, that all five of Harkins' theatres were within the relevant market. The distributors dispute this fact.

> their rejection by the distributors can be explained only as extraordinary exercises of bad judgment or as accommodation to a request by the [exhibitor] circuits for preferential treatment. Since consistently bad business judgment is not to be expected from able and experienced corporate decisionmakers, only the conspiratorial inference is plausible.

Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 501 (5th Cir. 1982) (appendix -- district court analysis); *see* *Milgram v. Loew's, Inc., 192 F.2d 579, 583 (3d Cir. 1951)*, *cert. denied*, *343 U.S. 929, 96 L. Ed. 1339, 72 S. Ct. 762 (1952)*.

Harkins attempts to raise a triable issue of fact regarding the quality of its bids by comparing the terms it offered with those of the licensed split member for forty top-grossing films. Written findings were not entered in this case and it is unclear whether the district court found Harkins' bids to be inferior as a matter of law. Our independent review of the data indicates that on a number **[**19]** of occasions, Harkins offered **[*485]** higher or identical guarantees and/or better terms on weekly percentages, length of engagement, house expense, clearance, theatre seating, and holdover allowance. Split members were also often late in submitting bids.

The distributors defend by pointing to the low guarantees Harkins offered for the sixteen most successful films of 1976 and 1977. While recognizing the importance of this component in the licensing process, we cannot conclude that overall, Harkins' bids were so poor as to fail to raise a triable issue of fact whether the distributors' consistent pattern of awarding films to designated exhibitors in the midst of an admittedly anticompetitive market was justified. [3]

[20]** The bid-quality data and overall statistical imbalance constitute only a portion of the "specific factual support" Harkins offers to meet its summary judgment burden under *Barnes, 759 F.2d at 680*. Other evidence in the record reasonably suggests active distributor participation in the market division scheme. For example, film buyer Pat Notaro, who as "split captain" coordinated the exhibitor meetings, acknowledged in his deposition that there was a "working understanding" that distributors dissatisfied with a particular split designee could seek a collective "course of action" in reallocating a film.

Although he did not allude to a specific agreement, Notaro testified that occasionally, "the distributor would call me and say I am not playing this theater. You are going to have to do something, go back and do something to satisfy me." In such cases, Notaro said "it was incumbent upon members of the split to make sure that that distributor was satisfied with a theater he would be happy to play in." General Cinema's Lawrence Lapidus testified that it was a common practice for distributors to request these "re-splits," although the evidence was in conflict regarding **[**21]** their frequency.

In addition, American Multi-Cinema's Arnold Shartin stated that distributors would "call up and ask [whether] you had the split meeting. . . . If not when are you going to have it, if so where did my picture -- who got my picture." Shartin at one point characterized the distributors as inquiring "where is my picture going to play." Harkins also produced a document from distributor Universal's records stating, "PHOENIX - SPLIT SITUATIONS - WE BELONG TO PACIFIC," theatres operated by exhibitor Nace. Nace's John Lewis testified that Universal never refused to license a film he had picked on the split.

Viewed collectively, this circumstantial evidence "tends to exclude the possibility of independent action" by the distributors. *Monsanto v. Spray-Rite, 465 U.S. at 768*. Harkins has presented factual support of a conspiracy between exhibitors and individual distributors to split the Phoenix film market and unreasonably restrain

[3] In addition to the 85% correlation between split designees and the actual film licensees, Harkins has presented uncontroverted evidence that exhibitors would sometimes "trade" rights to assigned films. The distributors actually licensed films to split members 97% of the time. This figure includes six occasions in which both Harkins and an exhibitor defendant were licensed the same film.

competition. ***HN11***[] In order to withstand summary judgment, an issue of material fact need not be conclusively resolved; "rather, all **[**22]** that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288-89, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*; *T.W. Elec. Serv., 809 F.2d at 630*. Harkins has met its burden on this issue.

We emphasize that our reversal on this claim is limited to the alleged horizontal combination by the exhibitors and the vertical agreement between split members and *individual* distributors. No evidence of a conspiracy *between* any distributors was presented, and Harkins may not pursue this theory on remand.

Harkins argues that this type of market splitting is illegal *per se*. This court has never ruled on the matter, but in *Exhibitors' **[*486]** Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 578 n.5 (9th Cir. 1986)*, we pointed out that ***HN12***[] "other courts have found similar split agreements to be horizontal restraints on competition that are *per se* illegal **[**23]** under Section One." *See* *United States v. Capitol Serv., Inc., 756 F.2d 502, 506* (7th Cir.), *cert. denied*, *474 U.S. 945, 106 S. Ct. 311, 88 L. Ed. 2d 288 (1985)*; *General Cinema Corp. v. Buena Vista Distribution Co., 532 F. Supp. 1244, 1279 (C.D. Cal. 1982)*. *Contra*, *Greenbrier Cinemas, Inc. v. Attorney General, 511 F. Supp. 1046, 1060 (W.D. Va. 1981)*. The view of splits as *per se* violations has usually referred, however, to its effects as a combination of buyers against a seller victim, which is not the situation here.

Courts have not regarded all concerted refusals to deal as illegal *per se*, but "rather have applied the rule of reason where the economic impact of the challenged practice is not obvious." *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1480 (9th Cir. 1986)*; *see* *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 877 (9th Cir. 1987)*. *Per se* treatment is appropriate, however, "where joint efforts by firms disadvantage competitors by inducing suppliers or customers to deny relationships the competitors need in order to compete." *Dimidowich, 803 F.2d at 1480*. **[**24]** *See* *Northwest Wholesale Stationers v. Pacific Stationary & Printing Co., 472 U.S. 284, 294, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*.

We conclude that the split agreement alleged here falls within the latter category, and if proven, is illegal *per se*. The district court should instruct the jury accordingly on remand.

2. Unreasonable Clearances

In *United States v. Paramount Pictures, Inc., 334 U.S. 131, 159-60, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*, the Supreme Court held that ***HN13***[] film licensing provisions that discriminate against small independent exhibitors in favor of large circuits "are included among the restraints of trade which the Sherman Act condemns." Harkins alleges that the distributors and exhibitors combined to stifle its competitive efforts through a system of unreasonable clearances granted in conjunction with the split. This argument lacks support and partial summary judgment was proper.

HN14[] Clearance is a contract term allowing an exhibitor **[**25]** a degree of exclusivity within a particular market. "Clearances preclude distributors from licensing other theaters, either specifically named or encompassed in a named geographic area, from showing a movie while it is being exhibited by the theater whose bid is accepted." *Theee Movies of Tarzana v. Pacific Theatres, Inc., 828 F.2d 1395, 1397 (9th Cir. 1987)*.

As vertical nonprice restraints, clearances are evaluated under the rule of reason. *Id. at 1398*; *see* *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Clearances that are "unduly extended as to area or duration," or granted over theatres "not in substantial competition," may be unreasonable under *section 1*. *Paramount Pictures, 334 U.S. at 145-46*; *see* *Theee Movies, 828 F.2d at 1399*; *Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 201* (9th Cir.), *cert. denied*, *379 U.S. 880, 13 L. Ed. 2d 87, 85 S. Ct. 143 (1964)*.

We agree with the distributors that an extended rule of reason analysis is unnecessary on this issue because Harkins has failed **[**26]** to provide any factual predicate for its clearance claim. Most of Harkins' arguments before the district court were general and conclusory. For example, Paramount Pictures was alleged to have discriminated by granting American Multi-Cinema's Town & Country theatre clearance over Harkins' Camelview theatre, which is fifty blocks away, while refusing to clear the UA 6 theatre only thirty-five blocks away. Yet this claim was not substantiated with particular dates or film titles.

In a rare specific example, Harkins argues that it was unreasonable for the UA 5 theatre to have been granted clearance for "The Turning Point" over Harkins' Tower Plaza, while the Town & Country was not **[*487]** cleared. This would make sense in terms of geography, however, because the Tower Plaza lies *closer* to the UA 5 than does the Town & Country. Other allegations are simply wrong. Harkins cites Smiley's deposition to support its claim that the Town & Country is closer to Nace's University theatre than is the Tower Plaza, which Nace regularly cleared. Smiley's testimony states, and a Phoenix map confirms, that the Town & Countryin fact is farther away.

3. Discriminatory Moveovers ***HN15***[]

[27]** "A moveover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre." *Paramount Pictures, 334 U.S. at 160 n.13*. Moveovers also occur when an exhibitor is allowed to shift a picture to a different screen at a multiplex theatre. These allowances are not inherently anticompetitive, *Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 886 n.7 (8th Cir. 1978)*, but distributor discrimination against small, independent exhibitors in granting moveovers is prohibited by the Sherman Act. *Paramount Pictures, 334 U.S. at 160*.

Licensing contracts normally specify the theatre or screen where a film may be exhibited and prohibit moveovers without permission. Harkins claims that the distributors prevented it from moving first-run films while expressly granting split members the privilege or allowing them to violate their contracts with impunity. The distributors deny discriminating and downplay the charge, stating that "a shift of film within a structure is hardly big news."

A number of successful **[**28]** films allegedly were moved by split members, including United Artists' "Network" and "Rocky"; Fox's "Silver Streak"; Paramount's "Looking for Mr. Goodbar"; Universal's "Jaws"; and Avco's "The Sailor Who Fell From Grace With the Sea." Yet even if these moveovers benefited the exhibitors, *section 1* could not have been violated unless the distributors' permission or acquiescence was part of an agreement to deny Harkins the same privilege.

Harkins has totally failed to support this discrimination claim. Despite maintaining throughout the litigation that it was never allowed to move first-run films, Harkins could not specify a single instance in which the privilege was denied. Because "***HN16***[] the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment," *T.W. Elec. Serv., 809 F.2d at 630*, we affirm the district court.

4. Bid Rigging

Competitive bidding was normally used to license films in the Phoenix market during the relevant period. Under this process, invitations to bid -- sometimes suggesting acceptable terms -- were **[**29]** issued to various exhibitors. If the licensing offers received were unsatisfactory, distributors "re-bid" the film on a large-scale basis or otherwise negotiated terms with a limited number of exhibitors.

HN17[] Concerted action to eliminate competitive bidding violates the Sherman Act. *United States v. Champion Int'l Corp., 557 F.2d 1270, 1272-73* (9th Cir.), *cert. denied*, *434 U.S. 938, 54 L. Ed. 2d 298 (1977)*; *United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1106* (7th Cir.), *cert. denied*, *444 U.S. 840, 62 L. Ed. 2d 52 (1979)*. Harkins alleges that the distributors communicated the terms of its bids to split members, enabling those exhibitors to make better offers, submit late bids, or circumvent the entire bidding process. While an individual distributor need not utilize competitive bidding, it may not employ a rigged system as a means of effectuating an agreement to allocate its films only to a concerted group, organized to exclude a competitor.

A large volume of statistical evidence was presented to the **[**30]** district court in support of this bid-rigging claim, much of which we noted in our earlier discussion of the distributors' role in the market split. *See* *supra at 484*. This data includes bid comparisons for forty films, a list of **[*488]** eighty-nine films licensed to exhibitors whose bids were undated or submitted after the due date, and a list of ninety films awarded to split members in which Harkins submitted the only written bid.

Harkins' most dramatically worded allegations -- that split members' nonrefundable guarantees were "transformed" into refundable advances and that distributors "destroyed" favored exhibitors' bids in order to accept newer, better ones -- lack specific support in the record. Particular reference is made, however, to the circumstances surrounding the licensing of "Star Wars" and "Funny Lady."

Plitt Theatres was assigned "Star Wars" at an October 1976 split meeting. Harkins' bid of November 23, 1976, the only one submitted to Twentieth-Century Fox, was rejected on December 2. In a December 7 letter, Fox announced a re-bid, stating, "WE WILL ATTEMPT TO ENTER INTO NEGOTIATIONS WITH THE THEATRE OR THEATRES WE CONSIDER MOST LIKELY TO GIVE US SATISFACTORY **[**31]** TERMS AND MAXIMUM FILM RENTAL." Harkins responded with a second bid on December 27. Unbeknownst to Harkins and contrary to Fox's letter, "Star Wars" had already been licensed to Plitt on December 1, six days *before* the announced re-bid.

In addition, each of the terms in Harkins' written bid for "Funny Lady," again the only bid submitted, was superior to the contract awarded by Columbia Pictures to split member General Cinema. Moreover, the contract was dated nearly three months *after* bids on the film were due.

The distributors fail to explain the peculiar sequence of events in these examples. They instead attempt to pass off the bid rigging claim as a "boiler plate" antitrust pleading and contend that the 1978 deposition statements made by Harkins and Smiley before the production of documents preclude a finding of antitrust liability. We disagree. The evidence presented, especially that regarding the "Star Wars" scenario, raises at least a reasonable inference that Harkins was victimized by tainted bidding procedures. The district court's summary judgment grant was therefore improper on this issue.

5. Circuit-Wide Deals

Harkins alleges that the distributors allowed **[**32]** split members to abuse the buying power of their large circuits by licensing theatres nationally rather than on a film-by-film, theatre-by-theatre basis in a geographic market. Harkins also claims that national fee-settlement adjustments were granted. Circuit-wide deals, or "master agreements," were declared anticompetitive by the Court in *Paramount Pictures*:

> ***HN18***[] Master agreements are unlawful restraints of trade . . . . They eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. . . . It is hardly necessary to add that distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade . . . .

334 U.S. at 154-55. Circuit-wide deals are evaluated under the rule of reason. *See United States v. Griffith, 334 U.S. 100, 108, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*. **[**33]**

The distributors' argument that the record does not contain even a scintilla of evidence of circuit-wide deals is mistaken. Harkins has presented abundant factual support of this claim and partial summary judgment was improper. For example, at least four witnesses testified that United Artists was involved in national licensing of the film "A Bridge Too Far." Nace's Lewis stated that this circuit-wide deal, which encompassed the Phoenix market, was "common knowledge" within the industry.

There was also testimony from a variety of witnesses that Columbia Pictures and Avco Embassy entered into a distribution agreement with ITC, an English film producer, whereby General Cinema was granted **[*489]** nationwide "preemptive rights" to license certain films. These films, cofinanced by General Cinema, included "The Eagle Has Landed," "March or Die," "The Cassandra Crossing," "Capricorn I," "Voyage of the Damned," and "The

Domino Principle." Finally, documents were produced indicating that Columbia had granted circuit-wide fee adjustments to General Cinema on "Funny Lady," "Shampoo," and "Tommy."

The distributors also contend that Judge Singleton's remand of the eight consolidated cases **[**34]** in MDL 366 following nationwide discovery proves that Harkins' claim lacks merit. It actually suggests the opposite. Although Judge Singleton refused to consolidate the cases for trial, he recommended that the district courts allow the plaintiffs "to amend their complaints to add an issue of national character."

6. Illusory Advances and/or Guarantees

It is standard practice in the motion picture industry for distributors to require exhibitors to pay an advance or guarantee. Advances are refundable payments applied toward a film's rental fee. Guarantees are nonrefundable minimum payments. Licensing agreements normally require that these payments be made in cash prior to the film's release.

Harkins claims that while the distributors always strictly enforced the advance and guarantee provisions of its licensing contracts, larger exhibitors were unlawfully granted preferential treatment. This alleged discrimination consisted of granting credit allowances in some cases and not requiring the payments be made at all in others. Harkins posits that contracting for a large but illusory guarantee could allow manipulation of the competitive bidding process in light of the importance **[**35]** of this ingredient in a licensing offer.

Two incidents are cited involving distributor Universal City Studios and split member General Cinema, the nation's largest exhibitor. First, Harkins claims that its review of Universal's records show that General Cinema did not pay any part of a $71,500 guarantee required in its licensing agreement for the film "Front Page." Second, an $80,000 guarantee for "Midway" was paid to Universal in installments, the last made seven weeks after the film's release.

The distributors contend that at most, the record suggests only that credit was extended in a few isolated situations to a deserving exhibitor. We agree that this evidence is hardly probative of a scheme to undermine competitive bidding. Even if it were, the district court's partial summary judgment grant still would have been proper, because Harkins has not shown any evidence of discrimination. Although he was always required to pay guarantees in cash prior to a film's engagement and characterized credit allowances as "very . . . abnormal," Daniel Harkins admitted never asking for the privilege.

7. Blind Bidding

Under a blind bidding system, distributors require exhibitors to **[**36]** submit bids for films without first having an opportunity to view them. Harkins contends that this practice -- illegal by statute in many states -- is inherently anticompetitive because it tampers with price structures and unreasonably shifts the risk of loss to exhibitors. Harkins also claims that the distributors granted split members preferential treatment by providing them with advance screenings of films that were later ostensibly blind bid.

The Supreme Court noted in *Paramount Pictures* that while blind bidding did not restrict competition to the same extent as some practices, it was nevertheless "capable of some abuse." *334 U.S. at 157 n.11*. We read this passage to mean that ***HN19***[] blind bidding is not illegal *per se*. Harkins has not presented any evidence that blind bidding adversely affected competition in the Phoenix market so as to violate the rule of reason.

The distributors concede that discriminating by allowing favored exhibitors to "sneak a peek" while excluding others would be actionable under *section 1*, but insist that this did not occur. Harkins attempts **[**37]** **[*490]** to support its allegation with deposition testimony by Daniel Harkins and General Cinema's Barry Reardon regarding what they had been told about the films "Star Wars," "The Exorcist," "The Eagle Has Landed," and "Lucky Lady." Yet these statements constituted "hearsay evidence [which] is inadmissible and may not be considered by this court on review of a summary judgment." *Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 667 (9th Cir. 1980)*.

Because Harkins otherwise has failed to raise a triable issue regarding blind bidding, the district court's grant of partial summary judgment is affirmed.

8. Shared Monopoly

Section 2 of the Sherman Act ***HN20***[] prohibits monopolization, attempted monopolization, and conspiracy to monopolize. *15 U.S.C. § 2 (1982)*. In its amended complaint, Harkins alleges that by engaging in bid rigging, circuit-wide deals, illusory advances and/or guarantees, and blind bidding, the distributors "have entered upon a systematic plan to form a shared monopoly, attempt to form a shared monopoly and conspire **[**38]** to form a shared monopoly" in the Phoenix film market.

Section 2 applies to "every person who shall monopolize." *Id.* Because oligopoly markets -- those with few sellers -- often exhibit the lack of competition, high prices, and low output of monopoly markets, commentators have suggested that *section 2* could be invoked to attack a shared monopoly even though no individual firm possessed the power to control prices or exclude competition. *See* P. Areeda & D. Turner, ***Antitrust Law*** paras. 840-845 (1978); L. Sullivan, *Handbook of the Law of Antitrust* § 124 (1977).

Harkins' theory is a novel one; Professors Areeda and Turner admit that "no case has held the *§ 2* monopolization provision applicable to shared monopoly." P. Areeda & D. Turner, ***Antitrust Law***, at para. 842. One court directly addressing the issue stated bluntly, "an oligopoly, or a shared monopoly, does not in itself violate *§ 2* of the Sherman Act." *Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F. Supp. 225, 228-29 (S.D.N.Y. 1982)*.

We need not decide whether the shared monopoly theory may be viable under some circumstances. Suffice it to say that in this **[**39]** case, involving a small market with numerous sellers, no claim is stated under *section 2*. Not only is there no case support for Harkins' position, but the suggestions in the learned treatises do not extend the theory this far. Partial summary judgment on the *section 2* claims against the distributors is affirmed.

C. *RULE 56(f)* MOTION

As an alternative to its opposition to the distributors' partial summary judgment request, Harkins asked Judge Craig to continue the matter. *Fed. R. Civ. P. 56(f)* ***HN21***[] provides that a court may order the continuance of a party's summary judgment motion to allow the nonmoving party to obtain affidavits, take depositions, or conduct other discovery. Harkins sought to bolster its case by gathering additional documents and deposing the distributors' local representatives.

Because the continuance was framed in the alternative, appeal of its denial is moot as to the three claims we remand for trial. The issue is therefore limited to the propriety of Judge Craig's decision with respect to Harkins' other allegations. Harkins insists that it was an abuse of discretion **[**40]** to deny the motion in light of the complexity of the suit and the distributors' alleged recalcitrance in producing documents. A review of the circumstances surrounding this litigation does not leave us with a definite and firm conviction that the district court committed a clear error of judgment, *Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1337 (9th Cir. 1985)*, and we affirm.

The district court denied the *Rule 56(f)* motion because the case was more than eight years old and "fundamentally, counsel on both sides have had plenty of opportunity to complete discovery long before now." Following eighteen months in the Arizona district court and four years in **[*491]** Texas as part of the multi-district litigation, the case was formally remanded to Judge Craig in December 1983. Although Harkins served document requests four months later, it did not file a motion to compel production until November 1985 -- seven weeks after the distributors moved for partial summary judgment.

Harkins maintains it was merely attempting to comply with a local rule requiring that sincere efforts to agree on discovery be made before seeking a court order. Yet the record discloses **[**41]** an inordinate amount of unproductive correspondence related to discovery during this nineteen-month interim. Harkins' counsel threatened to file a motion to compel as early as February 1985, and the distributors' "final position" regarding certain document requests was outlined in a June 1985 letter. On this record, we cannot hold that the trial court abused its discretion by denying the continuance.

D. SUMMARY JUDGMENT TO THE EXHIBITOR DEFENDANTS

Harkins sued the split member exhibitors under the same theories of conspiracy to restrain trade and shared monopoly as it did the distributors. Following Judge Craig's death, the case was transferred to Judge Hardy, who formally entered judgment in favor of the distributors and considered motions by the exhibitors for summary judgment. Judge Hardy granted the motions in January 1987.

The exhibitors contend that the ***HN22***[] "law of the case" rule required the district court to enter summary judgment for them as well on Harkins' six claims requiring assistance from the distributors: unreasonable clearances, discriminatory moveovers, bid rigging, **[**42]** circuit-wide deals, illusory advances and/or guarantees, and blind bidding. This rule ordinarily precludes a court from reexamining an issue previously decided by it or a higher appellate court in the same case. *Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833 (9th Cir. 1982)*.

The exhibitors' argument was justified in the district court. The decision regarding the distributors' conduct was appealed, however, and to the extent that we reversed the original judgment the law of the case was altered. Because our earlier review of the record discloses genuine issues of material fact regarding bid rigging and circuit-wide deals, we reverse and remand those claims against the exhibitors for trial.

Triable issues also exist as to distributor participation in the market split. Harkins is therefore a proper party to sue the exhibitors on this claim, and we reverse this portion of the judgment. *Cf. Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971)*; *Wilder Enters., Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1140 (4th Cir. 1980)*; *see Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 578-79 & n.4 (9th Cir. 1986)*. **[**43]**

Harkins contends that a stipulation approved by the district court effectively precluded the exhibitors from challenging any of Harkins' allegations. It provided that the sufficiency of Harkins' evidence would "not be made an issue in these summary judgment proceedings (except insofar as may have previously been determined in connection with the Distributor Defendants' summary judgment motions)." That exception applied, and in accordance with our earlier discussion we affirm the grant of summary judgment to the exhibitors on Harkins' claims of unreasonable clearances, discriminatory moveovers, illusory advances and/or guarantees, and blind bidding. Finally, summary judgment for the exhibitors on the shared monopoly claim under *section 2* is also affirmed.

IV. CONCLUSION

The record indicates that Harkins has presented specific facts to support its antitrust allegations of market splitting, bid rigging, and circuit-wide deals against the film distributors and exhibitors. We therefore reverse the district court's grant of summary judgment and remand these claims for trial. [4] We affirm the partial **[*492]** summary judgments on Harkins' claims of unreasonable clearances, discriminatory **[**44]** moveovers, illusory advances and/or guarantees, blind bidding, and shared monopoly, and hold that it was not an abuse of discretion to deny a continuance under *Fed. R. Civ. P. 56(f)*.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

End of Document

[4] The distributors brought their partial summary judgment motion jointly, and have not attempted to argue that some are entitled to judgment on certain claims while others are not. At this stage of the proceeding, therefore, we have not attempted to make such a delineation. Since Harkins has raised a triable issue of a conspiracy among the exhibitors, our decision applies to all of the exhibitors.

Tominaga v. Shepherd

United States District Court for the Central District of California

April 6, 1988, Decided ; April 6, 1988, Filed

No. CV 87-0172-ER

Reporter

682 F. Supp. 1489 *; 1988 U.S. Dist. LEXIS 2905 **; 1988-1 Trade Cas. (CCH) P67,985

Milton Tominaga, Plaintiff, v. Vance Shepherd, et al., Defendants

Disposition: **[**1]** GRANTED.

Core Terms

Pizza, franchisees, franchise, market power, distributor, products, summary judgment, crust, tying product, secret, food, competitors, packaging, trademark, supplies, relevant market, motive, plaintiff's claim, tied product, per se rule, ingredients, terminated, marked, recipe, concerted refusal, tying arrangement, service mark, fast food, concert, formula

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN1[] **Burdens of Proof, Movant Persuasion & Proof**

The moving party is entitled to summary judgment when the non-moving party bears the burden of proof at trial as to an element essential to its case, and the party fails to make a showing sufficient to establish a genuine dispute with respect to the existence of that element. In order to show that there are genuine factual issues that can properly be resolved only by a finder of fact, the non-moving party must show that the disputed facts may reasonably be resolved in favor of either party. If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN2[] **Tying Arrangements, Per Se Rule**

A tying arrangement occurs where a seller refuses to sell one product (the tying product) unless the buyer also purchases another product (the tied product). A tying arrangement is illegal per se where the controlling prerequisites are met. In order to prevail under a per se theory, plaintiff must establish the following three elements; (1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on a non-insubstantial volume of commerce in the tied product market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying arrangements receive per se condemnation only when the seller has some special ability--usually called market power--to force a purchaser to do something that he would not do in a competitive market. Since the primary purpose of the rule is to prevent the extension of market power from the tying product to the tied product, market power is deemed an essential element because such an extension of power is impossible unless the seller has substantial market power in the tying product.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN4[] **Regulated Practices, Market Definition**

Courts have identified three sources of market power: (1) when the government has granted the seller a patent or similar monopoly over a product, (2) when the seller's share of the market is high, and (3) when the seller offers a unique product that competitors are not able to offer.

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Business & Corporate Law > Distributorships & Franchises > Trademark Licensing

Trademark Law > ... > Licenses > Licensable Subject Matter > Tying Arrangements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5[] **Conveyances, Franchises**

A distinctive trademark is unique in the sense that it constitutes an identifiable property right, but it should not be confused in the franchising context with the existence of market power. A trademark is not itself persuasive evidence of economic power. Market power is not derived from a name or symbol, but from the product itself.

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Trademark Law > ... > Licenses > Licensable Subject Matter > Tying Arrangements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Business & Corporate Law > Distributorships & Franchises > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN6[] **Distributorships & Franchises, Antitrust Issues**

Postcontract a franchisor can use the threat of termination to hold up a franchisee that has made a specific investment in the marketing arrangement. However, this potential economic power has nothing to do with market power, ultimate consumers' welfare, or antitrust. The hold up of franchisees is a contract problem, but not an antitrust problem. As the axiom provides, the antitrust laws were designed to protect competition, not competitors; injury to the plaintiff alone (or to the franchisees) is not sufficient to prove injury to competition.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN7[] **Practices Governed by Per Se Rule, Boycotts**

The Supreme Court applies a per se rule to group boycotts or concerted refusals to deal. The Ninth Circuit limits application of the per se rule against group boycotts or concerted refusals to deal to concerted activity between two or more horizontal competitors. Some horizontal concert of action must be taken against the victims of the restraint in order for the per se rule to apply. The per se rule is never applied automatically when the concerted refusal to deal is vertical, rather than horizontal.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN8[] **Concerted Action, Civil Conspiracy**

A defendant may rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Once a defendant has met this initial burden, a plaintiff must provide specific factual support for its allegations of conspiracy tending to show that the defendant was not acting independently.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN9[] **Sherman Act, Claims**

An individual refusal to deal is analyzed under the rule of reason. To establish a violation of section one of the Sherman Act, *15 U.S.C.S. § 1*, under the rule of reason, plaintiff must show an agreement which is intended to harm or unreasonably restrain competition and actually does so. Plaintiff must show injury to a market or to competition in general, not merely injury to individual competitors.

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Competitive Advantage

Trade Secrets Law > Federal Versus State Law > Patent Law

HN10[] **Business Torts, Unfair Business Practices**

There are some business formulae, compiled information, and devices or processes which, though neither copyrighted nor patented, or not even novel, are kept as trade secrets of the user. Any secret information used in the conduct of the plaintiff's business which is of some competitive advantage to him, and which is not disclosed to the public, might be included. Equity provides a remedy where the information is kept secret and it is improperly obtained by the defendant.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN11[] **Intentional Interference, Defenses**

The tort of interference with prospective advantage consists of intentional and improper methods of diverting or taking business from another which are not within the privilege of fair competition. Under California law, one competitor is justified in inducing customers of another to do business with him. The competition justification requires that (1) the economic relation concerns a matter involved in the competition between the actor and competitor, (2) that no improper means are employed, (3) no illegal restraint of competition is attempted or intended, and (4) at least in part the purpose is to advance competition with the other party. The cases turn almost entirely upon the defendant's motive or purpose, and the means by which he has sought to accomplish it.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Trademark Law > Special Marks > Service Marks > General Overview

HN12[] **Preservation of Relevant Evidence, Exclusion & Preservation by Prosecutors**

Once defendant produces evidence that its action of diverting or taking business from another was based on a legitimate business motivation, plaintiff must present some evidence tending to exclude the defendant's innocent explanation.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Adhesion Contracts

Governments > Fiduciaries

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Energy & Utilities Law > Oil, Gas & Mineral Interests > Implied Covenants > General Overview

Torts > Business Torts > General Overview

Torts > Business Torts > Bad Faith Breach of Contract > Elements

HN13[] **Types of Contracts, Adhesion Contracts**

A tort claim for breach of the implied covenant of good faith and fair dealing requires proof of a special relationship between the parties, characterized by elements of public interest, adhesion and fiduciary responsibility. Factors which must be present for a special relationship to exist are: (1) the parties are in inherently unequal bargaining positions, (2) the plaintiff's motivation for entering into the contract must be a non-profit motivation (to secure peace of mind, security and future protection), (3) plaintiff is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the defendant to perform, and (4) defendant is aware of plaintiff's vulnerability. The supplier-distributor relationship cannot be described as having a non-profit motive. Similarly, the relationship between a franchisor and a distributor cannot be described as having a non-profit motive.

Counsel: Paul Sigelman, Esq., Beverly Hills, California, Attorney for Plaintiff.

Thomas Nevins, Esq., of Broad, Schulz, Larsen & Weinberg, Los Angeles, California, Attorney for Defendant.

Judges: Edward Rafeedie, United States District Judge.

Opinion by: RAFEEDIE

Opinion

[*1491] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EDWARD RAFEEDIE, United States District Judge

The captioned case came on for hearing before this Court, the Honorable Edward Rafeedie, United States District Judge, presiding, on March 21, 1988, on the motion of defendants El Centro Foods, Inc. and Vance Shepherd, for summary judgment. Plaintiff Milton Tominaga, doing business as PM Distributors, was represented by Paul Sigelman. Defendants were represented by John E. Rumel of Broad, Schulz, Larson & Wineberg.

The Court, having read and considered the papers in support of and in opposition to the motion, finds that summary judgment is appropriate for all plaintiff's claims except the claim for interference with economic advantage or contractual relations.

Defendants El Centro and Vance Shepherd move this court to grant summary judgment on plaintiff's Complaint. The Complaint alleges violations of *section 1* of the Sherman Act, and section 3 of the Clayton Act (tying arrangement, group **[**2]** boycott, refusal to deal), as well as the following state law claims: unfair competition, interference with contract or prospective advantage, and violation of the implied covenant of good faith and fair dealing.

FACTUAL BACKGROUND

Defendant El Centro is a California corporation and is the franchisor of "Pizza Man--He Delivers" and "Chicken Delight" franchises in Los Angeles and Orange Counties. There are currently forty-five Pizza Man, six combination Pizza Man and Chicken Delight, and one Chicken Delight franchisees in the Southern California area. Defendant Vance Shepherd is the president of El Centro. El Centro has registered its Pizza Man and Chicken Delight service marks with the United States Patent and Trademark office.

Plaintiff Milton Tominaga does business as P. M. Distributors in the Los Angeles area, and is a wholesale distributor of ingredients for prepared foods and restaurant supplies. He is an authorized distributor of food and packaging products to El Centro's franchisees. Tominaga owned a franchised store from 1975 until 1985. From 1982 to the present, he supplied various Pizza Man franchises with ingredients and supplies. In 1985, Tominaga sold his Pizza Man store, **[**3]** according to his affidavit, because defendant Shepherd told him he would become the exclusive distributor for Pizza Man ingredients and supplies.

El Centro franchisees entered into a franchise agreement with El Centro in order to obtain licenses to operate Pizza Man stores (all facts pertaining to Pizza Man should be assumed to apply to Chicken Delight unless otherwise noted) and to utilize the service mark. Under the franchise agreement, a franchisee is not limited to purchasing its food products and supplies from any one distributor:

> a franchisee may purchase any and all authorized food products and packaging from suppliers of his choice, provided that such food and packaging are uniform and high quality and comply with the standards and specifications set forth in the Operations Manual.

Also, under the standard form franchise agreements, each El Centro franchisee is obligated to package all goods sold to the public in approved Pizza Man packaging unless such packaging is unavailable, in which case written permission must be obtained from El Centro. Each franchisee is further required to prepare its menu and use ingredients in accordance with the methods and specifications set **[**4]** forth in the Pizza Man Operations Manual.

Tominaga was an authorized distributor of packaging materials and refrigerated food products, however, Tominaga was never the exclusive Pizza Man distributor (although Tominaga states that he was promised an exclusive dealership). There are substantial factual disputes as to Tominaga's **[*1492]** performance as a distributor, and the circumstances surrounding El Centro's entry into the market for the distributing packaging products to franchisees.

El Centro claims that Tominaga's conduct as a distributor of poor quality merchandise damaged its goodwill, as embodied in the service marks. Defendants have provided evidence that Tominaga provided substandard food and packaging products which did not meet El Centro's quality standards, and that he overcharged the franchisees. El Centro claims to have provided Tominaga with notice of its dissatisfaction on numerous occasions.

Tominaga disputes El Centro's charges, and claims that Vance Shepherd was angry with Tominaga when Tominaga refused to provide El Centro with a "kick back" from the manufacturers. When Shepherd offered to buy Tominaga out, Tominaga refused, and was allegedly threatened by Shepherd ("I'll **[**5]** break your back").

El Centro, on the other hand, argues that all its actions were based upon a perceived business need to standardize its distribution system and the quality of products delivered to the franchisees. This was the basis for El Centro's decision to enter into the distribution business, and its offer to buy out Tominaga.

In November of 1986, El Centro notified some of Tominaga's suppliers, as well as Tominaga, that El Centro would be the exclusive distributor of non-refrigerated and monogrammed goods bearing its service marks to Pizza Man franchisees. All franchisees were notified of this change, but were also told that Tominaga would continue to serve the franchisees with all refrigerated items and miscellaneous supplies. El Centro claims that the refrigerated items were the most expensive and most profitable items, while Tominaga complains that they are the least profitable items.

In April 1987, El Centro reinstated Tominaga's authorization to distribute goods bearing its service mark to its franchisees and notified the suppliers that Tominaga had been reinstated. Thus, since April, Tominaga and El Centro have competed for the franchisees' business.

DISCUSSION

I. STANDARD **[**6]** FOR SUMMARY JUDGMENT

HN1[] The moving party is entitled to summary judgment when the non-moving party bears the burden of proof at trial as to an element essential to its case, and the party fails to make a showing sufficient to establish a genuine dispute with respect to the existence of that element. *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)*. In order to show that there are genuine factual issues that can properly be resolved only by a finder of fact, the non-moving party must show that the disputed facts may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)*. If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*; *California Architectural Bldg. Prod. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987)*.

II. Antitrust Claims

A. *Illegal Tying Arrangement Claim*

HN2[] A "tying arrangement" occurs where a seller refuses to sell one product (the tying product) **[**7]** unless the buyer also purchases another product (the tied product). In *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, the Court reaffirmed the per se rule against tying. [1] **[*1493]** Thus, a tying arrangement is illegal per se where the controlling prerequisites are met. *Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984)*, *cert denied*, *473 U.S. 908, 87 L. Ed. 2d 657, 105 S. Ct. 3534 (1985)*. In order to prevail under a per se theory, plaintiff must establish the following three elements; "(1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on a non-insubstantial volume of commerce in the tied product market." *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., 732 F.2d 1403, 1407 (9th Cir. 1984)*. Plaintiff has failed to present competent evidence that El Centro had market power in the tying market.

[8]** It has been observed that the "per se" rule under which tying arrangements are analyzed is "unusual because of the essential role of economic analysis" in applying the standard. Klein & Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J. Law & Econ. 345, 345 (1985) (cited with approval in *Mozart Co. v. Mercedes-Benz of North America, 833 F.2d 1342, 1346 (9th Cir. 1987))*; *Hyde, 466 U.S. at 34, 104 S. Ct. at 1570* (O'Conner concurring). [2] As recognized by the court in *Mozart*, the majority in *Hyde*, "rather than abandoning the per se rule

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[1] The per se rule was affirmed by a bare majority, and in the face of serious criticism by antitrust scholars. R. Bork, *The Antitrust Paradox*, 372-75 (1978); *Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 n. 19* (9th Cir.), *cert. denied*, ***459 U.S. 973, 74 L. Ed. 2d 285, 103 S. Ct. 305 (1982)***; *Mozart Co. v. Mercedes-Benz of North America, 833 F.2d 1342, 1345 n. 2, n. 3 (9th Cir. 1987)*.

[2] Although the Court has stated, in dicta, that tying arrangements serve "hardly any purpose beyond the suppression of competition," *Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306, 69 S. Ct. 1051, 1058, 93 L. Ed. 1371 (1949)*, "this declaration was not taken literally even by the cases that purport to rely upon it." *Hyde, 466 U.S. at 34, 104 S. Ct. at 1563* (O'Conner concurring). "The Court has never been willing to say of tying arrangements, as it has of price fixing, division of markets, and other arrangements subject to per se analysis, that they are always illegal, without proof of market power or anticompetitive effect." *Id*.

against tying, chose to limit antitrust liability for tie-ins by insisting on a showing of *actual market power in the tying product." Mozart, 833 F.2d at 1345* (emphasis added) (*citing, Hyde, 466 U.S. at 13-17, 104 S. Ct. at 1558-1561*).

[9]** Tying arrangements, therefore, receive per se condemnation only when "the seller has some special ability-usually called 'market power'--to force a purchaser to do something that he would not do in a competitive market." *Hyde, 466 U.S. at 13-14, 104 S. Ct. at 1558-1559*. Since the primary purpose of the rule is to prevent the extension of market power from the tying product to the tied product, [3] market power is deemed an essential element because such an "extension of power is impossible unless the seller has substantial market power in the tying product." *Mozart, 833 F.2d at 1345*.

[10]** Courts have identified three sources of market power; (1) when the government has granted the seller "a patent or similar monopoly over a product," (2) when the seller's share of the market is high, and (3) when the seller offers a "unique" product that competitors are not able to offer. *Mozart, 833 F.2d at 1345-1346*. Prior to *Mozart*, antitrust plaintiff's would argue that market power could be presumed by virtue of the uniqueness of the trademark.

HN5[] A distinctive trademark is "unique" in the sense that it constitutes an identifiable property right, but it should not be confused in the franchising context with **[*1494]** the existence of market power. Klien & Saft, *supra*, at 355. In *Mozart*, the court held that a trademark is "not itself persuasive evidence of economic power." *Mozart, 833 F.2d at 1346*. As the court in *Mozart* recognized, market power is not derived from a name or symbol, but from the product itself. *Id*. (*citing*, Klien & Saft, *supra*, at 356).

In *Siegel v. Chicken Delight, 448 F.2d 43 (9th Cir. 1971)*, *cert. denied*, *405 U.S. 955, 31 L. Ed. 2d 232, 92 S. Ct. 1172 (1972)*, the court reasoned that Chicken Delight had sufficient market power because "it can hardly be denied **[**11]** that the Chicken Delight trademark is distinctive; that it possesses goodwill and public acceptance unique to it and not enjoyed by other fast food chains." *Id. at 50*. This analysis, however, has been subjected to a crippling attack by Klien & Saft;

> It makes no economic sense to attribute significant market power to the Chicken Delight trademark. The important economic distinction that must be made is between pre- and postcontract economic power. Precontract, competition among franchisors (such as McDonald's or Kentucky Fried Chicken) to sign up franchisees prevents Chicken Delight from exercising any economic power in setting contract terms with potential franchisees. Chicken Delight, although it possesses a trademark, does not possess any economic power in the relevant market in which it operates--the fast food franchising (or perhaps, more generally, the franchising) market.

Klien & Saft, *supra*, at 356; *Mozart, 833 F.2d at 1346* ("Market power, if any, is derived from the product, not from the name or symbol as such").

HN3[]

[3] There are three policy rationales for the per se rule against tying arrangements. The "primary purpose" is to prevent an extension of market power to a new product market. The so-called "leverage theory" has been criticized because "modern economic thought seems to indicate that all available monopoly profits could be obtained from the tying product alone without the use of a tie-in." *Mozart, 833 F.2d at 1345 n. 3* (*citing*, Bork, *supra*, at 373); *Hyde, 466 U.S. at 36, 104 S. Ct. at 1570-1571* (O'Conner, concurring). Tying arrangements have also been viewed as a method for facilitating price discrimination. *Id*. Such price discrimination occurs where the seller "meters" the buyers use of the tying product. *Hyde, 466 U.S. at 36 n. 4, 104 S. Ct. at 1571 n. 4* (O'Conner, concurring). In this case plaintiff has made no such allegations. Furthermore, the proper party to bring suit under this theory, would be the franchisees not the distributors. Finally, in a regulated industry, a firm with market power may be unable to extract a supercompetitive profit because it lacks control over the prices it charges for regulated products or services. Tying may be used to extract that profit from the sale of unregulated tied products. *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 513, 89 S. Ct. 1252, 1263-1264, 22 L. Ed. 2d 495 (1969)* (White, dissenting).

HN4[]

In this case, plaintiff argues that it need not rely upon a "presumption" of market power, because El Centro's activity is evidence of market power. **[**12]** Nevertheless, the above referenced analysis is useful in determining the merits of plaintiff's argument. Plaintiff charges that (1) El Centro demonstrated its market power by increasing prices of the service marked supplies, and foreclosing plaintiff from distributing such supplies; and (2) by "locking in" franchisees to the tying product by virtue of their investment in the franchise.

Plaintiff's argument, however, fails to define the relevant market. In *Mozart*, the court emphasized the necessity of defining the relevant market.

> The critical issue is whether MBNE [the Mercedes franchisor] possesses the "market power" to force dealers to purchase the tied product rather than acquire the franchise to sell a different automobile.

Mozart, 833 F.2d at 1346. Thus, as recognized in *Mozart*, the relevant market would include other franchises for similar products. Possible relevant markets include take out pizza franchises, fast food franchises or restaurant franchises in general. Klien & Saft, *supra*, at 356 (the relevant market in *Chicken Delight* was the fast food franchising market, or perhaps more generally, the franchising market).

Plaintiff's implicit argument is **[**13]** that the relevant market is the "Pizza Man franchising" market. This market definition is erroneous as a matter of law. No reasonable argument can be made that Pizza Man possesses the power to coerce potential franchisees to purchase the tied product rather than sell a different brand of fast food (the tying product). The analysis must take place at the "pre-contact" stage. Klien & Saft, *supra*, at 356. Plaintiff, however, engages in "post-contract" analysis concerning defendant's power over already existing franchisees by virtue of their "sunk costs." This argument was explicitly rejected in *Mozart*.

> Obviously there are costs in surrendering one franchise and acquiring another, but these costs are unrelated to the "market power" of a unique automobile. These costs will enable the car maker to extract concessions from the dealer, but this power is related to the franchise method of doing business, not to the possible uniqueness of the car.

Mozart, 833 F.2d at 1346-47. The court concluded that the district court's jury instruction was "improperly focused" on the particular franchise [Mercedes dealerships], and failed to recognize that the **[*1495]** "market" at issue "is the market **[**14]** for dealership franchises." *Id*. [4]

Therefore, plaintiff's argument that the evidence submitted shows there is a material issue of fact as to defendant's market power is based on an improper market definition. El Centro's ability to "coerce" its franchisees to purchase a product it may not wish to purchase (postcontract), and its claimed ability to raise prices because of the franchisees sunk investment, does not show market power in the fast **[**15]** food franchising market. The "power" exercised is merely the power of a franchisor over its franchisees. Nothing in the record shows that El Centro had the power (precontract) to "force" potential franchisees to purchase the tied goods. Such power could only be exercised by El Centro if the relevant market for the tying product were Pizza Man franchises. No such showing has been made, nor could such a showing be made.

Plaintiff relies upon *Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1341 (9th Cir. 1984)*, *cert. denied*, *473 U.S. 908, 87 L. Ed. 2d 657, 105 S. Ct. 3534 (1985)*. In *Digidyne*, the court held that market power will be found were defendant is able to "lock in" the tied product when a customer has made a substantial investment in the tying product. The court in *Mozart* distinguished *Digidyne* on the grounds that it concerned a unique, copyrighted tying product, whereas *Mozart*, as our case, concerns a trademark tying product [Mercedes dealerships and Pizza Man stores]. Moreover, the court in *Mozart* suggested that the *Digidyne* panel erred in failing to engage in market

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[4] Klien & Saft come to the same conclusion; "Postcontract ***HN6***[] . . . a franchisor can use the threat of termination to "hold up" a franchisee that has made a specific investment in the marketing arrangement. However, this potential economic power *has nothing to do with market power, ultimate consumers' welfare, or antitrust*." Klien & Saft, *supra*, at 356 (emphasis added). The "hold up" of franchisees is a "contract problem," but not an antitrust problem. As the axiom provides, the antitrust laws were designed to protect competition, not competitors; injury to the plaintiff alone (or to the franchisees) is not sufficient to prove injury to competition. *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

analysis. *Mozart, 833 F.2d at 1346 n. 4*. In any event, the case before this court is on all fours with **[**16]** that before the *Mozart* panel. [5]

Therefore, plaintiff has failed to produce evidence creating a material issue of fact concerning El Centro's market power in the tying product, and summary judgment is appropriate.

III. Group Boycott or Concerted Refusal to Deal

Per Se Rule for Horizontal Conspiracy

HN7[] The Supreme Court applies a per se rule to group boycotts or concerted refusals to deal. *A. H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302, 1305 (9th Cir. 1981)*. The Ninth Circuit limits application of the per se rule against group boycotts or concerted refusals to deal to "concerted activity between two or more horizontal competitors." *Cascade Cabinet Co. v. Western Cabinet & Millwork, 710 F.2d 1366, 1370 (9th Cir. 1983)*. Some horizontal concert of action **[**17]** must be taken against the victims of the restraint in order for the per se rule to apply. *Gough v. Rossmoor Corp., 585 F.2d 381, 387 (9th Cir. 1978)*, *cert. denied*, *440 U.S. 936, 59 L. Ed. 2d 494, 99 S. Ct. 1280 (1979)*. The per se rule is never applied automatically when the concerted refusal to deal is vertical, rather than horizontal. *A. H. Cox, 653 F.2d at 1306*.

The first question, therefore, is whether the refusal to deal alleged involves concerted action between competitors. Plaintiff argues that El Centro conspired with Dixie Sales to carve plaintiff out from the distribution business. Plaintiff claims that the deal was that El Centro would sell **[*1496]** the Pizza Man service marked products, and Dixie would cover the remaining products which El Centro could not sell (such as food products). As a result of the concerted action between El Centro and Dixie, El Centro terminated plaintiff's distributorship.

At the time of the alleged agreement between Dixie and defendant, defendant had not entered the distribution market. Moreover, Dixie and defendant are not competitors because Dixie competes in the market for non-service marked goods, and defendant competes in the market for service marked goods. Therefore, **[**18]** there is no possible "horizontal" concert of action. Finally, there is *no* evidence that defendant and Dixie conspired to preclude plaintiff from the distribution market. There is no evidence that the "deal" alleged by plaintiff is anything more than a hypothesis of plaintiff's attorney. El Centro had the power to preclude its franchisees from dealing with plaintiff independant of any "deal" struck with Dixie. In fact, Dixie had no power to engage in a concerted refusal to deal because, as a distributor, Dixie did not deal with plaintiff. Thus, the real question is whether El Centro violated the antitrust laws with respect to the alleged concerted refusal to deal between El Centro and its franchisees, or whether El Centro's own refusal to deal with plaintiff violated ***antitrust law***.

2. *Rule of Reason for Vertical Conspiracy*

Plaintiff also alleges a vertical boycott between El Centro and the wholesalers of service marked supplies, and the various franchisees. El Centro sent letters to the wholesalers of approved Pizza Man products directing these companies not to sell to Tominaga. Also, letters were sent to franchisees notifying them that El Centro was the sole approved distributor **[**19]** for Pizza Man products.

HN8[] A defendant may "rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." *Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)*. "Once a defendant has met this initial burden, a plaintiff *must provide specific factual support for its allegations of conspiracy tending to show that the defendant was not acting independently." Id*.

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[5] The *Digidyne* court's failure to engage in market analysis has been rejected by the commentators and the courts. *Mozart, 833 F.2d at 1346 n. 4*. (*citing cases and articles*). The *Mozart* panel points out that two of the five Justices who favor retention of the per se rule against tying arrangements would have granted cert in *Digidyne* because of the panel's failure to engage in market analysis. *Id*.

Defendant has raised the plausible business justification of quality control as a reason for its termination of Tominaga. *Mozart, 833 F.2d at 1352* (quality control is a legitimate business justification for conduct alleged in a conspiracy charge). Plaintiff points to no specific evidence tending to establish that El Centro was acting in concert with its franchisees or with the distributors in order to protect any of them from competition. Under these circumstances, summary judgment is appropriate. *Richards, 810 F.2d at 903*.

IV. Refusal to Deal

HN9[] An individual refusal to deal is analyzed under the rule of reason. *Fine v. Barry and Enright Productions, 731 F.2d 1394, 1398-99* (9th Cir.), *cert. denied*, *469 U.S. 881,* ***[**20]*** *83 L. Ed. 2d 186, 105 S. Ct. 248 (1984)*. To establish a *Section 1* violation under the rule of reason, plaintiff must show an agreement which is intended to harm or unreasonably restrain competition and *actually does so. Id. at 1399*. Plaintiff must show injury to a market or to competition in general, not merely injury to individual competitors. *Id*.

Defendant has introduced evidence that its entry into the distribution market had a procompetitive effect, and plaintiff has not made any showing that defendant's entry into the market and exclusion of plaintiff (for a four month period) had an anticompetitive effect. Plaintiff has simply not addressed this issue, and no evidence submitted by plaintiff shows injury to competition, as opposed to injury to a competitor. Therefore, summary judgment is appropriate.

V. Pendent State Law Claims

A. *Unfair Competition*

Plaintiff claims defendants unfairly competed with defendant by inducing plaintiff to "improve, modify and change" the Pizza Man pizza crust, and then entering plaintiff's market for the sale of Pizza Man pizza crust by selling the "secret formula" **[*1497]** for the crust as developed by Tominaga.

Plaintiff's complaint alleges that plaintiff developed the present **[**21]** formulation and recipe for the pizza crust and passed the specifications on to El Centro. Plaintiff alleges that the recipe was secret because it could not be independently developed without substantial expense, time and research, and plaintiff was not paid for the new formula. Plaintiff claims he only disclosed the secret recipe (in confidence) for quality approval. In effect, plaintiff alleges that defendants "stole" plaintiff's pizza crust formula, which was revealed to defendants in confidence, and began selling the crust in competition with plaintiff.

The evidence reveals that the crust formula is indeed secret, in fact, it is so secret that plaintiff does not know the recipe! Tominaga Deposition, p. 138. The undisputed facts are as follows:

Pizza Man hired Pillsbury to formulate a new pizza crust. Pillsbury's recipe is a secret formula, and nobody outside that company knows the recipe (neither Tominaga nor Vance Shepherd). Tominaga thought the new crust was better than the old General Mills crust. However, he thought there was room for improvement.

Tominaga went to Jacopo's Pizzeria in West Los Angeles and discovered they used a "high-gluten" flour, and that Jacopo's was a very **[**22]** successful pizzeria. With this information, Tominaga told Shepherd that "we need to try out a high-gluten flour." Plaintiff "believes" Shepherd then talked to the people at Pillsbury to get them to increase the strength of their flour. Tominaga Deposition, p. 137. Tominaga also claims to have told Shepherd to "add oil . . . [and] add yeast." "I told him [Shepherd] that he should work with Pillsbury to--with their chemists. I mean, I'm not a chemist. And they should improve the product in that manner."

The evidence shows that plaintiff did not develop a secret recipe based upon extensive research. Rather, he asked another pizza joint what type of crust they used, and passed this generalized information onto Shepherd, and Pillsbury may have used this in developing their crust.

HN10[] There are some business formulae, compiled information, and devices or processes which, though neither copyrighted nor patented, or not even novel, are kept as "trade secrets" of the user. Any secret information used in the conduct of the plaintiff's business which is of some competitive advantage to him, and which is not disclosed to the public, might be included. Witkin, 7 *Summary of California Law*, at p. 5305. **[**23]** Equity provides a remedy where the information is kept secret and it is improperly obtained by the defendant. *Id*. at 5306.

In this case, plaintiff passed on generalized advice concerning the consistency of Jacopo's Pizzeria's pizza crust. This information does not constitute a trade secret. Therefore, summary judgement is appropriate.

B. *Interference with Contract and/or Prospective Advantage*

Plaintiff claims that defendants interfered with plaintiff's contractual relations with El Centro's franchisees, as well as interfering with plaintiff's prospective business advantage by precluding the franchisees from purchasing service marked goods from plaintiff.

HN11[] The tort of interference with prospective advantage consists of intentional and improper methods of diverting or taking business from another which are not within the privilege of fair competition. Witkin, 4 *supra*, at p. 2643. Under California law, one competitor is justified in inducing customer's of another to do business with him. The "competition justification" requires that (1) the economic relation concerns a matter involved in the competition between the actor and competitor, (2) that no improper means are employed, **[**24]** (3) no illegal restraint of competition is attempted or intended, and (4) at least in part the purpose is to advance competition with the other party. *Charles C. Chapman Building Co. v. California Mart, 2 Cal. App. 3d 846, 855-56, 82 Cal. Rptr. 830 (1969)*. The cases turn almost entirely upon the defendant's motive or purpose, and the means by which he has sought to accomplish it. *Id*. Almost any manner of intentional invasion of plaintiff's interest may be sufficient if **[*1498]** the purpose is not a privileged one. Thus, motive and intent are the crucial issues. *Continental Maritime v. Pacific Coast Metal Trades, 817 F.2d 1391, 1395 (9th Cir. 1987)*.

HN12[] Once defendant produces evidence that its action was based on a legitimate business motivation, plaintiff must present some evidence tending to exclude the defendant's innocent explanation. *Continental Maritime, 817 F.2d at 1395*. Plaintiff's declaration presents evidence which casts a shadow upon defendant's "innocent explanation" that plaintiff was terminated for reasons of quality control. Plaintiff was only terminated only from the service mark products distribution business, not the non-service mark product market, which includes **[**25]** the food used as ingredients in Pizza Man pizza. Moreover, plaintiff's declaration states that as an individual involved in the business, he knows that it is expensive to store the perishable items used as ingredients. This suggests that defendant terminated plaintiff's business in the service marked goods business in order to gain a competitive advantage, and did not exclude plaintiff from the perishable goods market for Pizza Man ingredients because defendant could not afford to enter that market. Since quality control concerns are at least equally relevant to both markets, the evidence may lead a reasonable jury to infer defendant's actions were motivated by its desire to eliminate a competitor, not to control quality.

Since the legal question centers on defendants' motive, and plaintiff has presented evidence which a reasonable jury may find persuasive, summary judgment on this claim is not appropriate. There is a material issue of fact as to whether defendants' termination of Tominaga was improperly motivated.

C. *Duty of Good Faith and Fair Dealing*

Plaintiff alleges that he had an agreement with El Centro that he would be El Centro's distributor to its franchisees and that **[**26]** each store was to be free to purchase from distributors of their choice, and that by terminating plaintiff's distributorship they (defendants) have violated the covenant of good faith and fair dealing.

HN13[] A tort claim for breach of the implied covenant of good faith and fair dealing requires proof of a special relationship between the parties, characterized by elements of public interest, adhesion and fiduciary responsibility. *Seaman's Direct Buying Service, Inc. v. Standard Oil, 36 Cal. 3d 752, 768-69, 206 Cal. Rptr. 354, 686 P.2d 1158 (1984)*. In *Wallis v. Superior Court, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984)*, the court listed a number of factors which must be present for a "special relationship" to exist; (1) the parties are in inherently unequal bargaining positions, (2) the plaintiff's motivation for entering into the contract must be a non-profit motivation (to secure peace of mind, security and future protection), (3) plaintiff is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the defendant to perform, and (4) defendant is aware of plaintiff's vulnerability. *Id. at 1118*.

As recognized by the court in *Premier Wine & Spirits* ***[**27]*** *v. E. & J. Gallo Winery, 644 F. Supp. 1431, 1436-37 (E. D. Cal. 1986)*, the supplier-distributor relationship cannot be described as having a "non-profit" motive. Similarly, the relationship between a franchisor and a distributor can not be described as having a non-profit motive because it is purely a business relationship and plaintiff is in the business to make a profit. Therefore, it seems that plaintiff's claims is outside the scope of the tort. Summary judgment is appropriate.

The Court will retain its pendent jurisdiction over the interference with prospective advantage or contractual relations claim pursuant to *United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*, because defendants' federal trademark claim is still pending in this Court.

IT IS THEREFORE ORDERED that defendants' motion for Summary Judgment is GRANTED as to all claims *except* plaintiff's claim for interference with prospective advantage or contractual relations.

The Court further orders the Clerk to serve copies of this Order on all parties by United States mail.

[LexisNexis]

Vannelli v. National Collegiate Athletic Asso.

Court of Appeals of Minnesota

April 8, 1988, Decided ; April 19, 1988, Filed

No. C3-87-2039

Reporter

1988 Minn. App. LEXIS 361 *; 1988 WL 35433

Mark Vannelli, Appellant, v. The National Collegiate Athletic Association, et al., Respondents

Notice: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

Subsequent History: Review denied by *Vannelli v. NCAA, 1988 Minn. LEXIS 494 (Minn., June 29, 1988)*

Core Terms

Vannelli, athletic, anti trust law, hockey, summary judgment, antitrust, trial court, eligibility, decisions, team

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN1[] **Estoppel, Collateral Estoppel**

Under Minnesota law, collateral estoppel applies where (1) the issue sought to be estopped in the second case is identical to the one resolved in the first; (2) there has been a final judgment in the first action; (3) the party sought to be estopped was a party, or was in privity with a party, to the first action; and (4) the party sought to be estopped had a full and fair opportunity to be heard on the issue in a prior case.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

The Minnesota ***Antitrust Law***, *Minn. Stat. § 325D.49, et seq.*, which parallels the Sherman Act, Minnesota ***antitrust law*** is to be construed uniformly with federal court interpretations of the Sherman Act, unless differences in language compels a different result. The Minnesota ***Antitrust Law*** is framed along the lines of the federal statute, although it is more diffuse. It may be fairly assumed, however, that the general purpose of all statutes of this kind is the same, and a court may properly look to the decisions made under federal and state statutes of a similar character for the principles by which to construe our own statute. The Minnesota ***antitrust law*** is substantially the same as the Sherman Act and therefore should be construed by reference to federal case law.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] **Summary Judgment, Supporting Materials**

Summary judgment is appropriate where no material fact issues are presented and the moving party is entitled to judgment as a matter of law. *Minn. R. Civ. P. 56.03*. A party may not rest on his pleadings to create fact issues where the movant has provided affidavits in support of the motion.

Torts > ... > Commercial Interference > Contracts > General Overview

HN4[] **Commercial Interference, Contracts**

Elements of intentional interference include an alleged wrongdoer's knowledge of the contract and his intentional procurement of its breach.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN5[] **Private Actions, State Regulation**

Minn. Stat. § 325D.57 (1986) provides that any person "injured" by a violation of the Minnesota ***Antitrust Law*** of 1971 may recover damages.

Counsel: John E. Thomas, St. Paul, MN, for appellant.

John F. Beukema, John D. French, Minneapolis, MN, for respondent.

Judges: Heard, considered and decided by Norton, Presiding Judge, Kalitowski, Judge, and Schultz, Judge.*

Opinion by: NORTON

Opinion

NONPUBLISHED OPINION

NORTON, Judge

* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. 6, § 2.

FACTS

In early 1980, while appellant Mark Vannelli was still in high school, he was recruited by Northern Michigan University (NMU) for its hockey team, and was offered an athletic scholarship. Appellant alleges that he was offered a scholarship to cover the full costs of a four-year education at NMU. Respondent agrees that if such an offer was made, it was made in violation of National Collegiate Athletic Association (NCAA) rules.

Vannelli and NMU entered into a scholarship agreement of financial assistance on April 15, 1980. It is undisputed that this written tender of financial assistance covered only a single academic year, 1980-1981. It stated that Vannelli would "be eligible for a **[*2]** renewal" of the scholarship at the end of that term if he was academically eligible for continued athletic competition.

Appellant competed as a member of the NMU hockey team during 1980-1981, his freshman year. His scholarship was renewed under the same terms for the 1981-1982 year, but at the beginning of that hockey season, he failed to make the hockey team. NCAA rules prohibited cancellation of Vannelli's scholarship during its term for failure to make the team, however Vannelli chose to abandon his scholarship and leave NMU at the end of the fall 1981 quarter. He claims that he inquired about enrolling at the University of Minnesota but was told that NCAA rules would prevent his playing hockey for one year and that therefore no scholarship would be offered to him at that time. Respondent contends that if this representation was made, it erroneously stated the NCAA transfer rules then in effect.

Vannelli enrolled at the College of St. Thomas in January 1982. St. Thomas does not grant athletic scholarships. Appellant did not participate in intercollegiate hockey competition until the following school year. Vannelli played hockey for St. Thomas during the 1982-83, 1983-84, and 1984-85 **[*3]** seasons, thereby completing the four full years of competition allowed by NCAA rules. He graduated from St. Thomas in May 1985.

In support of its motion for summary judgment, the NCAA offered an affidavit of its Assistant Executive Director establishing that the NCAA had no knowledge of or involvement in the circumstances giving rise to Vannelli's suit. Appellant failed to counter these assertions with evidence that anyone acting for the NCAA communicated with him until after he left NMU.

Respondent alleges its sole involvement in the events out of which this action arises is that, before appellant was recruited by or enrolled at an NCAA member institution, its members had enacted various regulations that applied equally to all college athletes.

Respondent NCAA is a voluntary unincorporated association with nearly 1000 members, including four-year colleges and universities. Its purpose is the establishment and enforcement of rules governing intercollegiate athletic competition among its members.

Appellant claims that NCAA rules prevented him from transferring from one NCAA member institution to another and "immediately" participating in intercollegiate hockey at the University **[*4]** of Minnesota. However, the NCAA's uncontested affidavit shows it has no knowledge of what reason, if any, Vannelli may have been given for Minnesota's claimed disinterest in offering him an athletic scholarship when he proposed to transfer there. Yet, respondent claims, if Vannelli had enrolled at the University in January 1982, his athletic eligibility at that time would have been governed by NCAA Bylaw 5-1-(j)-(7). This "transfer rule," did not affect Vannelli's eligibility to participate in regular season games or his eligibility for an athletic scholarship; it prohibited only his participation in NCAA *championships* within one year after his transfer.

Appellant claims a second NCAA rule, Article 3, section 4(d) of the NCAA Constitution, had an unfavorable impact on appellant because it prohibits NCAA member institutions from granting athletic scholarships for more than one year at a time. Appellant argues that, but for this rule, he would have been granted a four-year scholarship at NMU and would have continued to receive the scholarship even after he was cut from the NMU hockey team.

This is the second action between these parties. Appellant first brought a class action **[*5]** against the same parties in the United States District Court for the District of Minnesota in December 1984. In that action, appellant asserted the following claims against the NCAA and NMU: a) fraud, in that appellant claimed to have been promised a four-year scholarship when he was recruited as a student-athlete by NMU; b) breach of contract; c) tortious interference with appellant's "present and/or prospective commercially economically advantageous activity with regard to his services as an athlete . . ."; d) violation of federal and state antitrust laws and e) violation of the *14th Amendment of the United States Constitution*.

The federal court dismissed all of appellant's claims. It reached the merits of only the constitutional and federal antitrust claims against the NCAA, holding that the NCAA's actions were not "state action" and therefore were not subject to constitutional challenge, and that appellant lacked standing to assert claims under the federal antitrust laws in that he had not been "injured in his 'business or property'" within the meaning of those laws. The court declined to exercise pendent jurisdiction over appellant's common law and state antitrust claims against **[*6]** the NCAA and dismissed them without prejudice. vannelli has not appealed that decision.

Appellant then filed the present action in state court, asserting virtually the same claims of fraud, breach of contract, tortious interference, and violation of state antitrust laws as had been dismissed. By a March 3, 1987 order the trial court granted summary judgment in favor of the NCAA on all counts.

As to the fraud claim, the court stated that "the complaint does not contain any particular representations made between Vannelli and the NCAA." Summary judgment for the NCAA was granted on the breach of contract claim because, the court ruled, "the NCAA is not a party to [the] agreements between Vannelli and NMU because it is referenced to in the documents" and "the NCAA was not involved in any of the decisions concerning vannelli." Vannelli's claim for tortious interference was also denied, because he had not shown there was a contract between him and the NCAA, that the NCAA was aware he had a scholarship with NMU, that the NCAA intentionally breached a contract or that the NCAA was aware of future contracts Vannelli hoped to enter into. The court also ruled against Vannelli on the state **[*7]** antitrust claim, on the basis of collateral estoppel:

HN1[] Under Minnesota law, collateral estoppel applies where (1) the issue sought to be estopped in the second case is identical to the one resolved in the first; (2) there has been a final judgment in the first action; (3) the party sought to be estopped was a party, or was in privity with a party, to the first action; and (4) the party sought to be estopped had a full and fair opportunity to be heard on the issue in a prior case. *Willems v. Commissioner of Public Safety, 333 N.W.2d 619, 621 (Minn. 1983)*.

In Vannelli's case, the last three of these elements have been met. The question then becomes whether the antitrust issue decided by Judge Renner is identical to the antitrust issue raised in this case.

HN2[] The current Minnesota ***Antitrust Law***, *Minn. Stat. sec. 325D.49, et seq.*, which parallels the Sherman Act, was enacted in 1971, replacing an earlier version first enacted in 1891. There are few reported decisions by the Minnesota Supreme Court under either the current statute or its predecessor. The cases that do exist indicate that the Minnesota ***antitrust law*** is to be construed uniformly with federal court interpretations of the **[*8]** Sherman Act, unless differences in language compels a different result. This principle was established under the 1891 statute:

The Minnesota ***Antitrust Law*** is framed along the lines of the federal statute, although it is more diffuse. It may be fairly assumed, however, that the general purpose of all statutes of this kind is the same, and we may properly look to the decisions made under federal and state statutes of a similar character for the principles by which to construe our own statute.

State v. Duluth Board of Trade, 107 Minn. 506, 121 N.W. 395, 399 (1907).

The court went even further in *Campbell v. Motion Picture Operators Local 21, 151 Minn. 220, 186 N.W. 781 (1922)*, by following federal cases involving the Sherman Act rather than prior inconsistent Minnesota decisions. Emphasizing the importance of uniformity between state and federal law, the court held that the Minnesota ***antitrust law*** was substantially the same as the Sherman Act and therefore should be construed by reference to federal case law.

Since the Minnesota Supreme Court followed federal precedent when construing the 1891 Minnesota antitrust statute, it is logical that it would follow federal precedent **[*9]** in construing the 1971 law.

DECISION

HN3[] Summary judgment is appropriate where no material fact issues are presented and the moving party is entitled to judgment as a matter of law. *Minn. R. Civ. P. 56.03*. A party may not rest on his pleadings to create fact issues where the movant has provided affidavits in support of the motion. *Eakman v. Brutger, 285 N.W.2d 95 (Minn. 1979)*.

Appellant claims the trial court erred in granting summary judgment on the fraud claim by ruling the NCAA was not involved in any of the decisions or representations concerning Vannelli. But appellant fails to establish either by way of affidavit or other evidence or by argument in his brief, specifically how he claims the NCAA was involved. Instead he makes broad assertions about NCAA activities generally. What appellant requests is for this court to take a leap of logic from the assertion that the NCAA is generally involved with the lives of student-athletes to the assertion that therefore the NCAA engaged in fraud.

Clearly the trial court was correct in its ruling that, without some factual showing, such as an assertion in an affidavit, that the NCAA made a specific representation which was fraudulent, **[*10]** summary judgment must be granted. *See* *Davis v. Re-Trac Manufacturing Corp., 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967)*, (Minnesota Supreme Court set out a list of eleven elements of the tort, none of which were even alleged against respondent here).

Appellant alleges the trial court erred by ruling the NCAA was not a party to the documents signed by Vannelli. As with the fraud issue, appellant fails to point to any specific evidence suggesting respondent was a party to these scholarship contracts with Vannelli. Respondent is not listed as a party on the scholarship agreements, and the documents are not signed by an NCAA representative. Appellant suggests that, because the NCAA is referred to in the National Letter of Intent contracts, it is a party to these agreements. However, appellant cites no authority for this argument.

Appellant's claim for tortious interference was also properly foreclosed by summary judgment. He argues that the trial court erred in ruling that the NCAA was uninvolved in Vannelli's contract, yet he fails to point to evidence of specific acts by respondent to support the claim. *See e.g.*, *Boute v. Richard Miller Homes, Inc., 321 N.W.2d 895, **[*11]** 900 (Minn. 1982)* ***HN4***[] (elements of intentional interference include alleged wrongdoing's knowledge of the contract and his intentional procurement of its breach). As respondent points out, appellant has not countered the NCAA's affidavit stating it had no knowledge of or involvement in the events leading up to this lawsuit.

Appellant urges reversal of the trial court's ruling that he is collaterally estopped from asserting the state antitrust claims.

Appellant claims that because the phrase "business or property" is missing from ***HN5***[] *Minn. Stat. § 325D.57* (1986), the state ***antitrust law*** differs from the similar federal ***antitrust law***. The Minnesota statute provides that any person "injured" by a violation of the Minnesota ***Antitrust Law*** of 1971 may recover damages. Respondent points out that numerous state and federal court decisions in Minnesota have routinely construed the Minnesota statute to follow the corresponding federal law. Appellant has not provided us with any legislative history showing the judiciary should interpret state law differently from federal law, notwithstanding the minor difference in language. Additionally in this case, it is logical to conclude that if appellant was **[*12]** not injured in his business or property, he was not injured at all. The premise of this lawsuit is appellant's assertion that he was restricted by NCAA rules from freely selling his amateur athletic services.

Affirmed.

Local 210, Laborers' International Union v. Labor Relations Div. Associated General Contractors, etc.

United States Court of Appeals for the Second Circuit

December 18, 1987, Argued ; April 12, 1988, Decided

No. 87-7702

Reporter

844 F.2d 69 *; 1988 U.S. App. LEXIS 4914 **; 128 L.R.R.M. 2060; 108 Lab. Cas. (CCH) P10,469; 1988-1 Trade Cas. (CCH) P67,962

Local 210, Laborers' International Union of North America, Plaintiff-Appellee, v. Labor Relations Division Associated General Contractors of America, N.Y.S. Chapter, Inc., and F.A. Wellington Corp., Defendants-Appellants

Prior History: [1]** Appeal from a judgment entered in the United States District Court for the Western District of New York, Elfvin, J., holding that a restrictive subcontracting clause in a collective bargaining agreement was protected by the construction industry proviso to section 8(e) of the National Labor Relations Act, *29 U.S.C. § 158(e)*, and ordering arbitration Pursuant to the terms of the agreement.

Disposition: Affirmed.

Core Terms

construction industry, subcontracting, proviso, clauses, arbitration, collective bargaining agreement, exemption, antitrust, anti trust law, policies, merits, status quo, illegality, bargaining, subcontractors, nonstatutory, contracting, secondary, signatory, nonunion, contractors, Relations, grievance, terms, collective bargaining, general contractor, district court, Sherman Act, anticompetitive, non-signatories

LexisNexis® Headnotes

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN1[] **Union Violations, Union Refusal to Bargain**

See *29 U.S.C.S. § 158(e)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

HN2[] Collective Bargaining & Labor Relations, Strikes & Work Stoppages

Section 8(e) was designed to outlaw so-called "hot cargo" clauses in collective bargaining agreements, by which unions would secure agreements from employers to boycott the goods or services of other employers that did not comply with union standards or recognize a union. Liability under § 8(e) of the National Labor Relations Act, *29 U.S.C.S. § 158(e)*, turns in large part on whether an agreement is characterized as "primary" or "secondary" in nature. An agreement has primary objectives, and thus is outside the ban of § 8(e), if it is intended to preserve work traditionally performed by a union for a particular employer. If, on the other hand, an agreement is designed to influence the labor relations policies of third parties by prohibiting dealings with those parties, it then has secondary goals and it is barred by § 8(e).

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

HN3[] Union Violations, Union Refusal to Bargain

In enacting § 8(e) of the National Labor Relations act, *29 U.S.C.S. § 158(e)*, Congress has expressly provided that purely secondary activity would be tolerated in certain industries. To that end, Congress has added the garment industry and construction industry provisos to § 8(e).

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN4[] Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements

See *29 U.S.C. S. § 158(e)*.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN5[] Practices Governed by Per Se Rule, Boycotts

In combination with the other provisions of § 8(e) of the National Labor Relations act, *29 U.S.C.S. § 158(e)*, the construction industry proviso therefore explicitly sanctions certain "agreements" between unions and employers under which the employers agree to cease or refrain from doing business with any other person. However, such restrictive clauses in collective bargaining agreements, amounting to secondary boycotts, undoubtedly can act as a direct restraint on the business market, having substantial anticompetitive effects, both actual and potential.

Accordingly, clauses in agreements are vulnerable to challenge under federal ***antitrust law*** unless they are protected both by the construction industry proviso and by an exemption from antitrust scrutiny.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Primary Jurisdiction

Contracts Law > Contract Conditions & Provisions > General Overview

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

HN6[] **Jurisdiction, Primary Jurisdiction**

Section 8 of the National Labor Relations Act, *29 U.S.C.S. § 158*, strongly implies that a court must reach the merits of an illegality defense in order to determine whether the contract clause at issue has any legal effect in the first place. This is particularly true when labor law questions emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws.

Governments > Legislation > Statutory Remedies & Rights

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN7[] **Legislation, Statutory Remedies & Rights**

Claims based on federal statutory rights are fully arbitrable and should be decided in such a forum when the parties have so chosen by contract.

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Labor & Employment Law > ... > Labor Arbitration > Arbitrators > Authority

HN8[] **Dispute Resolution, Arbitration & Mediation**

Deference to an arbitrator may not be necessary or appropriate when there is a claim that the very contract clause that is the subject of a dispute is itself facially illegal.

Contracts Law > Remedies > Specific Performance

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN9[] **Remedies, Specific Performance**

Federal courts have a duty to determine whether a contract violates federal law before enforcing it.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN10[] Reviewability of Lower Court Decisions, Preservation for Review

The failure to bring a cross-appeal constitutes a waiver of any pre-existing claims.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

HN11[] Alternative Dispute Resolution, Validity of ADR Methods

The litigation of substantial issues going to the merits may constitute a waiver of the right to arbitration.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

HN12[] Union Violations, Union Refusal to Bargain

The construction industry proviso in § 8(e) of the National Labor Relations Act, *29 U.S.C.S. § 158*, must be interpreted in light of the statutory setting of the Landrum-Griffin Act, Pub. L. No. 86-257, § 704(b), 73 Stat. 519, 543-44 (1959), and the circumstances surrounding its enactment.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

HN13[] Union Violations, Union Refusal to Bargain

The test for the permissibility of any particular practice under the construction industry proviso of § 8(e) of the National Labor Relations Act, *29 U.S.C.S. § 158(e)*, is whether or not the practice is consistent with Congress's perceptions regarding the status quo in the construction industry. The relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN14[] Labor, Nonstatutory Exemptions

The statutory antitrust exemptions, which are contained in certain provisions of the Clayton Act, *15 U.S.C.S. § 17*, *29 U.S.C.S. § 52*, and the Norris-LaGuardia Act, *29 U.S.C.S. §§ 104*, *105*, *113*, exempt certain union activities from antitrust scrutiny. They do not, however, reach concerted activity between a union and a nonlabor party, such as an employer. Therefore, if a clause in an agreement is to survive, it must find protection in the nonstatutory exemption, which does permit certain union-employer agreements.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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 > Statutory Exemptions

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Scope, Exemptions**

Agreements between a union and an employer are exempt from antitrust scrutiny if they are so intimately related to wages, hours and working conditions that the union's successful attempt to obtain the provisions through bona fide, arm's length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and therefore is exempt from the Sherman Act, *15 U.S.C.S. § 1 et seq.*

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Business Administration & Organization > Employment Issues > Collective Bargaining & Labor Unions

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 > ... > Market Definition > Relevant Market > Product Market Definition

HN16[] **Antitrust & Trade Law, Exemptions & Immunities**

In assessing whether any particular agreement is protected by the nonstatutory antitrust exemption, the crucial determinant is not the form of the agreement but its relative impact on the product market and the interests of union members. In essence, the test is one that balances the conflicting policies embodied in the labor and antitrust laws, with the policies inherent in labor law serving as the first point of reference. First, the agreement at issue must further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects of collective bargaining. Second, the agreement must not impose a direct restraint on the business market that has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions that results from collective bargaining agreements.

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Judges: Timbers, Meskill and Kearse, Circuit Judges.

Opinion by: MESKILL

Opinion

[*70] MESKILL, Circuit Judge:

The policies inherent in federal labor and ***antitrust law*** have long been a source of conflict. Whereas ***antitrust law*** seeks to promote open and unfettered competition, labor law encourages collective activity by workers seeking to enhance their power in the marketplace. *See Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Electrical Workers, 325 U.S. 797, 806, 89 L. Ed. 1939, 65 S. Ct. 1533 (1945)*. **[**2]** Indeed, the two areas of law embody "policies that often appear irreconcilable." Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 Brooklyn L. Rev.1, 3 (1983). *See also* Winter, *Collective Bargaining and Competition:* ***[*71]*** *The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14, 16-17 (1963).

This appeal presents questions that once again bring this conflict into sharp focus. We must decide whether a clause in a collective bargaining agreement that prohibits an employer from subcontracting work either to or from other employers that are not bound by the agreement is an unlawful restraint on trade, in violation of the Sherman Act, *15 U.S.C. § 1, et seq. (1982)*. As a necessary corollary to this inquiry, we also must decide whether the same clause is protected by the so-called construction industry proviso to section 8(e) of the National Labor Relations Act (NLRA), *29 U.S.C. § 158(e) (1982)*. Despite the anticompetitive effect that this clause could have on commerce among affected employers, the United States District Court for the Western District of New York, Elfvin, **[**3]** *J.*, held that it was protected by the construction industry proviso and thus exempt from antitrust scrutiny. For the following reasons, we affirm.

BACKGROUND

In 1981, plaintiff-appellee Local 210 of the Laborers' International Union of North America (the union) entered into a collective bargaining agreement with defendant-appellant Associated General Contractors of America, New York State Chapter, Inc. (AGC). AGC is a multiple-employer bargaining agent representing general contractors throughout New York State. Its Labor Relations Division negotiates and executes collective bargaining agreements with unions on behalf of AGC's members. One of AGC's members at the time of the 1981 agreement was defendant-appellant F.A. Wellington Corp. (Wellington).

The collective bargaining agreement provided grievance and arbitration procedures to be followed in the event of "any controversy, dispute or misunderstanding arising as to the meaning, application or observances of any provisions of this Agreement." If a grievance or dispute could not be resolved by on-site job supervisors, it was then to be submitted to a Joint Committee composed of three representatives each from the union and **[**4]** the employers. If that body was unable to resolve the matter, then the agreement provided for arbitration before an impartial arbitrator chosen by the parties.

Section 3 of Article XV of the collective bargaining agreement provided that:

> An employer, who is a party to and/or is bound by the terms of this Agreement, shall not accept a contract from or subcontract work covered by this Agreement to a firm, person or group where such firm, person or group is not a party to or bound by this Agreement when the subcontracted work begins. This provision does not apply to private, commercial, and residential work, and rented equipment.

AGC claims to have objected to this restrictive subcontracting clause at the time the agreement was negotiated, asserting that it represented an unlawful restraint on trade. AGC nonetheless agreed to the inclusion of the clause in the parties' collective bargaining agreement.

In late 1981, Wellington entered into a subcontracting agreement with Bhandari Constructors & Consultants, Inc. (Bhandari). Wellington agreed to act as a subcontractor and to perform certain work for Bhandari, which was acting as the general contractor at a construction **[**5]** project located within the geographical jurisdiction of the union. Bhandari, however, was not a signatory to or bound by the terms of AGC's collective bargaining agreement with the union. The union filed a grievance pursuant to the terms of the agreement, charging that Wellington's subcontract with Bhandari was in violation of section 3 of Article XV. The grievance was referred to the Joint Committee. The employer representatives on the committee refused to participate in the grievance process, however, arguing that the restrictive subcontracting clause was illegal under federal ***antitrust law*** and therefore unenforceable. For similar reasons, AGC refused to participate in the selection of an arbitrator when the union insisted that the grievance be submitted **[*72]** for binding arbitration pursuant to the collective bargaining agreement.

The union subsequently initiated this action in the district court seeking to compel arbitration pursuant to the terms of the agreement. The union relied for jurisdiction upon section 301 of the Labor Management Relations Act (LMRA), *29 U.S.C. § 185 (1982)*. AGC and Wellington counterclaimed, alleging that the clause at issue **[**6]** was an unlawful restraint on trade, in violation of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. The union thereafter moved for summary judgment, arguing that the subcontracting clause was expressly protected by the construction industry proviso to section 8(e) of the NLRA and was therefore exempt from antitrust scrutiny. The employers responded that the clause was uniquely and impermissibly broad and fell outside the intended scope of the proviso. They argued that typical restrictive subcontracting clauses in the construction industry only prohibited employers from subcontracting *to* non-signatories. This clause also prohibited Wellington from accepting subcontracted work *from* other employers who were not bound by the collective bargaining agreement -- a result that the employers said was never intended by Congress when it enacted section 8(e).

Judge Elfvin granted summary judgment for the union. He first addressed the "threshold issue" of whether or not AGC and Wellington could raise "illegality as a defense" to an action to compel arbitration. Relying on *Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 70 L. Ed. 2d 833, 102 S. Ct. 851 (1982)*, **[**7]** Judge Elfvin concluded that he "must reach the merits of an illegality defense in order to determine whether the contract clause at issue has any legal effect in the first place." *See* J App. at 11-12. He therefore decided that the issue of the clause's legality was not solely within the jurisdiction of an arbitrator. Next, the district court considered whether the clause was indeed protected by the construction industry proviso. Citing *Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 72 L. Ed. 2d 398, 102 S. Ct. 2071 (1982)*, Judge Elfvin held that Congress enacted the proviso in 1959 to preserve the status quo regarding collective bargaining practices in the construction industry. He then noted several pieces of evidence indicating that clauses such as the one at issue here -- prohibiting subcontracting both to and from non-signatories-- were used in 1959. He concluded that the clause was protected by the proviso and was therefore exempt from the antitrust laws. Having concluded that the clause was valid and enforceable, Judge Elfvin granted the union's request for arbitration in accordance with the terms of the collective bargaining agreement, ordering AGC **[**8]** and Wellington to participate in that process.

DISCUSSION

Section 8(e) was added to the National Labor Relations Act in 1959 by the Labor-Management Reporting and Disclosure Act, also known as the Landrum-Griffin Act. *See* Pub. L. No. 86-257, § 704(b), 73 Stat. 519, 543-44 (1959). Section 8(e) provides in part that:

> ***HN1***[] 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 [sic] and void.

29 U.S.C. § 158(e). ***HN2***[] Section 8(e) was designed to outlaw so-called "hot cargo" clauses in collective bargaining agreements, by which unions would secure agreements from employers to boycott the goods or services of other **[**9]** employers that did not comply with union standards or recognize a union. *See* *National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612, 634-37, 18 L. Ed. 2d 357, 87 S. Ct. 1250 (1967)*. *See also* *NLRB v.*

International Longshoremen's Ass'n, 473 U.S. 61, 74-75, 87 L. Ed. 2d 47, 105 S. Ct. 3045 (1985); *Carrier Air Conditioning* ***[*73]*** *Co. v. NLRB, 547 F.2d 1178, 1184-85 (2d Cir. 1976)*, *cert. denied*, *431 U.S. 974, 53 L. Ed. 2d 1072, 97 S. Ct. 2940 (1977)*; *Donald Schriver, Inc. v. NLRB, 204 U.S. App. D.C. 4, 635 F.2d 859, 868 (D.C. Cir. 1980)*, *cert. denied*, *451 U.S. 976, 68 L. Ed. 2d 357, 101 S. Ct. 2058 (1981)*. Liability under section 8(e) turns in large part on whether an agreement is characterized as "primary" or "secondary" in nature. *See* *National Woodwork Manufacturers, 386 U.S. at 635-39*; *Carrier Air Conditioning, 547 F.2d at 1184-85*. An agreement has primary objectives, and thus is outside the ban of section 8(e), if it is intended to preserve work traditionally performed by a union for a particular employer. *International Longshoremen's Ass'n, 473 U.S. at 75-76*; **[**10]** *National Woodwork Manufacturers, 386 U.S. at 635-39, 644-45*; *Carrier Air Conditioning, 547 F.2d at 1184*. *Cf.* *Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 209-12, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964)* (holding that the "contracting out" of work traditionally performed by bargaining unit employees is a mandatory subject of bargaining under the NLRA). If, on the other hand, an agreement is designed to "influenc[e] the labor relations policies of [third] parties" by prohibiting dealings with those parties, it then has secondary goals and it is barred by section 8(e). *Donald Schriver, 635 F.2d at 868*. *See also* *National Woodwork Manufacturers, 386 U.S. at 635-36*; *Carrier Air Conditioning, 547 F.2d at 1184-85*.

HN3[] In enacting section 8(e), however, Congress expressly provided that purely secondary activity would be tolerated in certain industries. *See* *National Woodwork Manufacturers, 386 U.S. at 637-38*; *Donald Schriver, 635 F.2d at 869*. To that end, Congress added the garment industry and construction industry provisos to section 8(e). **[**11]** [1] The construction industry proviso states that

> ***HN4***[] nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

29 U.S.C. § 158(e). ***HN5***[] In combination with the other provisions of section 8(e), the proviso therefore explicitly sanctions certain "agreement[s]" between unions and employers under which the employers agree "to cease or refrain from . . . doing business with any other person." *Id.* However, such restrictive clauses in collective bargaining agreements, amounting to secondary boycotts, undoubtedly can act as a "direct restraint on the business market[,] ha[ving] substantial anticompetitive effects, both actual and potential." *See* *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 625, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*. *Cf.* *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)* **[**12]** (holding that many concerted refusals to deal, or "group boycotts," are sufficiently anticompetitive to constitute *per se* violations of *section 1* of the Sherman Act). Accordingly, clauses such as the one at issue in the instant case are vulnerable to challenge under federal ***antitrust law*** unless they are protected both by the construction industry proviso and by an exemption from antitrust scrutiny. *See* *Sun-Land Nurseries, Inc. v. Southern California District Council of Laborers, 793 F.2d 1110, 1115-16 (9th Cir. 1986)* (in banc), *cert. denied*, *479 U.S. 1090, 107 S. Ct. 1299, 94 L. Ed. 2d 155 (1987)*. *Cf.* *United Mine Workers of America v. Pennington, 381 U.S. 657, 664-66, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* (agreements resulting from union-employer **[*74]** bargaining are not automatically exempt from Sherman Act).

[13]** In this case, AGC and Wellington argue that the restrictive subcontracting clause enjoys neither the protection of the construction industry proviso nor of an antitrust exemption and that it therefore is facially illegal. Moreover, they pose this "illegality defense" as a bar to compelled arbitration. We therefore must address three

[1] The garment industry proviso creates an even broader exception than the construction industry proviso, allowing unions in the garment industry to use restrictive subcontracting clauses as organizational and economic weapons. *See* *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, 494 F.2d 1230, 1236 (2d Cir. 1974)* (Friendly, J.). *See also* *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 633 n.13, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*.

questions: (1) whether the district court was correct in reaching the merits of the employers' illegality defense or whether that question should have been within the sole province of an arbitrator; (2) whether the clause at issue is within the intended scope of the construction industry proviso; and (3) whether the clause would therefore enjoy an exemption from the application of federal antitrust laws.

A. *Arbitrability*

In deciding that he must reach the merits of the employers' illegality defense, Judge Elfvin relied on the Supreme Court's decision in *Kaiser Steel*. In *Kaiser Steel*, however, the Court addressed a jurisdictional conflict between a federal court and the National Labor Relations Board (NLRB), not one between a federal court and an arbitrator. A mineworkers' union and several coal-producing companies had entered into **[**14]** a collective bargaining agreement that required any employer that purchased coal from nonunion producers to pay penalties into the union's health and retirement funds. *See* *455 U.S. at 74-76*. The trustees of the fund sued Kaiser Steel in a federal district court for failure to make such payments, basing jurisdiction in part on section 301 of the LMRA. *Id. at 76*. Kaiser defended by claiming that the contract provision violated section 8(e) of the NLRA and *sections 1* and *2* of the Sherman Act. *Id.*

Both lower courts held that they could not reach the merits of the illegality defense because to do so would interfere with the primary jurisdiction of the NLRB, but the Supreme Court reversed, holding that "federal court[s] ha[ve] a duty to determine whether a contract violates federal law before enforcing it." *Id. at 83*. Although the Court acknowledged that section 8(e) makes the use of hot cargo clauses an unfair labor practice -- an area typically within the primary jurisdiction of the NLRB -- it noted that the statute also provides that such clauses are "void at their inception and at all times unenforceable by federal courts. **[**15]** " *See* *id. at 84*. The court held that this second component of section 8(e) ***HN6***[] "strongly implies that a court must reach the merits of an illegality defense in order to determine whether the contract clause at issue has any legal effect in the first place." *See id. See also* Anderson, *Hot Cargo Enforcement After* Kaiser Steel: *A New Look at Section 8(e)*, 1983 Utah L. Rev. 493, 494-97. This is particularly true when "'labor law questions . . . emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws.'" *Kaiser Steel, 455 U.S. at 85* (quoting *Connell Construction, 421 U.S. at 626*).

Although *Kaiser Steel* generally supports Judge Elfvin's decision to reach the merits of the illegality defense in this case, there may be different considerations in a case involving a jurisdictional conflict between a federal court and an arbitrator chosen by the parties for the resolution of their disputes. The Supreme Court has consistently **[**16]** held that ***HN7***[] claims based on federal statutory rights are fully arbitrable and should be decided in such a forum when the parties have so chosen by contract. *See, e.g.,* *Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 55 U.S.L.W. 4757, 4759-63, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987)* (holding that civil RICO claims and claims of securities fraud are arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-29, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)* (holding that federal antitrust claims arising in the context of international business transactions are arbitrable). However, we have held, along with others, that ***HN8***[] deference to an arbitrator may not be necessary or appropriate when there is a claim that the very contract clause that is **[*75]** the subject of a dispute is itself facially illegal. *See, e.g.,* *Danielson v. International Organization of Masters, Mates and Pilots, 521 F.2d 747, 754-55 (2d Cir. 1975)*. *See also* *NLRB v. Local 1131, Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 777 F.2d 1131, 1140-41 (6th Cir. 1985)* **[**17]** (noting NLRB practice of refusing to defer to arbitration when contract clause is claimed to be illegal); *International Union of Operating Engineers,* *Local 701, 216 N.L.R.B. 233, 234 (1975)* (same), *enf'd*, *578 F.2d 841 (9th Cir. 1978)*. This seems consistent with the Supreme Court's holding in *Kaiser Steel* that ***HN9***[] "federal court[s] ha[ve] a duty to determine whether a contract violates federal law before enforcing it." *455 U.S. at 83*.

In any event, we need not determine whether the employers' illegality defense in this case should have been left to an arbitrator. We are confident that the parties' conduct in this case constituted a waiver of any rights they may have had to put the matter before an arbitrator. Although the union argued before Judge Elfvin that an arbitrator must decide the legality of the clause at issue, the union does not now challenge the district court's action in reaching the merits of the issue. We have held in a similar context that ***HN10***[] the failure to bring such a cross-appeal constitutes a waiver of any pre-existing claims. **[**18]** *United Optical Workers Union Local 408 v. Sterling Optical Co., 500 F.2d 220, 224 (2d Cir. 1974)*. Moreover, ***HN11***[] "'the litigation of substantial issues going to the merits may constitute a waiver of [the right to] arbitration.'" *Rush v. Oppenheimer & Co., 779 F.2d 885, 887 (2d Cir. 1985)* (quoting *Sweater Bee By Banff, Ltd. v. Manhattan Industries, Inc., 754 F.2d 457, 461* (2d Cir.), *cert. denied*, *474 U.S. 819, 88 L. Ed. 2d 55, 106 S. Ct. 68 (1985))*. On appeal, the union has urged us to affirm the district court's ruling in all respects, a request that certainly constitutes "the litigation of substantial issues going to the merits." The employers have similarly argued the merits on appeal, asking this Court to hold that the contract clause at issue is not protected by the construction industry proviso and is therefore illegal. Furthermore, the employers refused at a much earlier juncture to participate in the grievance and arbitration process. In sum, we believe that we are justified under these circumstances in reaching the **[**19]** merits of the employers' illegality defense. We therefore must consider whether the restrictive subcontracting clause at issue violates either section 8(e) of the NLRA or any relevant provisions of the antitrust laws.

B. *Section 8(e) of the NLRA: The Construction Industry Proviso*

HN12[] The construction industry proviso "'must be interpreted in light of the statutory setting [of the Landrum-Griffin Act] and the circumstances surrounding its enactment.'" *Woelke, 456 U.S. at 653* (quoting *Connell Construction, 421 U.S. at 628*). *See also Sun-Land Nurseries, 793 F.2d at 1113*; *Donald Schriver, 635 F.2d at 871*. Congress' primary purpose in enacting the proviso in 1959 was to "'preserve the *status quo*' regarding agreements between unions and contractors in the construction industry." *Woelke, 456 U.S. at 657* (quoting *National Woodwork Manufacturers, 386 U.S. at 637*). Recognizing certain unique characteristics of collective bargaining in the construction industry, Congress was trying to **[**20]** "'preserve the present state of the law with respect to . . . the validity of agreements relating to the contracting of work to be done at the site of the construction project.'" *Woelke, 456 U.S. at 656* (quoting 105 Cong. Rec. 17,900, *72 L. Ed. 2d 398, 102 S. Ct. 2071 (1959)* (comments of Sen. Kennedy), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1433 (1959) (Leg. Hist.)). *See also* H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959), *reprinted in* 1 Leg. Hist. at 943. Thus, ***HN13***[] the test for the permissibility of any particular practice under the construction industry proviso is whether or not the practice is consistent with "Congress' perceptions regarding the status quo in the construction industry [in 1959]." *Woelke, 456 U.S. at 657*. **[*76]** *See also Sun-Land Nurseries, 793 F.2d at 1114*. "'The relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.'" *Woelke, 456 U.S. at 658* **[**21]** (quoting *Brown v. General Services Administration, 425 U.S. 820, 828, 48 L. Ed. 2d 402, 96 S. Ct. 1961 (1976))*.

Restrictive subcontracting clauses in collective bargaining agreements that limited the ability of employers to deal with nonunion or non-signatory subcontractors were common in the construction industry at the time of the passage of the Landrum-Griffin Act. *See id. at 659* (citing Lunden, *Subcontracting Clauses in Major Contracts* (Part I), 84 Monthly Lab. Rev. 579 (1961)). The purpose of such clauses was not only to avoid the unique job-site friction that could exist when union and nonunion workers were employed on the same construction site, but also to recognize the "close community of interests" inherent in the construction industry, where the wages and working conditions of one set of employees could often affect those of another. *See id.* at 661-63; *Donald Schriver, 635 F.2d at 880*. *See also National Woodwork Manufacturers, 386 U.S. at 638-39*; *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB, 332 F.2d 636, 640 (3d Cir. 1964)*. **[**22]** The construction industry proviso was designed to recognize these realities and to allow certain otherwise prohibited secondary agreements to promote those interests. These secondary agreements might take the form of union-signatory clauses, in which an employer agreed not to subcontract work to any party that was not a signatory to the contract, *see, e.g., Woelke, 456 U.S. at 647-48, 659 n.12*, or union-standards clauses, in which an employer agreed not to subcontract work to any party unless that party agreed to comply with the terms of the union contract, *see id. at 659 n.12*; *see also Donald Schriver, 635 F.2d at 880*. As Senator Kennedy, the chairman of the Senate conferees who produced the final version of Landrum-Griffin in 1959, said:

> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under [the proviso to] section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on

> a construction project site with other contractors or subcontractors **[**23]** regardless of the precise relation between them.

105 Cong. Rec. at 17,900, *reprinted in* 2 Leg. Hist. at 1433.

The clause at issue in the instant case therefore clearly is protected by the construction industry proviso insofar as it bars the signatory employers from subcontracting work *to* other employers that are "not a party to or bound by th[e] Agreement." The more difficult question, however, is whether the clause has a uniquely and impermissibly broad scope by also precluding signatory employers from accepting subcontracting work *from* other contractors that are not bound by the agreement negotiated by AGC. The employers in the instant case argue that this aspect of the clause is a novel extension of such subcontracting clauses that first appeared in the industry around 1979. If they are correct, of course, then this aspect of the clause would not be protected by the construction industry proviso because it could not have been part of the "status quo in the construction industry [in 1959]." *Woelke, 456 U.S. at 657*. However, we believe, as did Judge Elfvin, that there is sufficient evidence indicating that practices such as the one at **[**24]** issue here were indeed part of the status quo in the construction industry at the time of the enactment of Landrum-Griffin and that Congress therefore intended to protect such clauses.

First, as we have noted, Senator Kennedy, in commenting on the compromise version of Landrum-Griffin produced by a **[*77]** conference committee, noted that the proviso would reach "*all* . . . agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors *regardless of the precise relation between them*." 105 Cong. Rec. at 17,900, *reprinted in* 2 Leg. Hist. at 1433 (emphasis added). This seems to indicate that hot cargo provisions would be tolerated in the construction industry whether the signatory employer was subcontracting work to or receiving it from a nonsignatory. Moreover, as the Supreme Court in *Woelke* noted, the comments of the chairman of the Senate conferees are "entitled to substantial weight." *Woelke, 456 U.S. at 656 n.9*.

Second, the so-called "Lunden report," a study of pre-Landrum-Griffin subcontracting practices relied upon by the Supreme Court in *Woelke*, indicates that clauses nearly identical **[**25]** to the one at issue here were indeed part of the status quo in the construction industry in 1959. The Lunden report examined more than 1,687 major collective bargaining agreements, including 155 in the construction industry. *See* Lunden, Part I, *supra*, at 579-82. More than fifty of the construction industry contracts studied contained restrictive subcontracting clauses. *See* Lunden, *Subcontracting Clauses in Major Contracts* (Part II), 84 Monthly Lab. Rev. 715, 715 (1961). The report quoted from one typical example of such a clause, which provided:

> Any employer or shop signed to this agreement shall not sublet *to or from* any . . . company . . . unless the work to be performed is performed under the terms of this contract, and the employer whose employees perform such work is either signatory to this contract or has signed a short form contract which requires acceptance of and being bound by all the terms and conditions of this contract.

Id. (emphasis added). Thus, clauses prohibiting subcontracting both to and from non-signatories appear to have existed before the passage of Landrum-Griffin. This conclusion is further borne out by **[**26]** the testimony of Senator Curtis regarding an early Senate version of the Landrum-Griffin legislation. Senator Curtis noted that hot cargo clauses were then used "extensively" by major trade unions and that under such clauses prevalent in the construction industry in Baltimore, "unionized general contractors could not hire nonunion subcontractors, and unionized subcontractors could not work for nonunion general contractors." *Labor-Management Reform Legislation: Hearings Before the Subcommittee on Labor*, 86th Cong., 1st Sess. 752 (1959). The employers in the instant case argue that Senator Curtis' comments are unpersuasive because he made them in support of more restrictive legislation that ultimately was rejected. The employers, however, misunderstand the import of Senator Curtis' comments. They are persuasive not because of Senator Curtis' role in the passage of Landrum-Griffin, but because they provide one more piece of evidence that subcontracting clauses such as the one at issue here were indeed part of the status quo in the construction industry in 1959.

Finally, as the Supreme Court noted in *Woelke*, courts and the NLRB had upheld broad subcontracting clauses in construction **[**27]** industry labor contracts in the years prior to 1959. *See* *Woelke, 456 U.S. at 658-59* & n.11

(citing *Associated General Contractors of America, Inc. (St. Maurice, Helmkamp & Musser), 119 N.L.R.B. 1026 (1957)*, *enf'd*, *44 L.R.R.M. 2078, 266* F.2d 905 (D.C. Cir.), *cert. denied*, *361 U.S. 834, 80 S. Ct. 86, 4 L. Ed. 2d 76 (1959))*. *See also* *id. at 659 n.12* (noting other evidence indicating prevalence of broad subcontracting clauses in pre-1959 construction industry). This evidence and other factors led a unanimous Supreme Court in *Woelke* to take a permissive stance regarding such clauses, holding that the "construction industry proviso . . . ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining relationship, even when not limited in application to particular jobsites at which both union and nonunion workers are employed." *Id. at 666*. Many of the same factors, as well as the **[*78]** evidence of pre-1959 labor contracts similar to that at issue here, dictate that we take a similar stance. We believe that the clause at issue in this **[**28]** case falls within the intended scope of the construction industry proviso.

The employers in this case nonetheless argue that this clause is inconsistent with the overall policies underlying the National Labor Relations Act. They argue that the clause must satisfy what amounts to a two-part test: that it be part of the status quo in the construction industry as of 1959 *and* that it be generally consistent with policies underlying the NLRA. We disagree. If this practice was part of the status quo in the industry in 1959, then Congress in drafting section 8(e) meant to protect the practice and it follows *a fortiori* that it is consistent with the NLRA amendments contained in Landrum-Griffin. *See* *Sun-Land Nurseries, 793 F.2d at 1114 n.5* (relying on Woelke's test of the status quo in 1959 and rejecting any further inquiry into the "purpose" of a clause).

In a similar vein, the employers argue that the clause at issue here will force contractors in the affected region of New York State to recognize particular unions or particular union standards in order to secure work. That may be so. Nevertheless, we must assume that Congress in 1959 anticipated such consequences **[**29]** and nonetheless decided to enact the construction industry proviso. We should not second-guess the Congress on such policy matters. Secondary subcontracting agreements such as the one at issue here inevitably create a so-called "'top-down' pressure for unionization; they . . . take the representation decision out of the hands of the employees and place it in the hands of the employers." *Woelke, 456 U.S. at 662-63*. Although Congress sought in 1959 to limit such "top-down" organization with the passage of section 8(e), *see* *id. at 662-64*; *Connell Construction, 421 U.S. at 632-33*, it nonetheless "concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the [practices authorized by the construction industry proviso]." *Woelke, 456 U.S. at 663*. *See also* *A.L. Adams Construction Co. v. Georgia Power Co., 733 F.2d 853, 856 (11th Cir. 1984)* (holding that pressure on subcontractors to unionize caused by a restrictive subcontracting clause is acceptable if clause is part of a valid collective bargaining agreement), *cert.* **[**30]** *denied*, *471 U.S. 1075, 85 L. Ed. 2d 511, 105 S. Ct. 2155 (1985)*. Congress made a similar concession for the construction industry when it enacted section 8(f) of the NLRA, *29 U.S.C. § 158(f) (1982)*, allowing so-called prehire agreements, under which employers and unions may enter into collective bargaining agreements in certain circumstances even when the employees in the bargaining unit have not yet designated the union as their representative. *See* *Woelke, 456 U.S. at 663-64*.

The employers here argue that this clause creates a unique brand of "bottom-up" pressure, by which they presumably mean that nonunion general contractors such as Bhandari might be forced to recognize a particular union or to comply with certain standards in order to solicit work from unionized subcontractors such as Wellington. The potential antidemocratic effect of such a clause on workers, however, is no different than that created by the more typical clause discussed in *Woelke*; it still tends to create a pressure that will emanate from management downward within the structure of any given employer. The secondary organizational pressure created **[**31]** by the clause at issue here is not materially different from that created by a clause that restricts only the subcontracting of work *to* non-signatories. In fact, the Supreme Court in *Woelke* "recognize[d] that 'the use of union signatory subcontracting clauses [may] give a particular union a monopoly position in a labor market,' yet upheld such clauses nevertheless." *Sun-Land Nurseries, 793 F.2d at 1114* (quoting *Woelke, 456 U.S. at 663 n.15*) (citation omitted).

[*79] C. *Antitrust Laws: Exemptions*

Although the clause at issue here is protected by the construction industry proviso to section 8(e) of the NLRA, it is not necessarily beyond the reach of the federal antitrust laws. *See id. at 1115*. *See also* Pennington, 381 U.S. at 664-66. The practice also must fall within one of two recognized labor law exemptions from antitrust scrutiny -- the statutory and nonstatutory exemptions. *See, e.g.,* *Connell Construction, 421 U.S. at 621-22*; *Sun-Land Nurseries, 793 F.2d at 1115*; *Home Box Office, Inc. v. Directors Guild of America, Inc., 531 F. Supp. 578, 585 (S.D.N.Y. 1982)*, **[**32]** *aff'd*, *708 F.2d 95 (2d Cir. 1983)* (per curiam). ***HN14***[] The statutory exemptions, which are contained in certain provisions of the Clayton Act, *see* *15 U.S.C. § 17 (1982)*; *29 U.S.C. § 52 (1982)*, and the Norris-LaGuardia Act, *see* *29 U.S.C. §§ 104*, *105*, *113 (1982)*, exempt certain union activities from antitrust scrutiny. *Connell Construction, 421 U.S. at 621-22*. They do not, however, reach concerted activity between a union and a nonlabor party, such as an employer. *Id.;* *Sun-Land Nurseries, 793 F.2d at 1115*. Therefore, if the clause at issue is to survive, it must find protection in the nonstatutory exemption, which does permit certain union-employer agreements. *See* *Connell Construction, 421 U.S. at 622* (citing *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965))*.

The purpose of the nonstatutory exemption is "to reconcile [the] conflicting national policies [inherent in the labor and antitrust laws] -- one protecting business **[**33]** competition, the other encouraging collective bargaining." *Home Box Office, 531 F. Supp. at 591*. In what we have called the "classic formulation" of the nonstatutory exemption, *see* *Berman Enterprises Inc. v. Local 333, United Marine Division, Int'l Longshoremen's Ass'n, 644 F.2d 930, 935 n.8* (2d Cir.), *cert. denied*, *454 U.S. 965, 102 S. Ct. 506, 70 L. Ed. 2d 381 (1981)*, a plurality of the Supreme Court in *Jewel Tea* held that ***HN15***[] agreements between a union and an employer are exempt from antitrust scrutiny if they are

> so intimately related to wages, hours and working conditions that the union['s] successful attempt to obtain th[e] provision[s] through bona fide, arm's length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and therefore is exempt from the Sherman Act.

Jewel Tea, 381 U.S. at 689-90. *See also* **[**34]** *Berman Enterprises, 644 F.2d at 935 n.8*; *Home Box Office, 531 F. Supp. at 590*.

HN16[] In assessing whether any particular agreement is protected by the nonstatutory exemption, the "'crucial determinant is not the form of the agreement . . . but its relative impact on the product market and the interests of union members.'" *Id.* (quoting *Jewel Tea, 381 U.S. at 690 n. 5*). In essence, the test is one that balances the conflicting policies embodied in the labor and antitrust laws, with the policies inherent in labor law serving as the first point of reference. *See* *Jewel Tea, 381 U.S. at 689-90*; *Home Box Office, 531 F. Supp. at 591-93*. *See also* 6 Von Kalinowski, ***Antitrust Law*** *and Trade Regulation*, § 48.03 [1], at 48-30 -- 48-32 (1987). First, the agreement at issue must further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects of collective bargaining. *See* *Jewel Tea, 381 U.S. at 689-90*; *Sun-Land Nurseries, 793 F.2d at 1115-17*; *Consolidated Express, Inc. v. New York Shipping Ass'n, Inc., 602 F.2d 494, 517-18 (3d Cir. 1979)*, **[**35]** *vacated and remanded on other grounds*, *448 U.S. 902, 100 S. Ct. 3040, 65 L. Ed. 2d 1131 (1980)*; *Mackey v. National Football League, 543 F.2d 606, 614-15 (8th Cir. 1976)*, *cert. dismissed*, *434 U.S. 801 (1977)*; *Home Box Office, 531 F. Supp. at 591-93*; 6 Von Kalinowski, *supra*, at 48-32. Second, the agreement must not impose a "direct restraint on the business market [that] has **[*80]** substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions [that results from collective bargaining agreements]." *Connell Construction, 421 U.S. at 625*. *See also* *Mid-America Regional Bargaining Ass'n v. Will County Carpenters District Council, 675 F.2d 881, 892* (7th Cir.), *cert. denied*, *459*

U.S. 860, 103 S. Ct. 132, 74 L. Ed. 2d 114 (1982); *Consolidated Express, 602 F.2d at 517*; *Home Box Office, 531 F. Supp. at 591*; 6 Von Kalinowski, *supra*, at 48-32. [2]

[36]** Given these standards, and the background of the construction industry proviso discussed earlier, we agree with the position taken by the Ninth Circuit, sitting *in banc*, in *Sun-Land Nurseries*. There, the court rejected an antitrust challenge to a restrictive subcontracting clause, holding that clauses protected by the construction industry proviso "must be given breathing room to operate in their intended fashion without interference from the antitrust laws." *Sun-Land Nurseries, 793 F.2d at 1117*. Although the court "refuse[d] to rule that such clauses are wholly exempt from scrutiny if they are shown to be instruments of an antitrust conspiracy otherwise existing, [it did] hold that a *valid* subcontracting clause contained in a collective bargaining agreement cannot serve as the basis of an antitrust claim." *Id.* (emphasis added). *See also* *Suburban Tile Center, Inc. v. Rockford Building and Construction Trades Council, 354 F.2d 1, 3 (7th Cir. 1965)* ("success in securing" restrictive subcontracting clause is not alone enough to constitute an antitrust violation), *cert. denied*, *384 U.S. 960, 16 L. Ed. 2d 673, 86 S. Ct. 1585 (1966)*. **[**37]** *Cf.* *A.L. Adams Construction, 733 F.2d at 855-58* & n.5 (holding, without considering nonstatutory antitrust exemption, that a clause in a valid collective bargaining agreement that is permitted by the construction industry proviso is permissible under ***antitrust law*** in the absence of any other evidence of an unlawful restraint on trade). This comports with the Supreme Court's suggestion in *Jewel Tea* that restrictive subcontracting clauses obtained as a result of "bona fide, arm's-length bargaining in pursuit of . . . [legitimate] labor policies" are entitled to the protection of the nonstatutory exemption, whereas agreements secured "at the behest of or in [unlawful] combination with nonlabor groups" are not. *See* *Jewel Tea, 381 U.S. at 689-90*. It is also consistent with *Connell Construction*, which involved a restrictive subcontracting agreement between a union and an employer with whom the union had not engaged in collective bargaining. *See* *421 U.S. at 619*. The Court held the clause illegal, but suggested that such an agreement might have enjoyed an antitrust exemption "if it [had been] included in a lawful collective-bargaining **[**38]** agreement." *Id. at 625-26* (citing *Pennington, 381 U.S. at 664-65*; *Jewel Tea, 381 U.S. at 689-90*).

The subcontracting clause in the instant case was included in a valid collective bargaining agreement and we have no reason to believe that it was the product of anything other than "bona fide, arm's-length bargaining," *Jewel Tea, 381 U.S. at 690*. Moreover, in seeking the inclusion of the clause in the agreement, the union was pursuing a legitimate bargaining objective, *see* *Suburban Tile Center, 354 F.2d at 3*, and was undoubtedly **[*81]** seeking to promote the "close community of interest[s]" among construction workers within its jurisdiction. *See* *Woelke, 456 U.S. at 661-63*. *See also* *National Woodwork Manufacturers, 386 U.S. at 638-39*. Although the agreement will undoubtedly have some anticompetitive impact in the affected area of New York State -- particularly among employers that do not recognize the union or that are not willing to be bound by the terms of the AGC agreement -- we believe that certain anticompetitive pressures, like organizational pressures, **[**39]** are "implicit in the construction industry proviso," *Woelke, 456 U.S. at 663*; *see also* *Jim McNeff, Inc. v. Todd, 461 U.S. 260, 270 n.9, 75 L. Ed. 2d 830, 103 S. Ct. 1753 (1983)*. Even a threat that the union involved might achieve monopoly status in the relevant labor market would not, standing alone, necessarily mandate antitrust liability. *Cf.* *Woelke, 456 U.S. at 663 n.15*; *Sun-Land Nurseries, 793 F.2d at 1114*. As long as this clause was embodied in a legitimate collective bargaining agreement, we believe that our primary touchstone in assessing its validity must be the policies embodied in federal labor law. *Cf.* *Home Box Office, 531 F. Supp. at 591-93*. Therefore, because we detect no evidence here of "an antitrust conspiracy otherwise existing," *see* *Sun-Land Nurseries, 793 F.2d at 1117*, we

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[2] In *Mackey*, the Eighth Circuit articulated a three-part test to determine whether a particular agreement enjoys the protection of the nonstatutory exemption. First, the restraint on trade must primarily affect only the parties to the agreement. Second, the agreement must concern a mandatory subject of collective bargaining. Third, the agreement must be the product of bona fide, arm's-length bargaining. *See* *Mackey, 543 F.2d at 614*. The Ninth Circuit recently employed this three-part analysis. *See* *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council, 817 F.2d 1391, 1393 (9th Cir. 1987)*. Although we believe that the agreement in the instant case could satisfy such a test, we need not adopt this particular analysis. Rather, we rely on the discussion of *Jewel Tea* and *Connell Construction* by Judge Sofaer in *Home Box Office, 531 F. Supp. at 591-93*, which we subsequently endorsed. *See* *708 F.2d at 95*.

believe that the protection of the construction industry proviso to section 8(e) of the NLRA precludes any further antitrust scrutiny. The clause at issue is protected by a nonstatutory antitrust exemption.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court **[**40]** is affirmed and the parties are ordered to proceed to arbitration under the terms of the collective bargaining agreement to determine if there has been a violation of the agreement.

Collins v. Associated Pathologists

United States Court of Appeals for the Seventh Circuit

October 27, 1987, Argued ; April 20, 1988, Decided

No. 87-1399

Reporter

844 F.2d 473 *; 1988 U.S. App. LEXIS 5266 **; 1988-1 Trade Cas. (CCH) P67,971

James G. P. Collins, Plaintiff-Appellant, v. Associated Pathologists, Ltd., et al., Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Central District of Illinois, Peoria Division, No. 84 C 1332, Michael M. Mihm, Judge.

Core Terms

pathology, pathologists, district court, monopolization, patients, antitrust, staff privileges, summary judgment, Sherman Act, boycott, Electric, compete, relevant market, genuine, summary judgment motion, hospital service, anesthesiologist, conspiracy, practicing, products, cases, grant summary judgment, individual defendant, exclusive contract, provide a service, tying arrangement, coal company, consumers, counts

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

The very nature of antitrust litigation encourages summary disposition of such cases when permissible.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

The use of summary judgment is not only permitted but encouraged in certain circumstances, including antitrust cases.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Evidence > Inferences & Presumptions > Inferences

HN3[] **Inchoate Crimes, Conspiracy**

Any inference of conspiracy is unreasonable when (1) some portions of the evidence suggest that defendants conspired in ways that did not injure plaintiffs, and (2) the evidence that bore directly on the price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market, not to monopolize it.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN4[] **Summary Judgment, Burdens of Proof**

Fed. R. Civ. P. 56(e) requires the non-moving party to establish that there is a genuine issue of material fact.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN5[] **Judgment as Matter of Law, Directed Verdicts**

When the moving party has carried its burden under *Fed. R. Civ. P. 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. This means that where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. This language indicates that a summary judgment motion is like a trial motion for a directed verdict and that "genuine" allows some quantitative determination of the sufficiency of the evidence.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN6[] Judgment as Matter of Law, Directed Verdicts

The test for summary judgment is whether sufficient evidence exists in the pre-trial record to allow the non-moving party to survive a motion for directed verdict.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN7[] Monopolies & Monopolization, Conspiracy to Monopolize

If the factual context renders a claim implausible, if the claim is one that simply makes no economic sense, that party must come forward with more persuasive evidence to support its claim than would otherwise be necessary. The absence of any plausible motive to engage in the conduct charged is highly relevant to whether a genuine issue for trial exists. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

HN8[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Agreements are not an unreasonable restraint of trade even if they operate as exclusive contracts.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Not all exclusive contracts violate the Sherman Act. Whether a particular contract does so depends on the effect that contract has upon competition in the relevant market place. The controlling factor in this determination is the relevant market area.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In the Seventh Circuit at least boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se, for example price fixing agreements.

Antitrust & Trade Law > 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

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

The language of the Illinois Antitrust Act, Ill. Rev. Stat. ch. 38, § 60-3(2), closely tracks the language of § 1 of the Sherman Act and the language of the Illinois Antitrust Act, Ill. Rev. Stat. ch. 38, § 60-3(3), is very similar to the language of § 2 of the Sherman Act.

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Susan M. Hickman, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Springfield, Illinois, Hugh J. Graham, III, Graham & Graham, Springfield, Illinois, for Defendants-Appellees.

Judges: Cummings, Coffey and Easterbrook, Circuit Judges.

Opinion by: CUMMINGS

Opinion

[*474] CUMMINGS, Circuit Judge.

Plaintiff Dr. James G. P. Collins, a pathologist, is currently employed and practicing his specialty in San Leandro, California. Dr. Collins claims that he was forced to accept his current position after antitrust violations deprived him of his former position at St. John's Hospital in Springfield, Illinois. [1] **[**3]** More specifically, in a ten-count amended complaint Dr. Collins alleged that the contractual arrangement between St. **[*475]** John's and Associated

[1] Dr. Collins is not unique in turning to antitrust laws for relief. Yet despite the growing frequency with which doctors file antitrust claims, they have had little success. See Enders, *Federal Antitrust Issues Involved in the Denial of Medical Staff Privileges*, 17 Loy. U. Chi. L.J. 331 (1986).

Pathologists, Ltd. ("APL"), the group providing pathology services to the hospital, was a combination in restraint of trade, an unlawful boycott, and an unlawful tying agreement. Dr. Collins also accused APL **[**2]** of monopolization, attempted monopolization and conspiracy to monopolize the provision of pathology services. Finally, Dr. Collins' pendent state claims alleged violations of state ***antitrust law***, breach of contract, misrepresentation, wrongful removal or reduction in staff privileges and tortious interference with staff privileges. Defendants St. John's Hospital and APL [2] filed motions for summary judgment. In a thorough opinion, Judge Mihm painstakingly examined the voluminous discovery material filed in this case and concluded that Dr. Collins failed to raise a genuine issue of material fact with regard to any of his claims. *676 F. Supp. 1388, 1411 (C.D. Ill. 1987)*. Accordingly, the court granted the defendants' motions for summary judgment. We affirm on all counts that are still pressed. [3]

I

From October 1974 through January 31, 1982, when the directors of APL asked for and received Dr. Collins' resignation, Dr. Collins was an employee and, for most of that period, a shareholder of APL. Throughout the period in which he was employed by APL, Dr. Collins worked under contracts between APL and St. **[**4]** John's as a pathologist at St. John's. The contracts between APL and St. John's required APL to provide complete and adequate pathology services to St. John's. APL's contractual obligation to provide pathology services included engaging the staff necessary to provide "full and complete professional service for the department."

Following his forced resignation from APL in January 1982, Dr. Collins sought to continue his employment at St. John's as an independent pathologist, separate from the APL contract. Although St. John's did not remove or reduce Dr. Collins' staff privileges, it refused to employ him as a pathologist. This refusal and the contractual relationships surrounding it provide the bases for Dr. Collins' claims.

II

Dr. Collins begins his argument by challenging the standard for summary judgment employed by the district court. He cites *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, for the proposition that courts should hesitate before granting summary judgment in complex antitrust litigation. His argument ignores cases in this Circuit limiting *Poller* and noting that **[**5]** ***HN1***[] the very nature of antitrust litigation encourages summary disposition of such cases when permissible, see *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)*, certiorari denied, *470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)*; *Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)*; *Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1166 (7th Cir. 1978)*, certiorari denied, *440 U.S. 982, 60 L. Ed. 2d 242, 99 S. Ct. 1791 (1979)*, as well as the recent trilogy of cases in which the Supreme Court made clear that, contrary to the emphasis of some prior precedent, ***HN2***[] the use of summary judgment is not only permitted but encouraged in certain circumstances, including antitrust cases, *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Matsushita Electric **[*476]** Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; **[**6]** see generally Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183 (1987)*.

The first of the trilogy cases, *Matsushita*, is especially instructive because it involved the grant of a summary judgment motion in complex antitrust litigation. The plaintiffs in that case, Zenith and National Union Electric Corporation, filed suit alleging that 21 corporations, Japanese manufacturers of consumer electronic products and

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[2] Collins filed suit against APL, the corporation, as well as the four pathologists employed by the corporation, each of whom was sued individually. The estate of a fifth individual pathologist was named as a defendant in Collins' second amended complaint. However, as Jessie Fulcher, executrix of the estate of the fifth pathologist, Dr. J. Herschel Fulcher, Jr., is not listed by the plaintiff's or the other defendants' brief as an appellee and has not filed a brief in this Court, the estate appears to have been dropped as a defendant.

[3] Count VII, breach of contract, and Count VIII, misrepresentation, have evidently been abandoned. Plaintiff's briefs and oral argument do not fault the district court's disposition of those counts. See *676 F. Supp. at 1408-1410*.

their American subsidiaries that sold the products in this country, had illegally conspired to drive American firms from the market through a concerted predatory pricing scheme. The district court found that *HN3*[] any inference of conspiracy was unreasonable because (1) some portions of the evidence suggested that defendants conspired in ways that did not injure plaintiffs, and (2) the evidence that bore directly on the price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market, not to monopolize it. The court then granted summary judgment in favor **[**7]** of all defendants on all counts.

The Court of Appeals for the Third Circuit reversed. It concluded that a reasonable factfinder could find a conspiracy. Commenting on the Third Circuit's opinion, the Supreme Court noted that the circuit court had not considered if it was as plausible to conclude that defendants' price-cutting behavior was independent as it was to conclude that it was conspiratorial. The Supreme Court reversed and remanded, ordering that the summary judgment be reinstated unless the Third Circuit could find some other evidence in the record that excluded the possibility that defendants underpriced plaintiffs to compete for business rather than to implement an economically senseless conspiracy. *Id. 475 U.S. at 597-598*.

In reversing the circuit court the Supreme Court relied on a seemingly new evidentiary standard for summary judgments. The Court restated the language of *Fed. Rule Civ. Proc. 56(e)* *HN4*[] requiring the non-moving party to establish that there is a genuine issue of material fact, but the Court redefined "genuine." *Id. at 586-587*. **[**8]** It stated: "*HN5*[] when the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* This means that "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* This language indicates that a summary judgment motion is like a trial motion for a directed verdict and that "genuine" allows some quantitative determination of the sufficiency of the evidence. The trial court still cannot resolve factual disputes that could go to a jury at trial, but weak factual claims can be weeded out through summary judgment motions. The existence of a triable issue is no longer sufficient to survive a motion for summary judgment. *Id. at 587*. Instead, the triable issue must be evaluated in its factual context, which suggests that *HN6*[] the test for summary judgment is whether sufficient evidence exists in the **[**9]** pre-trial record to allow the non-moving party to survive a motion for directed verdict. See Childress, 116 F.R.D. at 186.

Further, the Supreme Court seems to require lower courts to engage in a qualitative review of the claim that goes beyond a minimum quantitative sufficiency of the evidence type of review. "It follows from these settled principles that *HN7*[] if the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense-respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita, 475 U.S. at 587*. "The absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with **[*477]** other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. **[**10]** " *Id. at 596-597*. *Matsushita*, not *Poller*, is now the applicable standard and the district court in this case applied it correctly.

III

In Count III of his amended complaint, Dr. Collins asserts that the series of consecutive contracts between APL and St. John's created and maintained an illegal tying arrangement in violation of Section 1 of the Sherman Act. Each of the three contracts required APL to provide complete and adequate pathology services to St. John's. St. John's then included the pathology services provided by APL in the package St. John's presented to its patients. This package included the full range of facilities and services necessary for the patients' treatment and maintenance in the hospital. As a result of this arrangement, patients who required pathology services purchased those provided for in the package -- the services of APL.

Dr. Collins contends that this arrangement constitutes illegal tying. However, a tying arrangement demands by definition two separate products -- a tying product and a tied product. In an attempt to satisfy this requisite, Dr. Collins argues that the tied product consists of the hospital facilities and services **[**11]** provided to patients at St. John's and that the tying product consists of the pathology services provided by the individual defendants.

Whether hospital services and pathology services are, as Dr. Collins asserts, two separate products "turns not on the functional relationship between them, but rather *on the character of the demand for the two items." Collins*, 676 F. Supp. at 1402 (emphasis in original) (quoting *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 19, 80 L. Ed. 2d 2, 104 S. Ct. 1551*). Therefore, in this case no tying arrangement can exist unless there is a distinct demand for the purchase of pathological services by hospital patients separate from the demand for the hospital facilities and services provided by St. John's; and further, this demand must be sufficient to identify a distinct product market in which it is efficient to offer pathological services separately from hospital services. See *Jefferson Parish, 466 U.S. at 22-23*.

An indicator of whether a separate demand exists for a product is whether consumers make specific requests. In *Jefferson Parish*, the plaintiff anesthesiologist supported **[**12]** his tying claim with "ample and uncontroverted testimony that patients or surgeons often request specific anesthesiologists to come to a hospital to provide anesthesia, and that the choice of an individual anesthesiologist separate from the choice of a hospital is particularly frequent in respondent's specialty, obstetric anesthesiology." *Jefferson Parish, 466 U.S. at 22*. In contrast, the evidence presented in this case is overwhelming that patients never request and physicians rarely request specific pathologists. The evidence presented here also established that pathology is a laboratory-based specialty, so that the pathologist, unlike the anesthesiologist, has no face-to-face contact with the patient and the treating physician. Clearly, the relationship between hospitals and pathologists differs from that of hospitals and anesthesiologists. See *id. at 23 n.36* (specifically recognizing that "anesthesiologists may differ from radiologists, pathologists and other types of hospital-based physicians").

Contrary to the finding of the Supreme Court in *Jefferson Parish* that "the record amply supports the conclusion that consumers differentiate between **[**13]** anesthesiological services and other hospital services provided by [the defendant hospital]," *id. at 23*, the district court in Dr. Collins' case found that pathology services are just one of the many services provided by the hospital for its patients. As such, no separate demand exists for pathological services that is sufficient to create a separate market. *676 F. Supp. at 1403*; see also, *Drs. Steuer and Latham v. National Medical Enterprises, Inc., 672 F. Supp. 1489, 1506-1508 (D. S.C. 1987)* (in **[*478]** which the record contained uncontroverted evidence consistent with and supportive of the reasoning of the district court herein that pathology services are not a product separate from hospital services). Because pathology services are not a separate and distinct product from hospital services, they combine in the form of one product, not two tied products. Without two products, the alleged tying arrangement is impossible.

IV

Dr. Collins also argues that the agreements entered into between St. John's and APL are exclusive contracts that constitute unreasonable restraints of trade in violation of Section 1 of the Sherman Act. **[**14]** Whether the agreements were indeed exclusive is a disputed factual issue, but the district court nevertheless granted summary judgment in favor of the defendants because it held that "the ***HN8***[] agreements are not an unreasonable restraint of trade even if they operate as exclusive contracts." *Collins*, 676 F. Supp. at 1394. We affirm the grant of summary judgment.

HN9[] Not all exclusive contracts violate the Sherman Act. Whether a particular contract does so depends on the effect that contract has upon competition in the relevant market place. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*. [4] The controlling factor in this determination is the relevant market area. *Id. at 329*. Thus we must determine the relevant market, which in this case first requires clarification of the relevant product.

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[4] Although *Tampa Electric* was brought under Section 3 of the Clayton Act, courts routinely rely on its analysis for cases arising under Sections 1 and 2 of the Sherman Act. Since the proscription of Section 3 of the Clayton Act is broader than that of Sections 1 and 2 of the Sherman Act, if a contract does not fall within the relevant market coverage of the Clayton Act it is not forbidden by the Sherman Act. In addition, while Section 3 of the Clayton Act does not apply to services, *Chelson v. Oregonian Pub. Co., 715 F.2d 1368, 1372 (9th Cir. 1983)*, reference is still appropriate for the analogous "relevant market" jurisprudence thereunder.

[15]** The relevant product here is pathologists, not pathology services, and the corresponding relevant market is the market in which pathologists compete for jobs, not the market in which hospitals compete in offering pathology services to patients. This conclusion is reached both by application of our earlier holding that no market exists for pathology services separate from hospital services and by an analysis of the exclusive dealing claim under the provisions of *Tampa Electric*.

First, as we held earlier, from the perspective of consumers of medical services, the patients in St. John's, there is no distinct demand for and thus no market for pathological services. See *supra at 477-478*. Therefore the contract between St. John's and APL for the provision of pathological services could not have had an impact on patients. The only segment possibly affected by the contract is that of providers of pathological services, namely, hospitals and clinical laboratories. Therefore the exclusive contract affects where pathologists can be employed and the relevant market is the market in which pathologists compete for jobs.

The same conclusion results from an analysis of the exclusive **[**16]** dealing claim alone and begins with *Tampa Electric*. The exclusive contract at issue there was a protracted requirements contract between a public utility, Tampa Electric Co., and a coal company. In its determination of whether the contract was an unreasonable restraint of trade that foreclosed competition, the Court did not consider any impact the contract might have on the consumers who purchased the resultant electricity. Instead, the Court focused on potential competitors of the party to the contract with Tampa Electric, other coal companies. The Court looked to the other coal companies that could have supplied Tampa Electric and concluded that the relevant market area was the area in which these coal companies competed. *Id. at 330-333*.

As the district court noted, in the present case, St. John's is in the position of Tampa Electric and APL is in the position of the **[*479]** supplying coal company. *676 F. Supp. at 1395*. In determining whether this exclusive arrangement forecloses competition, the focus is upon competition between pathologists for the right to practice at St. John's. So the contract must be viewed in light of its effect on pathologists **[**17]** competing for work, not from the effect on patients at St. John's whose options are limited.

Thus the market that must be determined is that in which pathologists compete for jobs. This market is not necessarily the same as the market in which hospitals compete in offering the services procured by the contract to patients, see *Jefferson Parish, 466 U.S. at 29*, and in this case it is not the same. The district court found that Dr. Collins failed to show that the market hospitals look to in hiring pathologists is anything but nationwide. *676 F. Supp. at 1405*. The only evidence in the record regarding the scope of the market is that a nationwide market exists for hospitals to hire pathologists. Dr. Collins' own experience demonstrates the coast-to-coast market. He practiced in Brooklyn, New York, before joining APL and practicing at St. John's in Springfield, Illinois. When he left Springfield, he found work in San Leandro, California. Most of the other pathologists employed by APL during the years in question were also from out of state, as are most of the pathologists employed by Dr. Collins' current employer, Humana Hospital. Dr. Collins' deposition **[**18]** testimony also admits the national scope of the market, reflected in the national listings of both pathologists and hospitals in the College of American Pathologists' placement service list and in the advertisements in the *New England Journal of Medicine*, a national publication.

The district court held that because the market is nationwide, even if the contract between APL and St. John's excluded Dr. Collins from the local Springfield market, a substantial number of other opportunities were available to him (and other pathologists) for practicing pathology and thus no genuine issue of material fact was in dispute regarding the effect of the agreement on competition. We agree.

V

In his memorandum in response to the Defendants' Motions for Summary Judgment, Dr. Collins argued that the exclusive agreement between St. John's and APL constitutes an illegal boycott in violation of Section 1 of the Sherman Act. Although an illegal boycott is not specifically alleged in Dr. Collins' amended complaint, the district court found that the broad language of Count I, alleging that the defendants engaged in a combination in restraint of trade, encompassed the idea of an illegal boycott **[**19]** and allowed the theory to be read into the complaint. The court, however, rejected Dr. Collins' assertion of a *per se* standard and under a rule of reason analysis granted summary judgment in favor of the defendants.

On appeal, Dr. Collins challenges the district court's analysis of several recent decisions by this Court applying the rule of reason in boycott cases. This challenge is meritless. The district court thoroughly and correctly applied the rule of this Circuit to the facts of Dr. Collins' case.

In *Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1155 (7th Cir. 1984)* (*en banc*), reversed on other grounds, *470 U.S. 373, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985)*, we stated, ***HN10***[] "in this circuit at least 'boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se - for example price fixing agreements'" (quoting an earlier panel opinion in that case, *706 F.2d 1488 at 1495 (7th Cir. Ill. 1983))*. See also *Wilk v. American Medical Ass'n, 719 F.2d 207, 221 (7th Cir. 1983)*; **[**20]** *United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 787-790 (7th Cir. 1981)* (*en banc*). Thus under the law of this Circuit, even if the individual members of APL combined in a horizontal group boycott to exclude Dr. Collins from practice at St. John's, the boycott would be illegal *per se* only if the agreement the individual members of APL combined to enforce was itself illegal *per se*.

[*480] If the individual members of APL did combine to persuade St. John's not to hire Dr. Collins as an independent pathologist, they did so to enforce their contract with St. John's under which it was agreed that APL would provide complete and adequate professional pathology services. This agreement did not violate Section 1 of the Sherman Act. See *supra at 479*. Because the agreement the alleged boycott was used to enforce was not illegal, much less illegal *per se*, the district court correctly applied the rule of reason as the applicable standard.

VI

Dr. Collins' final federal antitrust claim is against APL and the individual defendants for attempted monopolization and abuse of monopoly power. In his appellate brief Dr. Collins accuses **[**21]** the district court of ignoring both his evidence and his claim. Neither is true. What the district court did was rely on its earlier tying analysis in a manner that prevented anomalous holdings.

Dr. Collins argued that the relevant geographic market that APL monopolized or attempted to monopolize was the market for pathological services at St. John's hospital. Accepting the relevant market proposed by Dr. Collins, [5] the allegations of monopolization had to fail. In analyzing Dr. Collins' tying argument the court held as a matter of law that there is no distinct product market consisting of providing pathological services to individual patients of St. John's. It is impossible to monopolize a market that does not exist.

[22]** The district court also held that Dr. Collins could not state a claim against the APL defendants for monopolization or attempted monopolization of a broader market, the Springfield Metropolitan Statistical Area ("SMSA"), for pathological services without including St. John's hospital as a defendant. The allegations in Dr. Collins' brief before this Court admit as much: "through its exclusive access to the dominant hospital [St. John's] in the SMSA, APL has enjoyed an increasing share of the market for pathology services in the SMSA" (Br. 14). Dr. Collins cannot bring a claim of monopolization or attempted monopolization against the APL defendants without showing some type of effort at illegal monopolization on the part of St. John's hospital as well. Dr. Collins has made no such showing. The district court properly granted the defendants' motions for summary judgment regarding the monopolization claims.

VII

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[5] The district court noted, and we agree, that Dr. Collins is slicing the geographic market much too thin in limiting the relevant market for pathology services to St. John's hospital. *676 F. Supp. at 1405*. As we stated in *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1353 (7th Cir. 1982)*, "we have reason to doubt whether the relevant market can be sliced so small as to embrace only a single hospital."

In addition to his federal antitrust claims, Dr. Collins claims violations of three sections of the Illinois Antitrust Act that parallel his Sherman Act counts. Ill. Rev. Stat. ch. 38, §§ 60-3(2), 60-3(3) and 60-3(4). **[**23]** ***HN11***[] The language of Section 60-3(2) closely tracks the language of Section 1 of the Sherman Act and the language of Section 60-3(3) is very similar to the language of Section 2 of the Sherman Act. Based upon these similarities, summary judgment was appropriate as to the counts based on Sections 60-3(2) and 60-3(3) for the reasons stated with respect to the parallel Sherman Act counts.

Although the result under Dr. Collins' third Illinois Antitrust Act claim under Section 60-3(4) is the same, the analysis is somewhat complicated by the holding of an Illinois Supreme Court case that antedates *Jefferson Parish, People v. Schwulst Building Center, Inc., 89 Ill. 2d 365, 432 N.E.2d 855, 59 Ill. Dec. 911 (1982)*. In *Schwulst Building* the Supreme Court of Illinois recognized that Section 60-3(4) is patterned after Section 3 of the Clayton Act. *Id. at 374, 432 N.E.2d at 860*. It also noted that under Section 60-11 the Illinois section should be construed consistently with federal law. **[*481]** *Id.* [6] Thus the court in *Schwulst Building* felt bound to follow what it perceived the then existing federal law to be -- the application of a *per se* test **[**24]** to exclusive dealing and tying arrangements. *Id.* (citing *Standard Oil Co. v. United States, 337 U.S. 293, 304-305, 93 L. Ed. 1371, 69 S. Ct. 1051* *("Standard Stations");* *International Salt Co. v. United States, 332 U.S. 392, 396, 92 L. Ed. 20, 68 S. Ct. 12*).

Since the decision in *Schwulst Building*, the federal law that the Illinois courts are bound to follow in applying the Illinois Antitrust Act has changed. Recently we examined *Standard Stations*, the case on which *Schwulst Building* relied, and determined that "it now appears most unlikely that such agreements, whether challenged under section 3 of the Clayton Act or section 1 of the Sherman Act, will **[**25]** be judged by the simple and strict test of *Standard Stations*. They will be judged under the Rule of Reason, and thus condemned only if found to restrain trade unreasonably." *Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 (7th Cir. 1984)* (citing *Jefferson Parish, 466 U.S. at 45-46* (concurring opinion)).

In light of the recent developments in federal ***antitrust law***, the district court did not believe it was bound to apply the literal holding of *Schwulst Building* that Section 60-3(4) involves a *per se* analysis. *676 F. Supp. at 1407*. We agree. Therefore, for the reasons stated regarding the parallel federal claim, the district court appropriately granted summary judgment.

VIII

Dr. Collins also asserts that St. John's wrongfully removed or reduced his staff privileges in violation of the by-laws of the hospital. However, the record reflects that St. John's has neither removed nor reduced Dr. Collins' staff privileges. In May 1982, Dr. Collins was, on his own request, placed on leave of absence, but he retains full staff privileges to this day. Staff privileges reflect the hospital's decision that a physician **[**26]** is qualified to practice in the facility, but do not in and of themselves confer employment. Employment as a pathologist at St. John's was determined by the legal contract between St. John's and APL. See *supra at 477*. Although without concurrent employment by St. John's as a pathologist these staff privileges may be of little or no value to Dr. Collins, the fact remains that the privileges were neither removed nor reduced. We affirm the grant of summary judgment.

IX

Finally, Dr. Collins asserts that APL and the individual defendants tortiously interfered with his relationship with St. John's by inducing St. John's to remove or reduce his staff privileges and to exclude him from practicing at St. John's. As to the staff privileges assertion, we have already held that St. John's did not remove or reduce Dr. Collins' staff privileges. See *supra at 481*. APL and the individual defendants therefore cannot be liable for inducing a result that never occurred. As to any actions by APL or the individual defendants to exclude Dr. Collins from practicing at St. John's, we have already held that any such action was pursuant to a legal arrangement. See *supra*

[6] Section 60-11 of the Illinois Antitrust Act requires that "when the wording of this Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." 38 Ill. Rev. Stat. § 60-11.

at 480. Such legal actions **[**27]** cannot form the basis for a tortious interference claim. Summary judgment was again appropriately granted.

We affirm the district court's judgment in all respects.

[Kelco Disposal, Inc. v. Browning-Ferris Industries of Vermont, Inc.](#)

United States Court of Appeals for the Second Circuit

February 23, 1988, Argued ; April 21, 1988, Decided

Nos. 87-7754, 87-7758

Reporter

845 F.2d 404 *; 1988 U.S. App. LEXIS 5484 **; 1988-1 Trade Cas. (CCH) P67,974

Kelco Disposal, Inc. and Joseph Kelley, Plaintiffs-Appellees, Cross-Appellants, v. Browning-Ferris Industries of Vermont, Inc. and Browning-Ferris Industries, Inc., Defendants-Appellants, Cross-Appellees

Prior History: [1]** Cross-appeals from a judgment of the District Court for the District of Vermont (Billings, J.) that held defendants liable under the federal antitrust laws and Vermont tort law, and ordered plaintiff to elect between federal and state remedies.

Disposition: Affirmed.

Core Terms

defendants', attorney's fees, variable, costs, pricing, monopolize, punitive damages, roll-off, predatory, award of punitive damages, treble damages, antitrust, waste disposal, depreciation, roughly, haul, compensatory, probability, elect, reasonable anticipation, specific intent, fixed cost, characterization, competitors, damages, annual, forgo

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Judgment as Matter of Law, Judgment Notwithstanding Verdict**

Judgment notwithstanding the verdict is warranted where the verdict is so unsupported by the evidence that it could only have been the result of sheer surmise and conjecture, or where the movant's position is supported by such overwhelming evidence that a reasonable and fair minded person could not have arrived at a verdict against it.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN2[] **Monopolies & Monopolization, Attempts to Monopolize**

A claim of attempt to monopolize has three elements: (1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a dangerous probability that the attempt will succeed.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN3[] Actual Monopolization, Anticompetitive & Predatory Practices

Prices that are below reasonably anticipated marginal cost and its surrogate reasonably anticipated average variable cost are presumed predatory. By definition variable costs are dependent on the firm's output, while fixed costs are not.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Tax Law > ... > Amortization, Depletion & Depreciation > Amortization, Cost Recovery & Depreciation > General Overview

Tax Law > Federal Income Tax Computation > Amortization, Depletion & Depreciation > General Overview

HN4[] Actual Monopolization, Anticompetitive & Predatory Practices

The characterization of legitimately disputed costs is a question of fact for the jury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN5[] Monopolies & Monopolization, Attempts to Monopolize

Numerous market characteristics other than barriers to entry must be considered in determining whether a dangerous probability of monopolization exists.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN6[] Damages, Punitive Damages

Punitive damages are designed both to punish the wrongdoer and to deter similar conduct. Vermont law invests a jury with enormous discretion to award punitive damages when it decides that a party has acted maliciously. Vermont, like most jurisdictions, views punitive damage awards as incapable of precise determination. Vermont courts have refused to require that there be some kind of mystical ratio between punitive and compensatory damages.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] Costs & Attorney Fees, Clayton Act

15 U.S.C.S. § 15 is a statutory exception to the common law rule against awarding attorneys' fees.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN8[] Remedies, Costs & Attorney Fees

The common law hostility to attorneys' fees rests upon several considerations that include the potential chilling effect that fee shifting would have on indigents with compelling claims, the time, expense, and difficulty or litigating the fee question, and the possibility that the principle of independent advocacy might be threatened by having the earnings of the attorney flow from the pen of the judge before whom he argues.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Civil Procedure > Remedies > Damages > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN9[] Monopolies & Monopolization, Actual Monopolization

In order for a public defender of broad social objectives to recover treble damages and thereby deprive violators of the fruit of their illegality, a plaintiff must prove behavior that injures competition, as distinct from a competitor.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

HN10[] Remedies, Costs & Attorney Fees

A plaintiff that undertakes the role of private attorney general and recovers treble damages, is awarded attorneys' fees for safeguarding paramount and pervasive values that are protected by federal law.

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Remedies > Damages > General Overview

HN11[] Damages, Punitive Damages

Where the prevailing party elects a remedy provided by state law, and thereby forgoes its treble damage award, it should forgo the entire remedy provided by federal law, including attorneys' fees.

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J. Paul McGrath, New York, New York (Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York, Donald F. Turner, Washington, District of Columbia, Douglas Richards and Robert Gerety, Plante, Richards, Hanley & Gerety, Springfield, Vermont, of Counsel), for Defendants-Appellants, Cross-Appellees.

Judges: Feinberg, Chief Judge, Pratt, Circuit Judge, and Joseph M. McLaughlin, District Judge for the Eastern District of New York, sitting by designation.

Opinion by: McLAUGHLIN

Opinion

[*405] MCLAUGHLIN, District Judge:

Plaintiff sued under both the federal antitrust laws and Vermont tort law. A jury found against defendants on both counts and imposed $ 6 million in punitive **[**2]** damages on the state claim. The trial court denied defendants' motions for judgment notwithstanding **[*406]** the verdict or a new trial or remittitur; the court also ordered plaintiff to elect between its antitrust remedy (treble damages, attorneys' fees, and costs) and its state remedy (compensatory and punitive damages). The parties have cross-appealed. For the reasons discussed below, we affirm.

FACTS

This case involves competition in the "roll-off" waste collection business in Burlington, Vermont. Roll-off waste collection is usually performed at large industrial locations and construction sites with the use of a large truck, a compactor, and a container that is much larger than the typical "dumpster."

Browning-Ferris Industries, Inc. ("BFI") and Browning-Ferris Industries of Vermont, Inc. (collectively "defendants") operate a commercial and industrial waste collection business from BFI's headquarters in Houston, Texas. In fiscal year 1986, BFI had revenues in excess of $ 1.3 billion, net income of approximately $ 137 million, and net assets of approximately $ 980 million.

In 1973 defendants made two fateful decisions: they decided to enter the waste disposal business **[**3]** in Burlington and they appointed plaintiff Joseph Kelley to be district manager for the region. In 1976 defendants began to provide roll-off service in Burlington, and by 1980 they controlled 100% of the Burlington roll-off market.

Kelley left defendants in 1980, and formed his own waste disposal company, plaintiff Kelco Disposal, Inc. ("Kelco"). Soon thereafter, Kelco began to compete head-to-head with defendants in the Burlington roll-off market. In one year Kelco captured 37.6% of the market. In 1982 the figure rose to 42.7%. During 1982, defendants' new Burlington manager, Richard Mowbray, received orders from Michael Gustin, his boss in Boston, to "Put [Kelley] out of business. Do whatever it takes. Squish him like a bug." Defendants' Burlington salesman was also ordered to put Kelley out of business and was told that if "it meant give [services] away, give [them] away."

In the fall of 1982, accordingly, defendants cut their roll-off haul prices from $ 117 to $ 65, a reduction of about 40%. This price-cutting policy lasted for approximately six months, although some contracts made during this period extended these low prices into 1984. Defendants' market share, which **[**4]** had declined precipitously from 1980 to 1982, remained relatively stable during the 1982-84 period. Kelco's and defendants' combined revenues from the Burlington market were roughly $ 440,000. By 1985 Kelco had captured almost 56% of the market. In that year defendants left the market, and sold out to a third party. Since then, Kelco and this other company have been the only two competitors in the Burlington roll-off market. From 1981 to 1985, defendants and Kelco were the only competitors in the market.

In 1984, Kelley and Kelco brought this action. The complaint alleged that defendants had attempted to monopolize the Burlington roll-off market, in violation of *section 2* of the Sherman Act, as amended, *15 U.S.C. § 2 (1982)*, and that defendants' conduct constituted intererence with contractual relations under Vermont tort law.

Kelley's claims were severed from Kelco's, and Kelco's antitrust and tort claims were tried to a jury. Kelco's antitrust theory was that defendants had engaged in predatory pricing. At trial, Kelco's expert witness testified that from 1982 to 1984 defendants' average variable cost for roll-off service was roughly $ 104 per haul. The **[**5]** expert included as variable costs disposal fees; drivers' salaries; depreciation of equipment, including trucks, containers, and compactors; selling and administrative costs; and national overhead. In addition, numerous statements by defendants' officials that defendants had intended to put plaintiff out of business were introduced.

After a six-day trial on the liability issue, the jury found against defendants on both counts. A one-day trial on damages followed, and the jury returned a verdict for $ 51,146 on the antitrust claim, and $ 51,146 **[*407]** in compensatory damages and $ 6 million in punitive damages on the state claim.

Defendants then moved for judgment n.o.v. or, in the alternative, for a new trial or remittitur. By order dated August 11, 1987 the motions were denied. An amended order of judgment dated October 19, 1987 awarded Kelco $ 153,438 in treble damages and $ 212,500 in attorneys' fees and costs on the antitrust claim under section 4 of the Clayton Act, *15 U.S.C. § 15 (1982)* or, in the alternative, $ 6,066,082.74 in compensatory and punitive damages on the state claim. Kelco was ordered to elect between the alternative federal and state **[**6]** remedies.

On appeal defendants have mounted a three-pronged attack on the judgment: (1) the jury's liability verdict was not supported by sufficient evidence; (2) the trial court's jury charge was erroneous as a matter of law; and (3) the punitive damages award must be either reversed or remitted.

Kelco's cross-appeal argues that it is entitled under federal law to attorneys' fees and costs, even if it elects state-law compensatory and punitive damages over the more modest federal treble damage award.

DISCUSSION

I. Liability and Punitive Damages

A. *Attempted Monopolization*

1. Sufficiency of the Evidence

HN1[] Judgment n.o.v. is warranted where the verdict is so unsupported by the evidence that it "could only have been the result of sheer surmise and conjecture," or where the movant's position is supported by such overwhelming evidence that a "reasonable and fair minded [person] could not [have] arrived at a verdict against [it]." *Mattivi v. South African Marine Corp., "Huguenot*", *618 F.2d 163, 168 (2d Cir. 1980)*.

[7]** ***HN2***[] A claim of attempt to monopolize has three elements: "(1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a 'dangerous probability' that the attempt will succeed." *International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 790* (2d Cir.) ("IDC") (quoting *Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 85 (2d Cir. 1981)*, *cert. denied*, *455 U.S. 943, 102 S. Ct. 1438, 71 L. Ed. 2d 654 (1982))*, *cert. denied*, *482 U.S. 915, 107 S. Ct. 3188, 96 L. Ed. 2d 676 (1987)*. Defendants argue that Kelco failed to prove any of these elements at trial.

Kelco claims that defendants' anticompetitive or exclusionary conduct consisted of predatory pricing, and introduced evidence that defendants' price of $ 65 per roll-off haul was below its average variable cost of roughly $ 104 per haul. Defendants argue that Kelco's $ 104 figure was inflated because Kelco's expert witness mistakenly characterized certain fixed costs as variable in making his computations. Asserting that depreciation of equipment, selling and administrative costs, **[**8]** and national overhead should have been considered fixed costs, defendants contend that their true average variable cost was less than $ 50 per haul, well below their $ 65 haul charge.

A firm engaged in predatory pricing bites the bullet and forgoes present revenues to drive a competitor from the market. Its intent, of course, is to recoup lost revenues through higher profits when it succeeds in making the environment less competitive. [Northeastern Telephone, 651 F.2d at 86](#) (quoting 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 711b, at 151 (1978)); *see Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 493, 93 L. Ed. 2d 427 (1986)*. ***HN3***[] Prices that are below reasonably anticipated marginal cost, and its surrogate, reasonably anticipated average variable cost, *see* *Northeastern Telephone, 651 F.2d at 88*, are presumed predatory. *Id.* By definition variable costs are dependent on the firm's output, while fixed costs are not. *See* *id. at 86*. The characterization of certain costs as either variable or fixed **[**9]** frequently becomes a battleground where the plaintiff proceeds on a predatory pricing theory. The reason is obvious: the higher a party's average variable cost, the more likely it is that the party has priced below that cost.

[*408] Defendants argue that equipment depreciation should have been considered a fixed cost because defendants' accountants have always treated it so. Passing, for the moment, the bootstrap feature of this argument, the general legal rule is that depreciation caused by use is a variable cost, while depreciation through obsolescence is a fixed cost. *See id.* ***HN4***[] The characterization of legitimately disputed costs is a question of fact for the jury. *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884, 891 n.6 (5th Cir. 1984)*, *cert. denied*, *469 U.S. 1160, 83 L. Ed. 2d 924, 105 S. Ct. 910 (1985)*; *see William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1036-38 (9th Cir. 1981)*, *cert. denied*, *459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982)*. **[**10]** The jury may consider, but obviously cannot be bound by, a party's characterization of its own costs.

In this case, we conclude that the jury could have reasonably characterized equipment depreciation as a variable cost. The waste disposal industry makes intensive use of heavy equipment. There was no evidence presented that defendants' trucks, compactors, or containers became obsolete; rather, the picture painted was one of constant wear, tear, and damage due to use.

Defendants do not challenge the characterization of disposal fees and drivers' salaries as variable costs. Adding equipment depreciation costs to these other costs yields an average variable cost of roughly $ 81 per haul, well above defendants' $ 65 fee. Based on these figures alone, we conclude that the jury could have found that defendants engaged in predatory pricing. There is, therefore, no need to address defendants' challenge to the characterization of other costs.

Turning to the second element of an attempted monopolization claim, we reject defendants' attack upon the finding that they had specific intent to monopolize the market. Sufficient evidence of such intent was presented to the jury. Defendants' own **[**11]** officials frequently reaffirmed their goal of driving Kelley and Kelco out of the Burlington market. Defendants argue, as they did to the jury, that these statements merely reflected defendants' desire to remain competitive with Kelco, and cannot support a finding of specific intent to monopolize. The jury, however, also heard evidence that defendants had engaged in predatory pricing, and could have inferred intent from this fact. *See* *Northeastern Telephone, 651 F.2d at 85*. The "tough talk" by defendants' employees, coupled with the proof of predatory pricing, more than supports the jury's finding of a specific intent to monopolize.

Defendants' final challenge to the verdict is that, because the so-called "barriers to entry" in the Burlington roll-off business were low, a rational jury could not have concluded that there was a dangerous probability that BFI would monopolize the market. We reject this argument for three reasons.

First, the jury could have found that barriers to entry were, indeed, not at all low. Only two companies entered the relevant market during the eleven-year period from 1976-87. In addition, there was evidence that the cost of entering the **[**12]** market exceeded $ 300,000. Given the size of the market in 1982-84, roughly $ 440,000 in annual revenues, a firm that controlled 50% of the market and had a 10% return on revenue -- which the parties do not dispute is a fair rate of return -- would realize only a $ 22,000 annual profit. Such numbers would make a potential entrant think twice before making a $ 300,000 investment. *Compare* *United States v. Waste Management, Inc., 743 F.2d 976, 983 (2d Cir. 1984)* (finding of low entry barriers in large metropolitan waste disposal market with many competitors was not clearly erroneous).

Second, ***HN5***[] numerous market characteristics other than barriers to entry must be considered in determining whether a dangerous probability of monopolization exists. *See IDC*, 812 F.2d at 792 (some other factors are "the strength of the competition, the probable development of the industry, . . . the nature of [defendants'] anticompetitive conduct and the elasticity of consumer demand"). A survey of these **[*409]** other characteristics amply supports a finding of dangerous probability **[**13]** in this case. The Burlington waste disposal market was not unduly competitive. It supported only one participant in 1980, and two from 1981 to 1987. Consumer demand was rather inelastic because there were few, if any, alternatives to large-container waste disposal service. On top of this, there was compelling evidence that defendants intended to monopolize the market and were already executing a plan to further this goal.

Third, defendants possessed a significant market share. During the period in which defendants engaged in predatory pricing, their market share was above 55%. As late as 1980, their share had been 100%. Considering defendants' market share along with other market characteristics, the jury could reasonably have concluded that defendants had a dangerous probability of acquiring monopoly power.

In summary, we find that Kelco presented sufficient evidence for the jury to find that defendants attempted to monopolize the Burlington roll-off waste disposal market. Defendants concede that if Kelco prevails on the antitrust claim, then the defendants are also liable on the state tort claim. Accordingly, we conclude that the jury verdict on both claims is supported by sufficient **[**14]** evidence.

2. The Jury Charge

Defendants contend that the trial judge erroneously instructed the jury that Kelco could prove predatory pricing by showing that defendants had priced below their average variable cost; defendants now opt for a stricter standard: their *reasonably anticipated* average variable cost. Interesting as the distinction is, we need not address this argument because defendants have failed to preserve it for appeal under *Fed. R. Civ. P. 51*.

Defendants' proposed jury charge did not refer to reasonably anticipated variable costs. Although counsel for defendants did refer to reasonable anticipation at a charging conference, he did so in the context of the specific intent element of attempted monopolization, not the predatory pricing element. We thus conclude that defendants failed to state distinctly their objection to the challenged portion of the judge's charge. *See Fed. R. Civ. P. 51*. Absent plain error, defendants are precluded from raising the issue on appeal. *See Brenner v. World Boxing Council, 675 F.2d 445, 456* (2d Cir.), *cert. denied* **[**15]** , *459 U.S. 835, 74 L. Ed. 2d 76, 103 S. Ct. 79 (1982)*; *Cohen v. Franchard Corp., 478 F.2d 115, 122-25* (2d Cir.), *cert. denied*, *414 U.S. 857, 38 L. Ed. 2d 106, 94 S. Ct. 161 (1973)*.

Assuming arguendo that the charge was incorrect, we do not conclude that the error constituted plain error. Given the complexity of this case and the quantum of evidence supporting Kelco's claim of anticompetitive conduct by defendants, we find that the trial court's error was not sufficiently serious to affect the "'very integrity of the trial.'" *Brenner, 675 F.2d at 456* (quoting *Modave v. Long Island Jewish Medical Center, 501 F.2d 1065, 1072 (2d Cir. 1974))*. Accordingly, we decline to review defendants' assignment of error.

B. *Punitive Damages*

Defendants' final argument is that the $ 6 million punitive damage award should be reversed or remitted. ***HN6***[] Punitive damages are designed both to punish the wrongdoer and to deter similar conduct. *See Aldrich v. Thomson McKinnon Securities, Inc., 756 F.2d 243, 249 (2d Cir. 1985)*. **[**16]** Vermont law, which applies here, *see Whitney v. Citibank, N.A., 782 F.2d 1106, 1118 (2d Cir. 1986)*, invests a jury with enormous discretion to award punitive damages when it decides that a party has acted maliciously. *See Pezzano v. Bonneau, 133 Vt. 88, 90, 329 A.2d 659, 660 (1974)*. Vermont, like most jurisdictions, views punitive damage awards as "'incapable of precise determination.'" *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 77, 461 A.2d 414, 419 (1983)* (quoting *Lanfranconi v. Tidewater Oil Co., 376 F.2d 91, 96* (2d Cir.), *cert. denied*, *389 U.S. 951, 19 L. Ed. 2d 361, 88 S. Ct. 334 (1967))*, *aff'd on other grounds*, *472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985)*. Vermont courts have **[*410]** refused to require that there be some kind of mystical ratio between punitive and compensatory damages. *See* Pezzano, 133 Vt. at 92, 329 A.2d at 661; *see also* Aldrich, 756 F.2d at 249 ("punitive damages need bear no exact relationship to compensatory damages"). Finally, Vermont courts will interfere with a punitive damages **[**17]** award only if it is """manifestly and grossly excessive.""" Greenmoss, 143 Vt. at 77, 461 A.2d at 420 (quoting Pezzano, 133 Vt. at 91, 329 A.2d at 661 (quoting Gray v. Janicki, 118 Vt. 49, 52, 99 A.2d 707, 709 (1953))).

Bearing this in mind, we conclude that the punitive damage award in this case should not be disturbed. Faced with evidence that defendants wilfully and deliberately attempted to drive Kelco out of the market, the jury imposed punitive damages amounting to less than.5% of BFI's revenues, approximately.6% of its net worth, and less than 5% of its net income, for fiscal year 1986. This amount is not inconsistent with punitive damages levied in other jurisdictions against large corporations. *E.g.,* *T.D.S., Inc. v. Shelby Mutual Insurance Co., 760 F.2d 1520, 1531* & n.10 ($ 2.1 million award was approximately 1% of defendant's assets), *modified in part*, *769 F.2d 1485 (11th Cir. 1985)*; *Aldrich, 756 F.2d at 249* (remitting award to $ 1.5 million, which was roughly.9% of defendant's net worth); Hawkins v. Allstate Insurance Co., 152 Ariz. 490, 501, 733 P.2d 1073, 1085 **[**18]** ($ 3.5 million award amounted to roughly.25% of defendant's assets and 1% of defendant's annual income), *cert. denied*, *484 U.S. 874, 108 S. Ct. 212, 98 L. Ed. 2d 177 (1987)*; Downey Savings and Loan Association v. Ohio Casualty Insurance Co., 189 Cal. App. 3d 1072, 1101, 234 Cal. Rptr. 835, 851 ($ 5 million award exceeded 7% of defendant's annual income, and was 1% of defendant's net worth), *review denied*, No. S 000553 (Cal. May 27, 1987), cert. denied, *486 U.S. 1036, 108 S. Ct. 2023, 100 L. Ed. 2d 610 (1988)*; Moore v. American United Life Insurance Co., 150 Cal. App. 3d 610, 641-42, 197 Cal. Rptr. 878, 899 (1984) ($ 2.5 million award exceeded 6% of defendant's annual income).

After reviewing the record, we conclude that the punitive damage award fell within the allowable limits of Vermont law, and was not motivated by unfair prejudice. *See* Pezzano, 133 Vt. at 91, 329 A.2d at 661. In addition, we reject the defendants' notion that the award violates the *eighth amendment's* proscription against excessive fines. Even if the *eighth amendment* does apply to this nominally civil case, *see* *Ingraham v. Wright, 430 U.S. 651, 664-72, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977)*; **[**19]** *Zwick v. Freeman, 373 F.2d 110, 119* (2d Cir.), *cert. denied*, *389 U.S. 835, 19 L. Ed. 2d 96, 88 S. Ct. 43 (1967)*; *see also* Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62, 56 U.S.L.W. 3423-24 (1987), we do not think the damages here were so disproportionate as to be cruel, unusual, or constitutionally excessive. Accordingly, we decline to interfere with the punitive damage award.

II. Attorneys' Fees

Kelco's cross-appeal demands attorneys' fees under 15 U.S.C. § 15 when it rejects a modest federal remedy in favor of a generous state law remedy. Kelco maintains that because the fee award is not duplicative or inconsistent with the state remedy, it should not be precluded from receiving federal statutory attorneys' fees in addition to its state tort remedy. Defendants respond that Kelco's state claim provides it with a complete remedy, and that an additional award of attorneys' fees would provide Kelco with a windfall.

Section 15 ***HN7***[] is a statutory exception to the common **[**20]** law rule against awarding attorneys' fees. *See* *Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260-61, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975)*. As explained in great depth by the *Alyeska Pipeline Court*, the general rule, more commonly known as the "American Rule," dictates that, absent statutory authority, a prevailing party is not entitled to compensation for its attorneys' fees. *See* id. at 247-62. This rule has strong roots in American jurisprudence, *see* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 1 L. Ed. 613 (1796), and rests **[*411]** upon the common law judgment that "one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718, 18 L. Ed. 2d 475, 87 S. Ct. 1404 (1967)*.

HN8[] The common law hostility to attorneys' fees rests upon several considerations that include the potential chilling effect that fee shifting would have on indigents with compelling claims, "the time, expense, and difficulty or litigating the fee **[**21]** question, and the possibility that the principle of independent advocacy might be threatened by having 'the earnings of the attorney flow from the pen of the judge before whom he argues.'" *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters, 456 U.S. 717, 725, 72 L. Ed. 2d 511, 102 S. Ct.*

2112 (1982) (quoting F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129, 40 L. Ed. 2d 703, 94 S. Ct. 2157 (1974)).

Kelco wears two hats in this action. It wears one as a private victim seeking personal redress for an egregious infraction of Vermont tort law. It wears the other as a public defender of broad social objectives that casts it in the role of a surrogate enforcer of the federal antitrust laws. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131, 133, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969); Waldron v. Cities Service Co., 361 F.2d 671, 673 (2d Cir. 1966), *aff'd*, 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968). ***HN9***[] In the latter capacity, **[**22]** to recover treble damages and thereby deprive violators of the fruit of their illegality, *see* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977), a plaintiff must prove behavior that injures competition, as distinct from a competitor. *Cargill, 107 S. Ct. at 489*; Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). ***HN10***[] A plaintiff that undertakes the role of private attorney general and recovers treble damages, is awarded attorneys' fees for safeguarding paramount and pervasive values that are protected by federal law.

The question presented is whether a plaintiff that chooses to forgo treble damages available under § 15 and elects instead a far larger reward under state law may still collect attorneys' fees. Not surprisingly, the sparse language of § 15 and its extensive legislative history fail to address this issue.

We are unwilling to depart from the general rule and "fashion [a] drastic new rule[] with respect to the allowance of attorneys' **[**23]** fees to the prevailing party in federal litigation." Alyeska Pipeline, 421 U.S. at 269. Two reasons buttress this conclusion. First, the policy embodied in § 15 will in no way be hindered by our holding because the sum available in the state remedy package exceeds the sum of treble damages, attorneys' fees, and costs. Second, a plaintiff that chooses not to pursue its federal remedy has stepped outside its role as private attorney general, and thus should not come within the ambit of § 15.

HN11[] Where, as here, the prevailing party elects a remedy provided by state law, and thereby forgoes its treble damage award, it should forgo the entire remedy provided by federal law, including attorneys' fees. Attorneys' fees are an integral member of the federal remedy. This is one of those cases where the tail must go with the hide. Having turned its back on the federal remedy, Kelco must perforce lose the federal reward. In any event, its $ 6 million dollar punitive damage award should provide an adequate fund from which Kelco may pay its attorneys' fee without discomfiture. We therefore **[**24]** conclude that the district court properly ordered Kelco to elect between the alternative remedies.

CONCLUSION

For the forgoing reasons the judgment of the district court is affirmed.

McGlinchy v. Shell Chemical Co.

United States Court of Appeals for the Ninth Circuit

December 16, 1987, Argued and Submitted ; April 22, 1988, Filed

No. 86-2619

Reporter

845 F.2d 802 *; 1988 U.S. App. LEXIS 5400 **; 1988-1 Trade Cas. (CCH) P67,973; 25 Fed. R. Evid. Serv. (Callaghan) 813

William J. McGlinchy; Dan-De Products Corporation, a California corporation, Plaintiffs-Appellants, v. Shell Chemical Co.; Shell International Chemical Company, Ltd.; Pecten Chemicals, Inc.; Shell Oil Company; Royal Dutch Shell; Shell International Trading Co.; United States Brass Corp.; Qest Plumbing Products; Plastic Pipe Fittings Association, Defendants-Appellees

Subsequent History: **[**1]** Petition for Rehearing and Suggestion for Rehearing En Banc Denied July 11, 1988. As amended July 11, 1988.

Prior History: Appeal from the United States District Court for the Northern District of California, D.C. No. CV-84-474-SC, Samuel Conti, District Judge, Presiding.

Disposition: Affirmed.

Core Terms

district court, appellants', damages, commerce, antitrust claim, pleadings, antitrust, defendants', summary judgment, personal jurisdiction, leave to amend, anticompetitive, allegations, resin, sales, pipe fitting, purposefully, expert witness, domestic, studies, import, first amended complaint, amount of damages, minimum contact, Sherman Act, discovery, promotion, availing, amend, lack of personal jurisdiction

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN1[] **Standards of Review, Abuse of Discretion**

An appellate court reviews a district court's evidentiary decisions for an abuse of discretion.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] **Supporting Materials, Discovery Materials**

A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. An appellate court reviews a grant of summary judgment de novo, viewing the evidence in a light most favorable to the non-moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] **Summary Judgment, Entitlement as Matter of Law**

The plaintiffs must provide evidence such that the jury is not left to speculation or guesswork in determining the amount of damages to award. Summary judgment is appropriate where appellants have no expert witnesses or designated documents providing competent evidence from which a jury could fairly estimate damages.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] **Summary Judgment, Burdens of Proof**

Once a party makes a showing that the evidence raises no genuine issue of material fact, the burden is on the party opposing the motion for summary judgment to come forward with specific facts showing there was a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN5[] **Summary Judgment, Entitlement as Matter of Law**

Fed. R. Civ. P. 56(e) does not allow a party to oppose summary judgment on the pleadings themselves.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN6[] Standards of Review, Abuse of Discretion

Fed. R. Civ. P. 15(a) states that leave to amend shall be freely given when justice so requires. Bearing that standard in mind, an appellate court reviews a district court's denial of a motion for leave to amend for an abuse of discretion.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN7[] Pleadings, Amendment of Pleadings

Undue delay is one valid reason for a district court to deny a party leave to amend. Prejudice is another valid reason for a district court to deny a party leave to amend. Repeated failure to cure deficiencies by amendments previously allowed is another valid reason for a district court to deny a party leave to amend.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN8[] Standards of Review, De Novo Review

An appellate court reviews de novo a dismissal by judgment on the pleadings under Fed. R. Civ. P. 12(c). All allegations of fact by the party opposing the motion are accepted as true. A dismissal on the pleadings for failure to state a claim is proper only if the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN9[] Pretrial Judgments, Judgment on Pleadings

Where Fed. R. Civ. P. 12(c) is used to raise the defense of failure to state a claim, the motion for judgment on the pleadings faces the same test as a motion under Fed. R. Civ. P. 12(b)(6). The court may affirm the district court's dismissal only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. Not only must the court accept all material allegations in the complaint as true, but the complaint must be construed, and all doubts resolved, in the light most favorable to the plaintiff. Nonetheless, conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Monopolies & Monopolization, Attempts to Monopolize**

See the Sherman Act, *15 U.S.C.S. §§ 1*, *2*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Sherman Act, Claims**

To establish a *§ 1* violation under the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Practices Governed by Per Se Rule, Boycotts**

The Sherman Act's, *15 U.S.C.S. § 1 et seq.*, prohibition against concerted activity in restraint of trade is analyzed under either the "per se" rule or the "rule of reason." The per se analysis is applied to practices that are presumptively illegal, such as (1) horizontal and vertical price-fixing; (2) horizontal market division; (3) group boycotts and concerted refusals to deal; and (4) tie-in sales. The rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.

Antitrust & Trade Law > 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

HN13[] Sherman Act, Claims

To establish a Sherman Act, *15 U.S.C.S. § 2*, violation for an attempt to monopolize, a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury.

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Antitrust & Trade Law, Sherman Act

An alleged Sherman Act violation, *15 U.S.C.S. §§ 1*, *2*, must cause injury to competition beyond the impact on the claimant under *§ 1*, and must destroy competition and cause antitrust injury under *§ 2*. To state an antitrust claim, therefore, a party must allege antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The antitrust laws were enacted for the protection of competition, not competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Torts > Business Torts > General Overview

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN15[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Economic injury to a competitor does not equal injury to competition. The elimination of a single competitor, without more, does not prove anticompetitive effect. Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case. It is the impact upon competitive conditions in a definable market which distinguishes the antitrust violation from the ordinary business tort. An appellants' failure to allege injury to competition is a proper ground for dismissal by judgment on the pleadings.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN16[] Standards of Review, De Novo Review

The existence of subject matter jurisdiction presents a question of law reviewable de novo.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Trade Law > General Overview

HN17[] International Aspects, International Application of US Law

See *15 U.S.C.S. § 6a*.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN18[] International Aspects, International Application of US Law

15 U.S.C.S. § 6a establishes three requirements that an antitrust plaintiff, other than a domestic importer, must prove to establish subject matter jurisdiction: (1) the defendant's conduct must have a direct, substantial, and reasonably foreseeable effect on (2) plaintiff's continuing ability to export (3) from the United States.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN19[] Standards of Review, De Novo Review

An appellate court reviews the dismissal of a complaint de novo.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN20[] In Rem & Personal Jurisdiction, In Personam Actions

The "pervasive activities" test requires an allegation that the nonresident's activities within the forum state are substantial or continuous and systematic.

Admiralty & Maritime Law > Practice & Procedure > Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN21[] Practice & Procedure, Jurisdiction

An appellate court applies three criteria to determine whether sufficient minimum contacts exist to establish personal jurisdiction: (1) the nonresident defendant must perform some act by which he purposefully avails himself of the benefits and protections of the forum's laws; (2) the plaintiff's claim must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN22[] In Rem & Personal Jurisdiction, In Personam Actions

Unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN23[] In Personam Actions, Minimum Contacts

An individual's contract with an out-of-state party alone cannot automatically establish sufficient minimum contacts to support personal jurisdiction.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN24[] Standards of Review, Abuse of Discretion

An appellate court reviews the denial of leave to amend a complaint for abuse of discretion.

Counsel: Lawrence L. Curtice, Himelstein, Savinar, Petrocelli and Curtice, Patrick H. Fabian and Richard G. Krenz, Fabian, Graham and Englese, for the Plaintiffs-Appellants.

Raymond V. McCord, Shell Oil Company, James J. Garrett, Richard G. Seeborg, Thomas Reilly, Morrison & Foerster, for Shell Oil Company, Shell Chemical Co. and Pecten Chemicals, Inc.

Jan T. Chilton, Severson, Werson, Berke & Melchior, for United States Brass Corporation.

Max R. Shulman, Robert N. Feltoon, Cravath, Swaine & Moore, David A. Barrett, Duker & Barrett, David M. Heilbron, McCutchen, Doyle, Brown and Enersen, for Shell International Chemical Company Ltd., the Defendants-Appellees.

Judges: Herbert Y. C. Choy, Alfred T. Goodwin and Robert R. Beezer, Circuit Judges.

Opinion by: BEEZER

Opinion

[*804] BEEZER, Circuit Judge:

Appellants William McGlinchy and Dan-de Products Corporation filed claims against various defendants **[**2]** for antitrust violations, breach of contract, and related torts. They appeal from the district **[*805]** court's (1) grant of summary judgment in favor of certain defendants; (2) denial of appellants' motion to amend their complaint; (3)

grant of judgment on the pleadings for failure to state an antitrust claim concerning the polybutylene market; (4) dismissal of the antitrust claims for lack of subject matter jurisdiction; and (5) dismissal of the claims against Shell International Chemical Company for lack of personal jurisdiction. We affirm.

I

In 1977 Shell Chemical Company purchased all the patents, rights, and commercial production facilities for polybutylene (PB) from Whetco Company. PB resin is used to manufacture various products, including piping designed to carry water.

In 1978 William McGlinchy entered into an oral agreement with Shell Chemical to promote the sale of PB pipe grade resin in Southeast Asia. On January 25, 1979, Dan-de Products Corporation, owned and operated by McGlinchy, entered into a written contract with Shell Chemical for the same purpose. The written contract designated Dan-de as Shell Chemical's representative for the promotion and solicitation **[**3]** of orders for PB pipe resin in designated countries throughout Southeast Asia. The contract expressly provided that it would remain in force for one year, ending December 31, 1979, with year-to-year renewal subject to termination at year-end upon 30 days prior notice. The written contract was extended in May 1979 to include Saudi Arabia.

On April 6, 1981 McGlinchy entered into a written contract with Shell Chemical to promote PB resin in South America. In June 1980 Dan-de and Shell International Chemical Company (SICC) entered into a similar written contract covering sale and promotion of PB resin in Africa and the Middle East.

On November 5, 1982 Shell Chemical notified McGlinchy and Dan-de in writing that the contract for promotion and sale of PB resin in Southeast Asia and Saudi Arabia would be terminated. The contract remained in force through December 31, 1982, and Shell Chemical continued to pay Dan-de commissions on actual sales through the end of 1983 as the contract required. The contract between Shell Chemical and McGlinchy covering PB resin sales and promotion in South America and the contract between SICC and Dan-de covering Middle Eastern and African PB resin sales **[**4]** were also terminated in 1982 by Shell Chemical and SICC, respectively, pursuant to the terms of those contracts.

In February 1984 McGlinchy and Dan-de (collectively, appellants) instituted this action against Shell Oil Company, Shell Chemical Co. and Pecten Chemicals, Inc. (collectively, Shell Oil defendants), SICC, and other Shell-related entities. The original complaint alleged federal and state antitrust violations, as well as breach of contract and related torts. Appellants filed a first amended complaint on May 29, 1984.

SICC subsequently moved to dismiss for lack of personal jurisdiction, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction pursuant to *15 U.S.C. § 6a*. Shell Oil defendants joined in the motion to dismiss for lack of subject matter jurisdiction. On November 30, 1984, the district court granted SICC's motion to dismiss for lack of personal jurisdiction and further granted the motion to dismiss joined by Shell Oil defendants for lack of subject matter jurisdiction under *section 6a*.

Appellants next moved for leave to file a second amended complaint to add several manufacturers of PB pipe fittings **[**5]** as defendants and to add new antitrust claims relating to the promotion and sale of such fittings. On March 1, 1985 the district court denied appellants' motion to file a second amended complaint but allowed them to add four causes of action against newly named PB pipe fitting defendants. Appellants then filed an amended first amended complaint (AFA complaint) against the Shell Oil defendants and the PB pipe fitting defendants. [1]

[*806] Shell Oil defendants moved for judgment on the pleadings with respect to the federal and state antitrust claims relating to PB pipe fittings. The PB pipe fitting defendants joined in the motion, which the district court granted **[**6]** on June 7, 1985.

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[1] Appellants added Wallace Murray Corp. (along with its divisions U.S. Brass Corp. and Qest Plumbing Products), Vanguard Plastics, Inc. and Wrightway Mfg. Co., which all manufacture, produce, and sell insert fittings used with PB pipe systems. Appellants also added Plastic Pipe Fittings Association, which promotes, markets, and sells plastic pipe.

Subsequently the district court denied motions brought by Shell Oil defendants for summary judgment on appellants' breach of contract claim and for judgment on the pleadings on the remaining claims.

In December 1985 appellants again attempted to amend their complaint to add claims for relief against Shell Oil defendants for fraud and negligent interference with contract. On February 7, 1986 the district court denied the motion and subsequently set the case for trial in May 1986.

After all the parties had taken the depositions of each side's damages experts and discovery had closed, Shell Oil defendants moved the court to exclude the testimony of appellants' damages experts and to enter judgment against appellants for failure to offer a competent theory proving the fact or amount of damages. The district court granted Shell Oil defendants' motion on May 31, 1986, and entered judgment in their favor on June 5, 1986. Appellants' motion for reconsideration was subsequently denied, and appellants timely appealed.

II

The final proceedings in the district court dealt with appellants' only remaining claims: Shell Oil defendants' [Text Deleted by Court Emendation] **[**7]** breaches of contract (including promissory estoppel and quasi-contract) and Shell Oil defendants' "tortious interference" with appellants' contracts and business opportunities. Appellants contend that the district court erred in excluding damages studies prepared by appellants' expert witnesses as well as the future testimony of those expert witnesses. Appellants also contend that the district court erred in granting summary judgment in favor of Shell Oil defendants for appellant's failure to show a genuine issue about damages. We affirm both the exclusion of evidence and the grant of summary judgment.

A

HN1[] We review a district court's evidentiary decisions for an abuse of discretion. *Taylor v. Burlington Northern R.R. Co., 787 F.2d 1309, 1315 (9th Cir. 1986)*; *United States v. Solomon, 753 F.2d 1522, 1524 (9th Cir. 1985)* (expert witnesses).

The district court did not abuse its discretion in granting the Shell Oil defendants' motion to exclude the experts' damages studies and future testimony. The studies did not meet the standard that, in the context of **[**8]** a motion for summary judgment, an expert must demonstrate his competence or back up his opinion with specific facts. *Compare* *Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1985)* (per curiam) (weighing *Fed. R. Civ. P. 56(e)* and *Fed. R. Evid. 705*) *with* *United States v. Various Slot Machines on Guam, 658 F.2d 697, 700 (9th Cir. 1981)*. Both the studies and testimony were properly excluded because any probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Fed. R. Evid. 403*. *See* *Solomon, 753 F.2d at 1525*.

Appellants' final list of witnesses designated Stephen Jizmagian as an expert witness on damages. As his deposition shows, appellants asked Jizmagian to forecast future lost profits to the McGlinchy companies after a change in relations between the McGlinchys and Shell. On the one hand, Jizmagian stated that he quantified in dollar terms the effect of the act or acts by Shell Oil Company, and that he attributed all of the future lost profits to acts of Shell Oil Company. On the other hand, Jizmagian acknowledged that he did not relate the loss to specific **[**9]** acts and, indeed, could not recall any specific acts by Shell Oil defendants. He added that the cause of the decline in sales theoretically could have been anything. Given this inconsistency, Jizmagian's report and testimony would pose a great danger of confusing the fact and cause of damages with the amount of damages.

[*807] Even as a "before and after" assessment of appellants' damages from a hypothetical injury, Jizmagian's study was hopelessly flawed. He did not confirm that relevant market conditions were the same before and after the time the injury was alleged to have occurred. *See* *Pacific Coast Agric. Export Ass'n 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)*.

Worse, appellants' causes of action specify that Shell Oil defendants [Text Deleted by Court Emendation] breached obligations and tortiously interfered with appellants' contracts and business opportunities involving particular product lines and in particular overseas countries and territories. Jizmagian, however, compiled his report and was prepared to testify on the basis of the appellants' **[**10]** gross sales. He stated that he did not know which of appellants' product lines had declined in sales, or in which geographic areas -- even as between the United States and the rest of the world. Jizmagian's report and testimony would pose a great danger of misleading a jury into believing that appellants' losses associated with a decline in gross sales were the amount of damages to appellants from "lost profits" in particular product lines and territories.

Jizmagian's speculation about the amount of appellants' "lost profits" has no basis in the record. His study rests on unsupported assumptions and ignores distinctions crucial to arriving at a valid conclusion. *See* *Various Slot Machines on Guam, 658 F.2d at 700* (quoting *Merit Motors, Inc. v. Chrysler Corp., 187 U.S. App. D.C. 11, 569 F.2d 666, 672-73 (D.C. Cir. 1977))*. The district court did not abuse its discretion in excluding Jizmagian's study and future testimony.

Appellants alternately named William McGlinchy as an expert witness and as a witness on damages, but never as an expert witness on damages. The parties, nevertheless, treated William McGlinchy as an expert witness on damages in **[**11]** Southeast Asia. The district court evaluated William McGlinchy as an expert witness on those damages.

In making his study William McGlinchy's method was to forecast polybutylene resin sales, apply a given commission rate, and subtract out expenses to arrive at the net profits appellants would have earned but for the loss of their contract. The study's value depends heavily on the accuracy of the sales forecast. To forecast sales through 1987, William McGlinchy said that he "took the 838,000 pounds for 1982 actual sales and applied the 41 percent [compound annual] growth figure." He asserted that he based the 41 percent growth rate on local economic data, country by country in Southeast Asia, dating from the 1970's.

Yet William McGlinchy later acknowledged that in fact he first divined a total sales figure for 1987, then plugged in a compound growth rate -- 41 percent -- that would work backward to the 1982 actual sales figure. Although the study stated that companies he had been associated with had enjoyed growth rates of 41 percent and 83 percent, the study gave no indication of how he estimated a total sales figure for 1987. Lacking any sound foundation, the study would mislead **[**12]** a jury into believing that damages had grown exponentially over the relevant period.

Other aspects of the study would have the same effect. For instance, the study assumed that expenses would stay at $ 60,000 per year for nine years through 1991. When asked how he had arrived at the $ 60,000 per year figure, William McGlinchy replied, "I believe I arrived at it from experience plus inflation." The flat figure, however, could reflect neither experience nor inflation. William McGlinchy did not otherwise document the figure.

Indeed, he documented little of the basis for his conclusions. His speculation about the amount of appellants' damages has scant basis in the record. His study rests on unsupported assumptions and unsound extrapolation. *See* *Various Slot Machines on Guam, 658 F.2d at 700* (quoting *Merit Motors, Inc., 569 F.2d at 672-73*). The district court did not abuse its discretion in excluding William McGlinchy's study and future testimony.

[*808] B

After excluding the experts' studies and testimony, the district court granted Shell Oil defendants' motion for summary judgment. **[**13]** ***HN2***[] A summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. We review a grant of summary judgment de novo, viewing the evidence in a light most favorable to the non-moving party. *Dolphin Tours v. Pacifico Creative Serv., 773 F.2d 1506, 1509 (9th Cir. 1985)*.

The district court properly granted summary judgment in favor of Shell Oil defendants. In *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*, a majority consisting of five justices said, "In our view, the plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id. 106 S. Ct. at 2552-53*.

Before the district court granted summary judgment, **[**14]** appellants did not make a showing sufficient to establish the amount, causation, or fact of damages. The only evidence about amount of damages consisted in the studies of Jizmagian and William McGlinchy, previously excluded by the district court. The only other mention appellants made of damages was in listing William and Don McGlinchy as lay witnesses who would testify on damages. Appellants made no showing at all about causation or fact of damages.

After the district court granted summary judgment, Jizmagian, William McGlinchy, and Don McGlinchy made declarations about damages in connection with appellants' motion for reconsideration of summary judgment. These declarations added nothing to the pleadings, depositions, and other papers that the appellants already had filed.

Appellants seek comfort from the concurring opinion in *Celotex* by Justice White, who also joined the majority opinion. They argue that naming a witness to support a claim defeats summary judgment unless the movant somehow shows that the named witness's possible testimony raises no genuine issue of material fact. *Cf. id. at 2555-56* (White, J., concurring).

Even under this standard the district court **[**15]** properly granted summary judgment to Shell Oil defendants. The district court had excluded the damages studies by William McGlinchy and Jizmagian. Appellants named William McGlinchy and Don McGlinchy as lay witnesses on damages. In his deposition William McGlinchy, a plaintiff in this case, acknowledged that the damages studies by himself and Jizmagian were the only ones prepared for the lawsuit; William McGlinchy specified that he generated his own study without contribution from Don McGlinchy.

Some sort of study estimating the amount of damages was essential to appellants' case. As this court said in *Dolphin Tours*, ***HN3***[] the plaintiffs "must provide evidence such that the jury is not left to 'speculation or guesswork' in determining the amount of damages to award." *773 F.2d at 1509-10*. Summary judgment is appropriate where appellants have no expert witnesses or designated documents providing competent evidence from which a jury could fairly estimate damages. *Rickards v. Canine Eye Registration Found., Inc., 704 F.2d 1449, 1452* (9th Cir.) (antitrust case), **[**16]** *cert. denied*, *464 U.S. 994, 78 L. Ed. 2d 683, 104 S. Ct. 488 (1983)*.

In the absence of another study besides those that the district court had properly excluded, or the possibility that Don McGlinchy could rehabilitate William McGlinchy's defective study, appellants could make no showing about the amount of damages. By eliminating these possibilities, Shell Oil defendants made their showing that the named witnesses' possible testimony would raise no genuine issue of material fact about the amount of damages **[*809]** appellants had sustained. *Cf. Celotex 106 S. Ct. at 2555-56* (White, J., concurring).

HN4[] Once Shell Oil defendants made this showing, the burden was on appellants to come forward with specific facts showing there was a genuine issue for trial. *Fed. R. Civ. P. 56(e)*; *see* *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Appellants did not meet this burden; they produced no evidence at all to contradict Shell Oil defendants' showing, or even to enable contradictory inferences. **[**17]** *See British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978)*, *cert. denied*, *440 U.S. 981, 60 L. Ed. 2d 241, 99 S. Ct. 1790 (1979)*. The declarations appellants submitted when seeking reconsideration of summary judgment merely restated the pleadings; as the Court pointed out in *Celotex, 106 S. Ct. at 2554*, Federal *Rule 56(e)* ***HN5***[] does not allow a party to oppose summary judgment on the pleadings themselves.

Unlike in *Wool v. Tandem Computers Inc., 818 F.2d 1433, 1438 (9th Cir. 1987)*, in this case appellants submitted no specific facts on which a finder of fact could reasonably conclude that appellants actually suffered damages, caused by Shell Oil defendants, in any quantifiable amount. The district court properly granted summary judgment in favor of Shell Oil defendants.

III

Appellants contend that the district court erred in denying appellants leave to amend their complaint to add causes of action for fraud and negligent misrepresentation. We affirm the district court's denial of leave to amend.

[18]** *Federal Rule of Civil Procedure 15(a)* ***HN6***[] states that leave to amend "shall be freely given when justice so requires." Bearing that standard in mind, we review a district court's denial of a motion for leave to amend for an abuse of discretion. Unless we have a definite and firm conviction that the district court committed a clear error of judgment, we will not disturb the district court's decision. *California Arch. Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1987)*, *cert. denied*, *484 U.S. 1006, 108 S. Ct. 698, 98 L. Ed. 2d 650 (1988)*.

HN7[] "Undue delay" is one valid reason for a district court to deny a party leave to amend. *Id. at 1472* (citing *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962))*. Appellants claim that they only became aware of claims for fraud and negligent interference with contract after engaging in discovery in May 1985. Appellants should have been aware of a claim for negligent interference when they filed their original **[**19]** complaint, which included a claim for tortious interference. In any case, appellants did not give notice of their intention to amend their complaint until the middle of December, at least six months after they had become aware of the new claims. Discovery originally was scheduled to end on November 15, 1985, and a trial date was set for December 2, 1985. Appellants waited until the original trial date had been vacated to attempt to amend their complaint. This delay was undue.

"Prejudice" is another valid reason for a district court to deny a party leave to amend. *Id. at 1472* (citing *Foman, 371 U.S. at 182*). Appellants contend that Shell Oil defendants would have suffered no prejudice because discovery already had covered all the issues presented by the new claims for fraud and negligent interference with contract. As Shell Oil defendants point out, if appellants' contention were true their delay in seeking leave to amend would be even more inexcusable. In fact the new claims, especially fraud, would have required additional discovery on a wide range of new issues; that discovery likely would have included new depositions by Shell Oil defendants' employees. The **[**20]** new claims would have required additional research and rewriting of trial briefs. The resulting delay and expense would have prejudiced Shell Oil defendants, who were entitled to rely on a timely close of discovery and a near-term trial date.

Repeated failure to cure deficiencies by amendments previously allowed is **[*810]** another valid reason for a district court to deny a party leave to amend. *Foman, 371 U.S. at 182*. In February 1984 appellants filed their complaint. In May 1984 they filed a first amended complaint. In early 1985 they filed an amended first amended complaint. Appellants had ample opportunity to add new claims to their complaint.

The district court did not abuse its discretion in denying appellants leave to amend their complaint in February 1986; justice did not require otherwise.

IV

With respect to their antitrust claims concerning the PB market, the appellants appeal a judgment on the pleadings in favor of Shell Oil defendants and defendant U.S. Brass Corp., a manufacturer of insert pipe fittings. Because appellants' complaint does not sufficiently state a claim upon which relief can be granted, we affirm the district court's order.

[21]** A

HN8[] We review de novo a dismissal by judgment on the pleadings under *Rule 12(c)*. *Gearhart v. Thorne, 768 F.2d 1072, 1073 (9th Cir. 1985)*. All allegations of fact by the party opposing the motion are accepted as true. *Doleman v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir. 1984)*. A dismissal on the pleadings for failure to state a claim is proper only if "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1368, at 690 (1969)); *see also* *General Cinema Corp. v. Buena Vista Distrib., 681 F.2d 594, 597 (9th Cir. 1982)*.

HN9[] In this case *Rule 12(c)* was used to raise the defense of failure to state a claim. *See* *Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980)*. As a result, the motion for judgment on the pleadings faces the same test as a motion **[**22]** under *Rule 12(b) (6)*: this court may affirm the district court's dismissal "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); *see also* Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Newman v. Universal Pictures, 813 F.2d 1519, 1521-22 (9th Cir. 1987). Not only must the court accept all material allegations in the complaint as true, but the complaint must be construed, and all doubts resolved, in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 834-45 (9th Cir. 1980). Nonetheless, conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. McCarthy v. Mayo, 827 F.2d 1310, 1317 (9th Cir. 1987).

B

In their AFA complaint appellants sued under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, [2] as well as **[**23]** under the California Business and Professional Code, §§ 16700-16760 (California Cartwright Act). Because the district court concluded that appellants had inadequately pleaded antitrust injury to maintain a claim under the Sherman and California Cartwright Acts, the district court granted the defendants' motion for judgment on the pleadings for failure to state a claim.

[24]** Appellants contend that their complaint stated sufficient facts to preclude judgment on the pleadings on their federal and state antitrust claims relating to the PB pipe fitting market. Shell Oil defendants maintain that appellants have insufficiently **[*811]** pleaded antitrust standing or antitrust injury. Defendant U.S. Brass Corp. also argues that the district court properly granted judgment on the pleadings because the complaint pleaded no antitrust injury and did not adequately allege the elements of an antitrust claim.

HN11[] To establish a section 1 violation under the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., "antitrust injury"). *See* Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 211 (9th Cir. 1987); Aydin Corp. v. Loral Corp., 718 F.2d 897, 902 (9th Cir. 1983); **[**25]** Rickards v. Canine Eye Registration Found., 783 F.2d 1329, 1332 (9th Cir.), *cert. denied*, *479 U.S. 851, 107 S. Ct. 180, 93 L. Ed. 2d 115 (1986)*; Cascade Cabinet Co. v. Western Cabinet & Millwork, 710 F.2d 1366, 1373 (9th Cir. 1983). [3]

[26]** ***HN13***[] To establish a section 2 violation for an attempt to monopolize, a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. Supermarket of Homes v. San Fernando Valley Bd., 786 F.2d 1400, 1405 (9th Cir. 1986); Rickards, 783 F.2d at 1335.

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[2] Section 1 of the Sherman Antitrust Act provides, in pertinent part: ***HN10***[] "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. Section 2 of the Sherman Antitrust Act provides, in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2.

[3] ***HN12***[] The Sherman Act's prohibition against concerted activity in restraint of trade is analyzed under either the "per se" rule or the "rule of reason." The per se analysis is applied to practices that are presumptively illegal, such as (1) horizontal and vertical price-fixing; (2) horizontal market division; (3) group boycotts and concerted refusals to deal; and (4) tie-in sales. *See* Cascade Cabinet Co., 710 F.2d at 1370. The rule of reason requires "'the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.'" *Id.* (quoting Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)). In this case, no *per se* antitrust violation is alleged; rule of reason analysis is appropriate.

A fair and liberal construction of the complaint demonstrates that appellants failed to allege the requisite antitrust injury to competition that is required under both *sections 1* and *2* of the Sherman Act. [4] The Sherman Act itself speaks of "restraint[s] of trade or commerce," *15 U.S.C. § 1*, and attempted monopolization of "trade or commerce," *15 U.S.C. § 2*, not individual competitors in a market. ***HN14***[] The alleged violation must cause injury to competition beyond the impact on **[**27]** the claimant under *section 1*, and must destroy competition and cause antitrust injury under *section 2*. To state an antitrust claim, therefore, appellants must allege "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent. . . . The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* (emphasis in original). The antitrust laws **[*812]** were enacted for "the protection of *competition*, not *competitors."* *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* (emphasis in original).

[28]** In their AFA complaint appellants mechanically assert that the alleged violations of the antitrust laws "have had and continue to have a substantial effect on interstate and foreign trade and commerce." Appellants later specifically identify the relevant market by alleging: "For the purposes of the antitrust claims alleged herein, PB is the relevant market for determining the anti-competitive effects of the defendant's actions." Nowhere in their AFA complaint, however, do appellants allege injury to the competitive market for PB. Instead, they allege that the actions between Shell Oil defendants and their overseas affiliates "were taken for the purpose of eliminating McGlinchy and Dan-de as representatives of Shell Chemical and as sellers of PB and PB-related products, and for the financial benefit of defendant Shell Chemical and the parties acting in concert with such defendant." Thus appellants fail to state an antitrust claim based on defendants' conduct with respect to PB and PB-related products. It is injury to the market or to competition in general, not merely injury to individuals or individual firms that is significant. *Ralph C. Wilson Indus. v. Chronicle Broadcasting Co., 794 F.2d 1359, 1363 (9th Cir. 1986)*; **[**29]** *Fine v. Barry and Enright Prods., 731 F.2d 1394, 1399* (9th Cir.), *cert. denied*, *469 U.S. 881, 105 S. Ct. 248, 83 L. Ed. 2d 186 (1984)*.

Appellants also allege that Shell Oil defendants and other defendant manufacturers of PB insert pipe fittings "engaged in a conspiracy and a systematic pattern and practice to eliminate flare fittings from the marketplace, particularly the flare fittings sold by plaintiffs." [5] Appellants allege that the "co-conspirators and said defendants are in violation of the Sherman Act due to their attempt to monopolize the market for fittings for PB plumbing pipe and by wrongfully attempting to eliminate the flare fittings sold by plaintiffs." Finally, appellants allege that Shell Oil defendants, in concert with defendants who compete with the appellants in the PB fittings market, "have engaged in a conspiracy to eliminate plaintiffs from the domestic fittings market, and also have seriously undermined plaintiffs' position in the foreign market, resulting in an unreasonable restraint of trade."

[30]** These allegations focus on defendants' conduct with respect to flare fittings. In their brief appellants argue that they alleged injury in the pipe fittings market, rather than the PB market. As appellants are forced to concede,

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[4] The district court also dismissed appellants' state law claim under the California Cartwright Act, *Cal. Bus. & Prof Code §§ 16700*-16760. If a federal claim is dismissed before trial, any pendent state matters usually should be dismissed as well. *See* *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*; *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1268* (9th Cir.), *cert. dismissed*, ***464 U.S. 956, 104 S. Ct. 385, 78 L. Ed. 2d 331 (1983)***. In this case, however, appellants base their state law claim on the same facts on which they base their Sherman Act claims. We have recognized that Cartwright Act claims raise basically the same issues as do Sherman Act claims. *Filco, 709 F.2d at 1268* (citing *Milton v. Hudson Sales Corp., 152 Cal.App.2d 418, 439-41, 313 P.2d 936, 950 (1957))*. California state courts follow federal cases in deciding claims under the Cartwright Act. *See* *Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal.3d 920, 925, 130 Cal. Rptr. 1, 3, 549 P.2d 833, 835 (1976)*; *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc., 4 Cal.3d 842, 852, 94 Cal. Rptr. 785, 791, 484 P.2d 953, 959 (1971)*; *see also* *Filco, 709 F.2d at 1268*. As a result, our conclusion with regard to the Sherman Act claims applies with equal force to appellants' Cartwright Act claims. Accordingly, we also affirm the district court's grant of judgment on the pleadings on the state antitrust claims.

[5] In the AFA complaint the appellants stated that Dan-de "was and is now engaged in the domestic and overseas business of selling, marketing and promoting polybutylene pipe [and] producing and selling flare-type pipe fittings."

however, the AFA complaint plainly alleges that "PB is the relevant market for determining the anticompetitive effect of defendant's actions." [6]

In addition, appellants' allegations amount to an assertion that appellants' own fittings business has been injured by the defendants' conduct. **[**31]** Even if appellants claim a substantial loss to their flare fitting business within the broader PB market, ***HN15***[] "economic injury to a competitor does not equal injury to competition." *Cascade Cabinet Co., 710 F.2d at 1373*. The elimination of a single competitor, without more, does not prove anticompetitive effect. *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)*, *cert. denied*, *447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 (1980)*. As we have stated:

> Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case. It is the impact upon competitive conditions in a **[*813]** definable market which distinguishes the antitrust violation from the ordinary business tort.

Id. Appellants' failure to allege injury to competition is a proper ground for dismissal by judgment on the pleadings. *See Seattle Totems Hockey Club v. National Hockey League, 783 F.2d 1347, 1350* (9th Cir.), *cert. denied*, *479 U.S. 932, 107 S. Ct. 405, 93 L. Ed. 2d 357 (1986)*.

Because appellants can prove no set **[**32]** of facts consistent with their complaint that would entitle them to relief under the antitrust laws, appellants have not sufficiently stated an antitrust claim relating to the PB market.

V

Appellants appeal the district court's dismissal of their Sherman Act claims -- alleging concerted and unilateral refusal to deal in various foreign markets -- against SICC and the Shell Oil defendants. Because appellants pleaded only injury to customers or potential customers located in Southeast Asia and to plaintiffs themselves, we affirm the district court's holding that *15 U.S.C. § 6a* precluded subject matter jurisdiction. [7]

[33]** ***HN16***[]

The existence of subject matter jurisdiction presents a question of law reviewable de novo. *See Peter Starr Prod. Co. v. Twin Continental Films, Inc., 783 F.2d 1440, 1442 (9th Cir. 1986)*.

Appellants argue that their antitrust claims do not relate exclusively to foreign commerce and that their allegations meet the requirements of *section 6a*. Moreover, they contend that their complaint has alleged injury to competition in the United States in the relevant market.

SICC responds that appellants have not met the requirements of subsections 1(A) and 1(B) by showing that any effect on United States commerce was "direct, substantial, and reasonably foreseeable." *15 U.S.C. § 6a*. In addition, SICC maintains that appellants have not sufficiently alleged an antitrust violation as required by subsection

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[6] Appellants acknowledge that they failed to include an allegation that the relevant market was the pipe fittings market. Such an allegation was included in the proposed second amended complaint, which was disallowed by the district court. Because we hold that the district court properly exercised its discretion in not allowing appellants to amend their complaint, we are limited to considering what appears on the AFA complaint in reviewing the judgment on the pleadings for failure to state a claim.

[7] The district court also dismissed appellants' California Cartwright Act claims for failure to state a claim under *Rule 12(b)(6)*. We review such dismissals de novo. *Fort Vancouver Plywood Co. v. United States, 747 F.2d 547, 552 (9th Cir. 1984)*. Appellants have failed to allege conduct that involves intrastate commerce, *see, e.g., R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal.App.3d 653, 657, 666, 112 Cal. Rptr. 585, 587, 594 (1974)*; instead the state antitrust claims relate only to foreign commerce and fail to allege the requisite antitrust injury. We thus affirm the district court's order dismissing the California Cartwright Act claim for failure to state a claim.

2 of section 6(a). Shell Oil defendants argue that because all of the purportedly illegal conduct by defendants lacks the requisite domestic effect, the district court properly dismissed the antitrust claims alleging concerted and unilateral refusal to deal **[**34]** in various foreign markets for lack of subject matter jurisdiction under *section 6a*.

Section 6a was added by the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246. It provides:

> *Sections 1 to 7* of this title ***HN17***[] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect --
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of *sections 1 to 7* of this title, other than this section.
>
> If *sections 1 to 7* of this title apply to such conduct only because of the operation of paragraph (1)(B), then *sections 1 to 7* of this title shall apply to such conduct only for injury to export business in the United States.

[35]** *15 U.S.C. § 6a*. [8] There is little case law interpreting this section. In *Eurim-Pharm **[*814]** GmbH v. Pfizer, Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984)*, the district court granted defendants' motion to dismiss for lack of subject matter jurisdiction because the plaintiff had failed to establish that defendants' alleged conduct resulted in an anticompetitive effect on the United States domestic or import commerce. *Id. at 1107*. The court reasoned that *section 6a* "was intended to exempt from United States ***antitrust law*** conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad." *Id. at 1106*.

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[8] Prior to enactment of *section 6a*, the extraterritorial reach of the antitrust laws was governed in this circuit by a tripartite test: (1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behavior; and (3) the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness. *Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613, 615 (9th Cir. 1976)* (*Timberlane I*). Upon remand of *Timberlane I*, the district court applied the tripartite test. *See* *Timberlane Lumber Co. v. Bank of America, 574 F. Supp. 1453, 1463-67 (N.D. Cal. 1983)*, *aff'd*, *749 F.2d 1378 (9th Cir. 1984)*, *cert. denied*, *472 U.S. 1032, 87 L. Ed. 2d 643, 105 S. Ct. 3514 (1985)* (*Timberlane II*). On subsequent appeal, this Court reviewed the district court's analysis under the *Timberlane I* standard without mentioning *section 6a*. *See Timberlane II*, 749 F.2d at 1383-86. Other circuits had expressly rejected the *Timberlane I* test. *See, e.g.,* *National Bank of Canada v. International Card Ass'n, 666 F.2d 6, 8-9 (2d Cir. 1981)* (holding that there must be an appreciable anticompetitive effect on this country's commerce of a type sufficient to justify assertion of jurisdiction); *see also* *Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920, 923 (E.D.N.Y. 1985)*.

In an effort to provide a single standard for the issue of extraterritorial application of the Sherman Act, Congress enacted *section 6a*. *See* ***O.N.E. Shipping v. Flota Mercante Grancolombiana, 830 F.2d 449, 451 (2d Cir. 1987)***, *petition for cert. filed*, Feb. 8, 1988; *The 'In'* *Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 497-98 (M.D.N.C. 1987)*. Despite the peculiar procedural history of *Timberlane* -- *section 6a* was enacted between the remand and subsequent appeal -- we are bound to apply *section 6a*.

We note that in passing the Foreign Trade Antitrust Improvements Act, Congress did not change the ability of the courts to exercise principles of international comity. *See* H.R. Rep. 686, 97th Cong., 2d Sess. 13 (1982); *see also* *Laker Airways v. Sabena, Belgian World Airways, 235 U.S. App. D.C. 207, 731 F.2d 909, 946 n.137 (D.C. Cir. 1984)*; *McElderry v. Cathay Pacific Airways, 678 F. Supp. 1071, 1988 U.S. Dist. LEXIS 660, 1988-1 Trade Cas. (CCH) P 67,878, at 57,389* (S.D.N.Y. Feb. 3, 1988); ***O.N.E. Shipping, 830 F.2d at 451-54***.

[36]** In *Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920 (E.D.N.Y. 1985)*, the district court dismissed a plaintiff's antitrust claim under *section 6a* because there was "no jurisdictional nexus" for the court to decide the claim under the Sherman Act. *Id. at 925*. The court reasoned that *section 6a*'s legislative history demonstrated that "the effect required for jurisdictional nexus must be an anticompetitive effect in the domestic market." *Id. at 924*.

In *The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494 (M.D.N.C. 1987)*, the district court dismissed an antitrust claim because the foreign company plaintiff failed to meet the jurisdictional requirements of *section 6a*. *Id. at 501*. The court reasoned that *section 6a* **HN18**[] "establishes three requirements that an antitrust plaintiff, other than a domestic importer, must prove to establish subject matter jurisdiction: (1) the defendant's conduct must have a direct, substantial, and reasonably foreseeable effect on (2) *plaintiff's* continuing **[**37]** ability to export (3) *from the United States." Id. at 500* (emphasis in original; footnote omitted). The court concluded that the foreign company plaintiff failed to establish that it was within the class of injured United States exporters. *Id.*

In *McElderry v. Cathay Pacific Airways, 678 F. Supp. 1071, 1988 U.S. Dist. LEXIS 660, 1988-1* Trade. Cas. (CCH) P. 67,878, at 57,387 (S.D.N.Y. Feb. 3, 1988), the district court dismissed plaintiff's antitrust claims "for failure to meet the requirements of *[section 6a]*." *Id.* at 57,388. The court reasoned that under *section 6a* federal courts do not have jurisdiction under the Sherman Act unless there is a direct, substantial, and reasonably foreseeable anticompetitive effect on United States commerce, regardless of whether there was anticompetitive conduct in the United States. *Id.* at 57,388-89.

[*815] In their first amended complaint appellants alleged that their agreement with Shell Chemical involved "the promotion and solicitation of orders for PB resin in Hong Kong, India, Indonesia, Malaysia, the Philippines, Singapore, Taiwan, and Thailand," including attempts "to locate, develop **[**38]** and to promote local manufacturers or extruders of PB pipe in South East Asia." Because appellants challenge conduct in their antitrust claim that involves trade or commerce (other than import trade or import commerce) with foreign nations, they must satisfy either subsection (1)(A) or (1)(B), and subsection 2 of *section 6a*.

Appellants draw our attention to their allegations that "Dan-de was and is now engaged in the domestic and overseas business of selling and promoting pipe," and that the defendants' conspiracy resulted "in the termination of plaintiffs' agreement with Shell Chemical to be its exclusive representative in the sale, promotion, and distribution of PB resin and products in South East Asia and other areas."

As to subsection (1)(A), appellants have failed to allege that the defendants' conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce or import trade. *15 U.S.C. § 6a(1)(A)*. As to subsection (1)(B), appellants have not sufficiently alleged a direct, substantial, and reasonably foreseeable effect on export trade or commerce. *15 U.S.C. § 6a(1)(B)*. Indeed, in their first amended complaint **[**39]** appellants never maintained that they were exporters.

Finally, appellants have failed to allege an antitrust claim under subsection 2 of *section 6a*. Appellants must allege antitrust injury to the market or to competition in general, not merely injury to individuals or individual firms. *See Ralph C. Wilson Indus., 794 F.2d at 1363*; *Fine, 731 F.2d at 1399*. Appellants' first amended complaint only alleges injury to themselves, rather than to the relevant market.

After a careful review of the first amended complaint, we conclude that appellants' claims relate only to foreign commerce without the requisite domestic anticompetitive effect. The district court properly dismissed the antitrust claims concerning refusal to deal in foreign trade and commerce on the ground that the court lacked subject matter jurisdiction.

VI

Appellants argue that the district court improperly dismissed contract and tort claims against SICC for lack of personal jurisdiction. The district court found that it did not have personal jurisdiction over SICC, a nonresident, London-based firm, because appellants failed to demonstrate either "pervasive activities" by SICC in **[**40]**

California or "minimum contacts" linking SICC to California. We affirm the district court's dismissal of the AFA complaint against SICC for lack of personal jurisdiction.

Appellants also argue that the district court erred in denying them leave to amend defects in the AFA complaint. The district court found that appellants' proposed Second Amended Complaint failed to cure defects in the AFA complaint. We affirm the district court's denial of leave to amend the AFA by the proposed Second Amended Complaint.

A

HN19[] We review dismissal of the complaint against SICC de novo. *Fields v. Sedgwick Associated Risks, Ltd., 796 F.2d 299, 301 (9th Cir. 1986)*.

Appellants argue that SICC conducted "pervasive activities" in California, thereby subjecting SICC to personal jurisdiction in that state. The district court found that SICC's activities were not sufficiently pervasive to subject it to personal jurisdiction under the ***HN20***[] "pervasive activites" test. As set out in *Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977)*, **[**41]** this test requires an allegation that "the nonresident['s] . . . activities within the [forum] state are 'substantial' or 'continuous and systematic.'"

At no point have appellants alleged facts which would support a prima facie case for personal jurisdiction based on "substantial" or "continuous and systematic" activities in **[*816]** California. SICC has never maintained offices, qualified to do business, or regularly solicited business in California. SICC has never assigned agents or employees to work regularly in California, has never owned, used, or possessed real property in California, and has never contracted to supply goods or services in California.

SICC has never conducted any "substantial" or "continuous and systematic" activities in California. Thus SICC has not conducted "pervasive activities" in California.

Alternatively, appellants argue that they alleged sufficient "minimum contacts" in the AFA complaint to establish personal jurisdiction over SICC. ***HN21***[] We apply three criteria to determine whether sufficient "minimum contacts" exist to establish personal jurisdiction: **[**42]** "(1) the nonresident defendant must perform some act by which he purposefully avails himself of the benefits and protections of the forum's laws; (2) the plaintiff's claim must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable." *Raffaele v. Compagnie Generale Maritime, 707 F.2d 395, 397 (9th Cir. 1983)*; *see also* *Data Disc, 557 F.2d at 1287*.

Appellants allege that because the contract between SICC and appellants was signed by appellants in California, SICC "purposely availed" itself of the benefits and protections of California laws. The district court considered this allegation insufficient to constitute an SICC "act" of "purposefully availing." We agree.

Four reasons explain why appellants' execution of the contract in California is insufficient to meet the "purposefully availing" part of the "minimum contacts" test.

First, the contract was negotiated in England. Because "the substance of the relationship was formed" in England, the formality of signing the contract in California cannot establish jurisdiction. *R. E. Sanders & Co. v. Lincoln-Richardson Enters., Inc., 108 Cal. App. 3d 71, 80, 166 Cal. Rptr. 269, 273-74 (1980)* **[**43]** (quoting *Lakeside Ridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596, 604 (7th Cir. 1979)*, *cert. denied*, *445 U.S. 907, 63 L. Ed. 2d 325, 100 S. Ct. 1087 (1980)*.

Second, the contract makes no reference to California or to the United States, either as appellants' place of residence or as a forum for dispute settlement.

Third, no authorized agents of SICC were alleged to have performed or executed any portion of the contract in California. The parties conducted contract execution and termination by international mail. Such contacts are insufficient to constitute an act purposefully availing SICC of California laws. *See* *Interdyne Co. v. SYS Computer Corp., 31 Cal. App. 3d 508, 107 Cal. Rptr. 499, 501 (1973)*.

Fourth, even paired with appellants' alleged acts of inviting SICC to use and to observe California facilities and expertise, appellants' allegations fail to state a prima facie case. It is well settled that ***HN22***[] "the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement **[**44]** of contact with the forum State." *Hanson v. Denckla, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)*. [9]

Appellants' invitation to SICC to avail itself of appellants' California facilities constitutes unilateral activity. In the absence of contractual obligations by SICC, such as sale of goods or services to California residents or a deliberate presence in California, such activity is insufficient to satisfy part one of the "minimum contacts" test. Similarly, appellants' statement that it "performed 90% of [its] activities in the Bay Area," even **[**45]** if accurate, describes only unilateral activity. Again, such activity fails to create personal jurisdiction over SICC.

Thus appellants' complaint fails to state that SICC "purposefully availed" itself of California's laws. As we stated in *Republic Int'l Corp. v. Amco Eng'rs, Inc., 516 F.2d 161 (9th Cir. 1975)*, "'[a plaintiff's] performance **[*817]** in California cannot give jurisdiction over . . . [a nonresident defendant]; it is [a defendant's] activity that must provide the basis for jurisdiction.'" *Id. at 167* (citation omitted). *See also* *Hanson, 357 U.S. at 253*. Here the complete absence of activity by SICC in California bars personal jurisdiction over SICC.

Appellants suggest that a different result is compelled by our recent holding in *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392 (9th Cir. 1986)*. In *Haisten*, we stated:

> Recent Supreme Court cases indicate that modification of our three-prong test is appropriate. In particular, within the rubric of 'purposeful availment' the Court has allowed the exercise of jurisdiction over a defendant whose only 'contact' **[**46]** with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the forum state.

Id. at 1397 (emphasis in original) (quoting *Calder v. Jones, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984))*.

SICC's contractual obligations were to be carried out expressly in countries other than the United States. The contract makes no reference to California, to appellants' residence in California, or to any reliance on appellants' facilities in California. Appellants nevertheless allege that SICC's contractual obligations constitute a "foreign act purposefully direct[ed]" to have an "effect" in California.

This argument is specious. While the contract was indeed a "foreign act," it was not "purposefully direct[ed]" to have any "effect" in California. In *Haisten*, the insurance agreement "explicitly concerned the indemnification of *California* physicians against liability solely under *California* malpractice law. Thus, the effect in California was not only foreseeable, it was contemplated and bargained for." *Id.* In *Calder*, which we cited in *Haisten*, the Supreme Court considered a libel **[**47]** claim by a plaintiff whom defendant knew to reside in California. The *Calder* court noted that defendants "knew that the brunt of that injury would be felt by [the plaintiff] in the State in which the National Enquirer [owned by defendant] has its largest circulation." More specifically, the *Calder* court pointed to the fact that the defendant's "intentional, and allegedly tortious, actions were *expressly aimed at California."* *Calder, 465 U.S. at 789* (emphasis added).

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[9] More recently, the Supreme Court has held that ***HN23***[] "an individual's contract with an out-of-state party *alone* [cannot] automatically establish sufficient minimum contacts" to support personal jurisdiction. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)* (emphasis in original).

The facts of this case are significantly different. The relevant contract does not name California, expressly or by implication. The contract does not name the United States. It does name twenty-one other countries. There are no terms in the contract which would indicate that SICC contemplated an effect in California, much less that any such effect should be considered a material term of agreement. The contract was "purposefully directed" at activities in nations other than the United States; appellants concede this when they recite their "willingness and ability" to "travel anywhere, anytime and any place . . . to expand the market for [SICC's product]."

Finally, unlike in *Calder* **[**48]** or *Haisten*, in this case personal jurisdiction is sought on a contract claim, not on a tort claim. Appellants have failed to allege sufficient facts, including a tortious act or effect, to establish personal jurisdiction over their tort claims.

Appellants do not allege an "act . . . purposefully availing" SICC of the forum's laws, or a "foreign act . . . purposefully directed . . ." at an "effect" in California; hence appellants fail to satisfy part one of the "minimum contacts" test. Having established that appellants did not allege sufficient facts to support personal jurisdiction under either the "pervasive activities" test or under part one of the "minimum contacts" test, we need not consider whether appellants have satisfied parts two and three of the "minimum contacts" test. [10] **[*818]** The district court properly dismissed appellants' complaint against SICC for lack of personal jurisdiction.

[49]** B

HN24[] We review denial of leave to amend a complaint for abuse of discretion. *Halet v. Wend Inv. Co., 672 F.2d 1305, 1310 (9th Cir. 1982)*. The deficiencies in the AFA complaint are not cured by new facts or allegations presented by appellants in the proposed Second Amended Complaint. Accordingly, the district court did not abuse its discretion in denying leave to amend by means of the Second Amended Complaint. *Id.*

VII

The district court did not abuse its discretion in excluding the expert witnesses' studies and testimony and properly granted summary judgment in favor of Shell Oil defendants on appellants' contract theory and tortious interference claims. The district court did not abuse its discretion in denying appellants leave to amend their complaint to include claims for fraud and negligent interference with contract.

Because appellants failed to state sufficiently an antitrust claim upon which relief can be granted, the district court properly granted judgment on the pleadings in favor of Shell Oil and PB pipe fitting defendants. The district court also properly **[**50]** dismissed appellants' Sherman Act claims against SICC and Shell Oil defendants relating to various foreign markets. Appellants' complaint does not satisfy the requirements of *15 U.S.C. § 6a*, thereby depriving the district court of subject matter jurisdiction.

The district court properly dismissed appellants' AFA complaint against SICC for lack of personal jurisdiction and did not abuse its discretion in denying appellants leave to amend.

AFFIRMED.

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[10] Ordinarily, if part one of the "minimum contacts" test is satisfied, we proceed to part two, which requires that appellants' claim "arise out of or result from the defendant's forum-related activities," ***Raffaele, 707 F.2d at 397***, and part three, which requires that the exercise of jurisdiction be "reasonable." *Id.; Data Disc, 557 F.2d at 1287*. Personal jurisdiction is established, under the "minimum contacts" test, only if all three parts of this test are satisfied.

Redwood Theatres v. Festival Enters.

Court of Appeal of California, First Appellate District, Division One

April 22, 1988

No. A037916

Reporter

200 Cal. App. 3d 687 *; 248 Cal. Rptr. 189 **; 1988 Cal. App. LEXIS 370 ***; 1988-1 Trade Cas. (CCH) P68,065

REDWOOD THEATRES, INC., Plaintiff and Appellant, v. FESTIVAL ENTERPRISES, INC., et al., Defendants and Respondents

Subsequent History: **[***1]** A Petition for a Rehearing was Denied May 19, 1988, and the Opinion was Modified to Read as Printed Above. Respondents' Petitions for Review by the Supreme Court were Denied August 11, 1988.

Prior History: Superior Court of the City and County of San Francisco, No. 836273, Lucy Kelly McCabe, Judge.

Disposition: The summary judgment in favor of defendants Festival Enterprises, Inc., Paramount Pictures and Warner Bros. is reversed as to the Cartwright Act cause of action and affirmed as to the fraud cause of action. The summary judgment in favor of defendant Orion is affirmed. Appellant is entitled to costs on appeal.

Core Terms

distributors, films, theatre, exhibitors, Pictures, Sherman Act, boycott, franchising, cases, Enterprises, vertical, bidding, license, competitor, antitrust, monopoly, markets, terms, summary judgment, anti trust law, market power, suppliers, alleged agreement, motion picture, conspiracy, first-run, practices, compete, cards, unreasonable restraint

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Antitrust & Trade Law, Sherman Act**

Federal cases interpreting the Sherman Act, 15 U.S.C.S. § 1 et seq., are applicable to problems arising under the Cartwright Act, Cal. Bus. & Prof. Code § 16720 et seq.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[] **Causes of Action, Restraints of Trade**

A conspiracy among distributors and an exhibitor depriving plaintiff of an opportunity to obtain the supply of first-run films needed for effective competition constitutes a violation of the Sherman Act, *15 U.S.C.S. § 1 et seq.*

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN3[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Agreements to exclude competitors from valued trade relations are unreasonable restraints of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The rule of reason applies to vertical restraints on territory and customers.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

Mergers & Acquisitions Law > Antitrust > General Overview

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN6[] **Tying Arrangements, Defenses**

In the field of vertical restraints, restrictions may be justified under the rule of reason if they are the only practicable means a small company has for breaking into or staying in business.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

Whether a restraint of trade is reasonable is a question of fact to be determined at trial.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

In a fraud and antitrust action under the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*) by a motion picture exhibitor against a competing exhibitor and major film distributors, the trial court denied plaintiff's motion to compel discovery of certain documentary evidence by which it offered to prove alleged anticompetitive agreements, and thereafter granted summary judgment in favor of defendants. The complaint alleged that the competing exhibitor entered into unwritten agreements with the distributor defendants under which all or substantially all of their first-run motion pictures were licensed to the competitor, and that plaintiff was thereby locked out of the opportunity to compete for first-run pictures. Plaintiff offered to prove the alleged agreement through the history of bidding for films, based on the documentary evidence it sought through discovery. (Superior Court of the City and County of San Francisco, No. 836273, Lucy Kelly McCabe, Judge.)

The Court of Appeal reversed as to the Cartwright Act cause of action against the competing exhibit and two of the film distributors, but affirmed as to the third film distributor and as to the fraud cause of action. It held that the allegations of plaintiff's complaint, if proved, would present a triable issue of an unreasonable restraint of trade under the Cartwright Act as to two distributors. Thus, it held, the trial court erred in holding that plaintiff failed to present a triable issue of fact as to the existence of the agreements while denying plaintiff a promising avenue of proof by denying its motion to compel discovery. However, it held, the third film distributor held too small a market share of the industry to hold it liable for imposing barriers to fair competition. It also held that the trial court properly granted summary judgment as to the fraud cause of action, since the complaint failed to allege the essential elements of the tort. (Opinion by Newsom, J., with Racanelli, P. J., and Holmdahl, J., concurring.)

Headnotes

CA(1)[] **(1)**

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Interpretation—Reliance on Federal Authority.

--Reliance on federal authority in interpreting the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*) is accepted since it is patterned after the Sherman Act (*15 U.S.C. § 1 et seq.*), and both statutes have their roots in the common law.

CA(2a)[] (2a) CA(2b)[] (2b)

Amusements and Exhibitions § 2—Motion Picture Production and Distribution Agreements—Agreements Violating Antitrust Laws—Circuit Dealing.

--Circuit dealing in the distribution of motion pictures to theaters, in which the purchasing power of an entire theater circuit is pooled in bidding for films, is a misuse of monopoly power, since it eliminates the possibility of bidding for films theater by theater and in that way eliminates the opportunity for small competitors to obtain choice first runs and puts a premium on the size of the circuit. It stifles competition and diverts the cream of the business to the large operators. Therefore, it is an unreasonable restraint of trade under *§ 1* of the Sherman Act (*15 U.S.C. § 1 et seq.*).

CA(3a)[] (3a) CA(3b)[] (3b)

Amusements and Exhibitions § 2—Motion Picture Production and Distribution Agreements—Agreements Violating Antitrust Laws—Franchising Agreements.

--Franchising agreements in the distribution of motion pictures to theaters are not illegal per se under the Sherman Act (*15 U.S.C. § 1 et seq.*). They are, however, subject to careful antitrust scrutiny.

CA(4)[] (4)

Amusements and Exhibitions § 2—Motion Picture Production and Distribution Agreements—Agreements Violating Antitrust Laws—Group Boycotts.

--Group boycotts among motion picture distributors and exhibitors, depriving other theaters of an opportunity to obtain the supply of first-run films needed for effective competition in the motion picture exhibition industry, constitute per se violations of the Sherman Act (*15 U.S.C. § 1 et seq.*).

CA(5)[] (5)

Monopolies and Restraints of Trade § 4—Sherman Act—Two-party Boycotts.

--Typically, an alleged two-party boycott, involving a single competing dealer and a single supplier, is likely to be equivalent to an exclusive distributorship, which is a business arrangement not often subject to antitrust challenges. All exclusive distributorship agreements involve an intent to deprive competitors of access to a supplier; such is the essence of the agreement. Nevertheless, although an exclusive dealing agreement will only rarely constitute an illegal boycott, the possibility cannot be excluded a priori. A plan to deprive a competitor of needed trade relations, which satisfies the requirements of a conspiracy, constitutes a boycott even if only a single supplier and a single dealer are involved.

CA(6)[] (6)

Amusements and Exhibitions § 2—Motion Picture Production and Distribution Agreements—Distributor's Freedom of Licensing.

--Film distributors have freedom to choose where their films will play. The distributor has the right to license or refuse to license a film to any exhibitor, pursuant to its own reasoning, so long as it acts independently. A distributor acting independently has no legal duty to offer equally suitable theaters an equal opportunity to negotiate for or obtain films. Nor must it assess bids consistently or in good faith. It may favor a particular exhibitor for any reason or no reason at all.

CA(7)[] **(7)**

Amusements and Exhibitions *§ 2*—Motion Picture Production and Distribution Agreements—Alleged Boycott Between Single Competing Exhibitor and Individual Distributors—Evidence.

--In an action by a motion picture exhibitor against a competing motion picture exhibitor and major film distributors, alleging antitrust violations under the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*) by virtue of exclusive dealing agreements between the competitor and the major distributors, plaintiff failed to meet the evidentiary threshold required to sustain a boycott theory of per se liability. It produced no evidence of predatory intent, nor did it show that the alleged agreements were dictated by the competing exhibitor, concerned with its own position, rather than granted in the exercise of the distributors' independent discretion.

CA(8)[] **(8)**

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Judicial Evaluation of Alleged Antitrust Practices—Rule of Reason Standard—Vertical Restraints.

--Vertical restraints are subject to a rule-of-reason analysis, rather than the per se standard, to determine their impact on competition.

CA(9)[] **(9)**

Monopolies and Restraints of Trade § 4—Sherman Act—Boycotts and Vertical Restraints.

--The terms "boycott" and "vertical restraint" are merely labels that call for different forms of antitrust analysis, one focusing on competitive practices, the other on broader questions of market structure. The two approaches are potentially complementary; an anticompetitive practice may be linked to anticompetitive market conditions. The question whether a specific practice offends the Sherman Act (*15 U.S.C. § 1 et seq.*) ought not to exclude a broader inquiry into market structure.

CA(10)[] **(10)**

Monopolies and Restraints of Trade § 5—Actions—Under Sherman Act—Vertical Restraints—Application of Rule of Reason Standard—Tests and Evidence.

--Application of the rule of reason standard to vertical restraints requires balancing of intrabrand and interbrand competitive effects of vertical restrictions. A popular test of illegality is to say that the balance tips in the defendant's favor if the plaintiff fails to show that the defendant has significant market power, which is usually equated with market share and is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography. A second relevant factor is product differentiation. The interchangeability of products is usually considered in the definition of markets, and the presence of adequate sources of alternative products is a critical factor in evaluating the competitive effects of vertical restraints.

CA(11a)[] (11a) CA(11b)[] (11b) CA(11c)[] (11c)

Amusements and Exhibitions § 2—Motion Picture Production and Distribution Agreements—Exclusive Dealing Agreements—Antitrust Violations Under Cartwright Act.

--Because of unusual competitive conditions in the film industry, involving a unique product in short supply, a film exhibitor who lacks access to a substantial share of popular first-run films may be placed at a grave competitive disadvantage against a competitor who has locked-in access to such films through exclusive dealing agreements. Such an agreement, if proved, would present a triable issue of an unreasonable restraint of trade under the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*). Therefore, in an action under the Cartwright Act by a film exhibitor against a competing exhibitor and major film distributors, the trial court erred in granting summary judgment for defendants without permitting plaintiff discovery access to certain documents that might prove such an agreement.

CA(12a)[] (12a) CA(12b)[] (12b)

Monopolies and Restraints of Trade § 4—Sherman Act—Policy of Act.

--The policy of assuring free access to markets is central to the legislative purpose of the Sherman Act (*15 U.S.C. § 1 et seq.*). Both its legislative history and subsequent interpretation reveal that it was intended to prohibit unreasonable restraints on the freedom of entrepreneurs to enter new markets or to expand a small market share. Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

CA(13)[] (13)

Monopolies and Restraints of Trade § 3—Sherman Act—Generality and Adaptability.

--As a charter of freedom, the Sherman Act (*15 U.S.C. § 1 et seq.*) has a generality and adaptability comparable to that found to be desirable in constitutional provisions.

CA(14)[] (14)

Monopolies and Restraints of Trade § 5—Actions—Questions of Law and Fact—Reasonableness of Restraint.

--Whether a restraint of trade is reasonable is a question of fact to be determined at trial.

CA(15)[] (15)

Amusements and Exhibitions § 2—Motion Picture Production and Distribution Agreements—Alleged Antitrust Violation Under Cartwright Act—Distributor With Minimal Market Share.

--In an action by a motion picture exhibitor against a competing exhibitor and major film distributors, alleging antitrust violations under the Cartwright Act by virtue of an alleged agreement between the competing exhibitor and each distributor whereby all or substantially all first-run films were licensed to the competitor while denying access to plaintiff, the trial court properly granted summary judgment in favor of a defendant film distributor who held only a 3 percent market share. The film distributor was itself a new entrant and a relatively marginal participant in the film industry. Thus, it could not be held responsible for imposing barriers to fair competition among exhibitors.

CA(16)[] **(16)**

Fraud and Deceit § 20—Actions—Elements—Summary Judgment.

--In an action by a motion picture exhibitor against a competing exhibitor and major film distributors, alleging antitrust violations under the Cartwright Act and, alternatively, damages for fraud, based on allegedly anticompetitive exclusive distributorship agreements, the trial court properly granted summary judgment in defendants' favor with respect to the fraud cause of action. The complaint failed to allege the essential elements of the tort, and plaintiff's own affidavits tended to rebut both the existence of misrepresentation and action in reliance on it.

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Judges: Opinion by Newsom, J., with Racanelli, P. J., and Holmdahl, J., concurring.

Opinion by: NEWSOM

Opinion

[*692] [190]** Redwood Theatres, Inc. (hereafter appellant) filed this action on February 28, 1985, against a competing motion picture exhibitor, Festival Enterprises, and four major **[***2]** film distributors, Paramount Pictures Corporation, Warner Bros. Distributing Corporation, Orion Pictures Corporation, and Twentieth Century Fox Film Corporation (hereafter respondents). The complaint seeks treble damages for antitrust violations under the Cartwright Act and, alternatively, damages for fraud. The action against Twentieth Century Fox Film Corporation was later voluntarily dismissed. Much of the record on appeal consists of extensive arguments on a discovery request: appellant's motion to compel production of the distributor defendants' "cutoff cards" -- records providing a history of film rentals in each market -- for six cities in Northern California where Festival Enterprises does business. After the initial trial date was continued, respondents successfully **[**191]** moved for summary judgment, which was entered on January 15, 1987.

The case presents simple facts and complex questions of law. Appellant operates the Briggsmore Seven Theatre in Modesto, California. In 1981 and 1982, it invested $ 1.7 million for renovation and conversion of the theatre into a seven-screen complex. Two other exhibitors, including the respondent Festival Enterprises, also operate **[***3]** theatres in Modesto. Festival Enterprises operates additional theatres in five other Northern California markets -- Hayward, Stockton, Fresno, Walnut Creek, and Marin County -- and in Alaska and Southern California.

From our perusal of the record, we learn that the major film distributors in the United States release films simultaneously in hundreds of markets under license agreements. Almost all of a film's revenues in a market comes from its "first run"; box office receipts tend to diminish with each week that a picture is played. Distributors will license a first-run film to only one theatre in a medium-sized market such as Modesto. Commonly, the films are licensed by competitive bidding; the distributors send out written bid **[*693]** invitations and evaluate the bids submitted for each market. In other cases, the distributors may contact competing exhibitors by telephone to negotiate licensing terms.

Appellant's complaint alleges that the distributor defendants "have entered into unwritten agreements with Festival [Enterprises] pursuant to which all or substantially all of the Paramount, Warner Bros. and Orion first run product is licensed to the Festival-owned theatre **[***4]** or theatres in Modesto, Hayward, Stockton, Fresno, and to a lesser extent, Walnut Creek-Pleasant Hill, and in Marin County, . . ." Although the distributors have continued to solicit bids for Modesto showings, appellant alleges that the bids have been a sham; the distributors are committed to Festival

Enterprises even before bid invitations go out. As a result, the distributors have repeatedly licensed potentially remunerative films to Festival Enterprises even though appellant has submitted demonstrably superior bids.

The alleged unwritten agreements vary somewhat among the distributor defendants. For example, Warner Bros. is said to have committed only about 80 percent of its films to Festival Enterprises during the period December 1978 to August 1982; thereafter, it licensed films more evenly among Modesto exhibitors but reserved the most financially attractive films for Festival Enterprises. There is no allegation that the distributor defendants conspired among themselves or that they were a party to a plan to drive the appellant out of business. Rather, the agreements are alleged to be part of a business policy in which the distributor defendants dealt preferentially with **[***5]** theatre circuits such as Festival Enterprises.

In affidavits opposing the motion for summary judgment, appellant offers to prove the alleged agreement largely through the history of bidding. Though possessing superior facilities, it has been unable to obtain the desired first-run films even though it has frequently outbid its competitor, Festival Enterprises. Appellant also points to certain admissions of distributor's representatives which tend to some extent to corroborate this circumstantial evidence. But the history of bidding still may reflect only the distributors' disinclination to do business with appellant. To complete its case, appellant needed to show that it did not lose out in the bidding because of some factor peculiar to itself but because the distributors dealt preferentially or exclusively with Festival Enterprises throughout its circuit. This evidence arguably might be provided by the distributor's cut-off cards which list the films licensed to each theatre in each market and record the essential terms of the license agreement, box office receipts, and rental payments. The denial of its discovery motion left it without this critical evidence.

[*694] Although **[***6]** the agreement allegedly deprived it of access to substantially all the defendant distributors' films, appellant bases its claim for damages on bidding for twenty specific films -- eight from Paramount, seven from Warner Bros., and five from Orion. In each case, it offers to **[**192]** prove that it submitted a bid superior to that of Festival but failed to secure the film and was forced to license a less popular motion picture. Festival earned a gross profit on the twenty films of $ 628,157; during the same time period, appellant made a gross profit of only $ 268,269 on less desirable films.

In brief, while the evidence produced in discovery is rather equivocal, appellant maintains that the requested cutoff cards would clearly establish the alleged agreements between Festival Enterprises and the three distributor defendants. The alleged agreements, which are independent of each other and seem lacking in any predatory intent, reflect the distributors' preference for dealing with theatre circuits to the exclusion of independents such as appellant. The question on appeal is whether such exclusive-dealing agreements are violative of the state antitrust laws.

[*7]** ***CA(1)***[] **(1)** Although the complaint states a cause of action under the California Cartwright Act, (*Bus. & Prof. Code, § 16720 et seq.*) the briefs in this appeal have relied almost exclusively on federal precedents under the Sherman Act (*15 U.S.C. § 1*). "A long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, ***HN1***[] federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act." (*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 925 [130 Cal.Rptr. 1, 549 P.2d 833]*; *G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 265 [195 Cal.Rptr. 211, 41 A.L.R.4th 653]*.) Since the relevant case law under the Cartwright Act is comparatively sparse, we will also rely chiefly on federal decisions.

CA(2a)[] **(2a)** The federal precedent of most immediate relevance to this case, *United States v. Paramount Pictures (1948) 334 U.S. 131 [92 L.Ed. 1260, 68 S.Ct. 915]*, was forged in over a decade of litigation. It has been called **[***8]** "the greatest economic victory ever achieved by the Department of Justice" (*Southway Theatres, Inc. v. Georgia Theatre Co. (5th Cir. 1982) 672 F.2d 485, 497)* and resulted in a fundamental restructuring of the industry. In a dissenting opinion, Justice Frankfurter observed, "[the] terms of the decree in this litigation amount, in effect, to the formulation of a regime for the future conduct of the movie industry." (*Id. 334* U.S. at p. at 179 [*92 L.Ed. at p. 1304*].)

The Paramount Pictures case reached the Supreme Court with two companion cases which concerned regional chains of motion picture exhibitors **[*695]** and dealt chiefly with charges of abuse of monopoly power. (*United States v. Griffith, (1948) 334 U.S. 100 [92 L.Ed. 1236, 68 S.Ct. 941]*; *Schine Theatres v. United States (1948) 334 U.S. 110 [92 L.Ed. 1245, 68 S.Ct. 947]*.) In the most significant of these cases, *United States* v. *Griffith*, the Department of Justice brought suit against 4 affiliated motion picture exhibitors which operated a circuit of theatres in 85 towns in the southwestern United States; in 53 of these towns **[***9]** there were no competing theatres. The exhibitors jointly negotiated licensing agreements that "lumped together towns in which the [exhibitors] had no competition and towns in which there were competing theatres." (*Id. at pp. 102-103 [92 L.Ed. at p. 1241]*.) The Supreme Court held that the agreements served to monopolize trade in violation of *sections 1* and *2* of the Sherman Act. (*Id. at p. 106 [92 L.Ed. at p. 1243]*.) The opinion reasoned that an exhibitor with a monopoly of theatres in part of a circuit may not use "that strategic position to acquire exclusive privileges in a city where he has competitors, . . ." (*Id. at p. 107 [92 L.Ed. at p. 1243]*.)

In *United States v. Paramount Pictures, supra, 334 U.S. 131*, the Department of Justice directed its attack against the major motion picture distributors in the country. The complaint sought to enjoin a long list of anticompetitive practices, each of which was discussed *ad seriatim* by the Supreme Court and a distinguished three-judge panel in the lower court. We may approach the decision by first discussing its analysis of the two practices involved in this appeal -- circuit dealing and franchising **[***10]** -- and then considering the significance of the decision in light of **[**193]** the subsequent evolution of the ***antitrust law***.

The Department of Justice sought to enjoin two forms of circuit dealing -- formula deals and master agreements. A formula deal was a licensing agreement with a circuit of theatres in which the license fee of a given feature was measured "by a specified percentage of the feature's national gross." A master agreement covered exhibition in several theatres in a particular circuit and allowed "the exhibitor to allocate the film rental paid among the theatres as it sees fit and to exhibit the features upon such playing time as it deems best, . . ." (*Id. at pp. 153-154 [92 L.Ed. at pp. 1290-1291]*.)

Affirming the finding of the district court that formula deals and master agreements unreasonably restrain competition, the Supreme Court noted that under the holdings of *United States v. Griffith, supra, 334 U.S. 100* "the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations." (*Id. at pp. 154-155 [92 L.Ed. at p.* ***[*696]*** *1291]*.) **[***11]** But the court also affirmed the district court finding for a reason distinct from the misuse of monopoly power: the practices deprived other theatre owners of the opportunity to bid for motion pictures in their several areas. (*United States v. Paramount Pictures (S.D.N.Y. 1946) 66 F.Supp. 323, 347*.) Under this holding, "circuit dealing" violated *section 1* of the Sherman Act even where all of the markets within a circuit were competitive. Referring to formula deals and master agreements, the court explained, "they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators." (*United States v. Paramount Pictures, supra, 334 U.S. at p. 154 [92 L.Ed. at p. 1291]*.)

CA(3a)[] **(3a)** The court's consideration of franchising agreements required remand of the case to the district court for further findings. As a remedy for noncompetitive practices, the district court had ordered **[***12]** a system of competitive bidding; franchising agreements were obviously incompatible with this scheme and were specifically enjoined. (*United States v. Paramount Pictures, supra, 66 F.Supp. 323, 347*; *United States v. Paramount Pictures (S.D.N.Y. 1946) 70 F.Supp. 53, 63*.) After rejecting the remedy of competitive bidding in favor of divestment, the Supreme Court directed the district court to reconsider whether the practice of franchising was in fact an unreasonable restraint of trade. The opinion observed, "[franchise] agreements may have been employed as devices to discriminate against some independents in favor of others . . . . But we cannot say on this record that franchises are illegal *per se* . . . ." (*United States v. Paramount Pictures, supra, 334 U.S. at p. 156 [92 L.Ed. at p. 1292]*.) On remand, the district court enjoined the defendants from granting franchises to affiliated exhibitors but held that they might give them to independent theatre operators under appropriate circumstances. "We hold . . . that any of the defendants may grant franchises to an independent operator, provided that the result **[***13]** thereof will be to enable such independent to compete effectively with theatres affiliated with a defendant or with theatres in the new theatre circuits to be formed pursuant to our order of divorcement." (*United States v. Paramount Pictures (S.D.N.Y. 1949) 85 F.Supp. 881, 897*.) The Supreme Court affirmed *per curiam*. (*Loew's, Inc. v. United States (1950) 339 U.S. 974 [94 L.Ed. 1380, 70 S.Ct. 1031]*; *Twentieth Century Fox Film Corp. v. United States (1950) 339 U.S. 974 [94 L.Ed. 1380, 70 S.Ct. 1032]*; *Warner Bros. Pictures, Inc. v. United States (1950) 339 U.S. 974 [94 L.Ed. 1380, 70 S.Ct. 1032]*.)

In the present case, the issue of abuse of monopoly power is no longer raised. While asserting that defendant Festival Enterprises possesses a **[*697]** monopoly in one of the six areas in Northern California where it does business, the complaint alleges that it used this monopoly position only in bargaining **[**194]** with a dismissed defendant -- Twentieth Century Fox Film Corporation. ***CA(2b)***[] **(2b)** ***CA(3b)***[] **(3b)** But the *Paramount Pictures* decision still prohibits circuit dealing as an unreasonable restraint of trade under *section 1* of the Sherman Act and subjects franchises to careful antitrust scrutiny. The text of the opinion, in fact, suggests that circuit dealing is a per se violation of the **[***14]** Sherman Act; it holds categorically that the practice is an unreasonable restraint of trade while making clear that certain other practices are *not* per se illegal, e.g., clearances and franchises. (*United States v. Paramount Pictures, supra, 334 U.S. at pp. 145, 156 [92 L.Ed. at pp. 1286, 1291-1292]*.) The final decree in the case enjoined the defendants "[from] making or further performing any formula deal or master agreement to which it is a party." (*U.S.* v. *Paramount Pictures, Inc. et al. 1949 Trade Cases* para. 62,377; *U.S.* v. *Loew's, Inc., et al. 1951 Trade Cases* para. 62,765.)

The *Paramount Pictures* decision, however, must be understood in light of its peculiar facts and context. Formerly, the distributors controlled circuits of theatres, and commonly attempted to lessen competition at the exhibitor **[***15]** level by using their vertical leverage through such devices as block booking, direct discrimination against independent exhibitors, joint operation of theatres, and conspiracy to fix prices and establish uniform clearances. The charge of circuit dealing was colored by this evidence of conspiracy and vertical leverage; not only were some of the circuits controlled by affiliates, but in many instances there was "cooperation among the major defendants in their respective capacities as distributors and exhibitors." (*United States v. Paramount Pictures, supra, 85 F.Supp. 881, 888*.) As the district court observed, the holding that circuit dealing was an unreasonable restraint of trade should be considered "in view of the history and relation to the moving picture business of the various parties to this action . . . ." (*United States v. Paramount Pictures, supra, 66 F.Supp. 323, 346*.) Similarly, franchising had been a device used by the major distributors for domination of the exhibition business. The ultimate decision to prohibit franchises except to independent exhibitors represented an effort to unravel the effects of the distributors' past **[***16]** domination of film exhibition.

The *Paramount Pictures* decision "radically altered the structure of the industry," by requiring the major distributors to divest themselves of existing theatre circuits and by placing stringent restrictions on future acquisitions. (*U.S.* v. *Paramount Pictures, Inc*. (S.D.N.Y. 1980) *1980-2 Trade Cases* para. 63,553, p. 76,951.) Today, the issues surrounding circuit dealing have acquired a very different industrial context. As the court commented in *Southway Theatres, Inc. v. Georgia Theatre Co., supra, 672 F.2d 485, 498*, **[*698]** "[with] the elimination of a motion picture industry vertically integrated downward to the exhibitor level, the significance of a distributor's refusal to do business with an independent shifts dramatically." Moreover, it now makes no sense to distinguish between circuit dealing and franchising; both are exclusive dealing agreements. Circuit dealing defines the territorial extent of exclusive dealing in terms of a theatre circuit; franchising defines the duration of the agreement in terms of a period of years. In either case, the antitrust issues may be defined in terms **[***17]** of exclusive dealing agreements.

Although it remains the leading decision in the field, *Paramount Pictures* must be construed in a manner consistent with the subsequent evolution of the ***antitrust law***. In the 30 years of antitrust litigation following the *Paramount Pictures* decision, independent film exhibitors have frequently challenged theatre chains and major distributors on a variety of grounds. ***CA(4)***[] **(4)** A line of cases has proceeded on a theory alleging that a competing exhibitor and major film distributors have conspired among themselves "to deprive independent operators of desirable runs or priorities of exhibition of films, . . ." (*Loew's, Inc. v. Cinema Amusements (10th Cir. 1954) 210 F.2d 86, 89*, cert.den. *(1954) 347 U.S. 976*.) The theory falls within the conventional definition of a group boycott. The decisions have never questioned **[**195]** that ***HN2***[] a conspiracy among distributors and an exhibitor "depriving plaintiff of an opportunity to obtain the supply of first-run films needed for effective competition . . ." constitutes a violation of the Sherman Act. (*Brown v. Western Massachusetts Theatres, Inc. (1st Cir. 1961) 288 F.2d 302, 304*.) **[***18]** Rather, the critical issue on appeal has centered on proof of conspiracy by circumstantial evidence. In some cases, a summary judgment or directed verdict has been affirmed. (*Universal Amusements Co. v. Gen. Cinema Corp. (S.D.Tex. 1985) 635 F.Supp. 1505*; *Columbia Pictures Industries, Inc.* v. *Moyer* (D.C.Or. 1981) *1981-1 Trade Cases* para. 63,878; *Lamb's Patio Theatre v. Universal Film Exchanges (7th Cir. 1978) 582 F.2d 1068 [47 A.L.R.Fed. 200]*; *Viking Theatre Corp. v. Paramount Film Distributing Corp. (3d Cir. 1963) 320 F.2d 285*, affd. *(1964) 378 U.S. 123 [12 L.Ed.2d 743, 84 S.Ct. 1657]*.) But the plaintiffs have won a share of the cases by successfully proving collusion among distributors and competing exhibitors to deprive them of remunerative first-run films. (*Beech Cinema v. Twentieth Century Fox Film (2d Cir. 1980) 622 F.2d 1106*; *Columbia Pictures Corp.* v. *Charles Rubenstein, Inc*. (8th Cir. 1961) *289 F.2d 418*; *Fox West Coast Theatres Corp.* v. *Paradise T. Bldg. Corp. (9th Cir. 1958) 264 F.2d 602*; *Paramount Film Distributing Corp.* v. *Village Theatre, Inc. 1955 Trade Cases* para. 68,239; **[***19]** *Bordonaro Bros. Theatres v. Paramount Pictures (2d Cir. 1949) 176 F.2d 594*.)

Very few decisions have alluded to the specific practices of circuit dealing and franchising disapproved in *Paramount Pictures*. (But see *Paramount **[*699]** Film Distributing Corp. v. Applebaum (5th Cir. 1954) 217 F.2d 101, 122*, cert. den. *(1955) 349 U.S. 961*.) In two recent cases, however, the issue of circuit dealing has arisen in connection with alleged conspiracies to cut off the plaintiff from desired first-run films. (*Schmidt* v. *Columbia Pictures Industries Inc*. (D.C.Nev. 1982) *1986-2 Trade Cases* para. 67, 323; *Beech Cinema v. Twentieth Century Fox Film, supra, 622 F.2d 1106*.) In this context, circuit dealing may be viewed not as a per se violation of the Sherman Act (as suggested by the language of Paramount Pictures), but as a tactical device that has been used -- and may be used again -- in illegal conspiracies to exclude motion picture exhibitors from trade relations needed to compete. Franchising stands on the same ground. But while the practices may merit scrutiny, the issue of a Sherman **[***20]** Act violation will turn on the general ***antitrust law*** concerning boycotts.

In a long line of decisions the Supreme Court has held categorically that ***HN3***[] agreements to exclude competitors from valued trade relations are unreasonable restraints of trade. (*Montague & Co. v. Lowry (1904) 193 U.S. 38 [48 L.Ed. 608, 24 S.Ct. 307]*; *Fashion Guild* v. *Trade Comm'n*. *(1941) 312 U.S. 457 [85 L.Ed. 949, 61 S.Ct. 703]*; *Silver v. New York Stock Exchange (1963) 373 U.S. 341 [10 L.Ed.2d 389, 83 S.Ct. 1246]*.) Since *Northern Pac. R. Co. v. United States (1958) 356 U.S. 1, 5 [2 L.Ed.2d 545, 549-560, 78 S.Ct. 514]*, the court has identified such group boycotts as per se violations of the Sherman Act. (See also *United States v. General Motors (1966) 384 U.S. 127, 145 [16 L.Ed.2d 415, 426, 86 S.Ct. 1321]*; *Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920, 931-935*.) [1] Among these boycott decisions, *Klor's v. Broadway-Hale Stores (1959) 359 U.S. 207 [3 L.Ed.2d 741, 79 S.Ct. 705]*, bears closest resemblance to the present case. **[**196]** **[***21]** The alleged boycott also consisted of agreements between a single competing dealer and its suppliers. The plaintiff, Klor's, operated a retail store specializing in household appliances in San Francisco located next door to a major department store owned by Broadway-Hale Stores. In its complaint, Klor's alleged that Broadway-Hale and 10 suppliers conspired among themselves either not to sell it household appliances or to sell them at commercially unacceptable terms. The district court granted summary judgment for **[*700]** the defendants on the ground that the alleged conspiracy did not affect market conditions. It relied on affidavits showing that there was an active local market in household appliances, involving hundreds of other retailers who sold many competing brands of appliances. Reversing the judgment, the Supreme Court held that the plaintiff had alleged a group boycott that belonged to the "classes of restraints which from their 'nature or character' were unduly restrictive." (*Klor's v. Broadway-Hale Stores, supra,*

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[1] The per se rule, however, has been subject to some semantic confusion. The term "boycott" is sometimes used interchangeably with "concerted refusal to deal," which plainly cannot always be held in violation of the Sherman Act. (*Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc*. (D.C.Cir. 1986) *792 F.2d 210, 215 [253 App.D.C. 142]*, cert. den. ***(1987) 479 U.S. 1033 [93 L.Ed.2d 834, 107 S.Ct. 880]***.) In *Northwest Stationers v. Pacific Stationery (1985) 472 U.S. 284 [86 L.Ed.2d 202, 105 S.Ct. 2613]*, the court undertook to clarify the area of per se illegality: "Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" (*Id. at p. 294 [86 L.Ed.2d at p. 211*].)

359 U.S. at p. 211 [3 L.Ed.2d at p. 744].) The plaintiff therefore did need not to allege market-wide injury to competition.

[*22]** ***CA(5)***[] **(5)** The present case, however, differs from *Klor's* in a critical respect. There, the complaint alleged a conspiracy *among* the suppliers of the competing retailer. Here, the complaint contains no allegation of a combination among the distributor defendants; rather it alleges three separate agreements between the competing exhibitor and three major film distributors. If the plaintiff had alleged collusion among the offending film distributors, the case would come within the holding of *Klor's*. In the absence of this allegation, we must consider whether the three alleged agreements between the competing exhibitor and the distributor defendants may individually constitute a boycott.

In his frequently cited text, Sullivan comments that "the concept of a boycott does not necessarily involve the concert of several traders." If a single firm succeeds in inducing one important supplier to cease dealing with a would-be competitor, the resulting accommodation "would display all the essential elements of a boycott." (Sullivan, The Law of Antitrust (1977) p. 231, fn. 1.) The case law indeed includes a few examples of such a two-party boycott involving a single competing **[***23]** dealer and a single supplier. (See *Murphy Tugboat Co. v. Crowley (9th Cir. 1981) 658 F.2d 1256*, cert. den. *(1982) 455 U.S. 1018 [72 L.Ed.2d 135, 102 S.Ct. 1713]*.) In *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc. (5th Cir. 1966) 365 F.2d 478*, the plaintiff, one of three advertising agencies in Pensacola, Florida, charged that the only television station in the vicinity refused to accept its services because of a conspiracy between the station and a competing advertising agency. Under these facts, the court found a violation of *section 1* of the Sherman Act. Again, in *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc. (5th Cir. 1967) 383 F.2d 97*, cert. den. *(1968) 390 U.S. 904 [19 L.Ed.2d 870, 88 S.Ct. 816]*, plaintiff complained of an agreement between Monsanto and a competing dealer. Plaintiff's principal business dealt with a highly specialized commodity in a very limited market -- additives for drilling muds. After selling a specialized additive to plaintiff for many years, Monsanto gave exclusive distributorship rights to a competing dealer who then raised the **[***24]** price to the plaintiff. Stressing the apparent lack of an **[*701]** available substitute for the additive, the court held that the jury could have found that the exclusive distributorship effectively priced the plaintiff out of the market. "Such conduct would constitute a per se violation of *Section 1*." (*Id. at p. 105*.)

But as *Cherokee Laboratories* suggests, an alleged two-party boycott is likely to be equivalent to an exclusive distributorship -- a business arrangement not often subject to antitrust challenges. (See *Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 719 [187 Cal.Rptr. 797]*; *Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418 [313 P.2d 936]*; *Rolley, Inc. v. Merle Norman Cosmetics (1954) 129 Cal.App.2d 844 [278 P.2d 63]*.) In *Klor's*, the court made clear that it did not intend to cast doubt on the legality of such agreements: "This is not a case of a single **[**197]** trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, **[***25]** distributors and a retailer." (*Klor's v. Broadway-Hale Stores, supra, 359 U.S. 207, 212-213 [3 L.Ed.2d 741, 745]*, fn. deleted; quoted in *People v. Santa Clara Valley Bowling etc. Assn. (1965) 238 Cal.App.2d 225, 235 [47 Cal.Rptr. 570]*.) In *Continental T. V., Inc. v. GTE Sylvania Inc. (1977) 433 U.S. 36, 55 [53 L.Ed.2d 568, 583, 97 S.Ct. 2549]*, the court noted that exclusive distributorships may stimulate competition by inducing dealers to accept new products, to invest in service or repair facilities, or to engage in costly promotional activities.

All exclusive distributorship agreements involve an intent to deprive competitors of access to a supplier; this is the *raison d'etre* of the agreement -- the incentive offered to the dealer to make investment and promotional expenses. Cases such as *Six Twenty-Nine Productions* and *Cherokee Laboratories*, in which an exclusive dealing agreement constitutes a boycott, are probably rare and confined to unusual market conditions. Still, the possibility cannot be excluded a priori. Appellant heavily relies on a recent Second Circuit decision that appears to apply **[***26]** such a two-party boycott theory to the motion picture industry.

In *Beech Cinema v. Twentieth Century Fox Film, supra, 622 F.2d 1106*, four affiliated independent theatre operators brought suit against a single major distributor, Twentieth Century Fox Film Corporation (Fox), and a single competing exhibitor, General Cinema Corporation (General Cinema). Beginning about January 1975, Fox ceased to license films to the plaintiffs but continued actively to deal with General Cinema. Plaintiffs secured a favorable jury verdict on the theory that General Cinema had conspired with Fox "to cut off" their access to Fox films. The court found evidence "that Fox had a history of favoring 'circuits' . . . . [para.] . . . that **[*702]** Fox attempted to establish such a circuit deal with General Cinema, with the cut-off of plaintiffs being one term of the agreement . . . [and] [para.] . . . that General Cinema 'bought into' a special circuit deal with Fox by special payments made in connection with the licensing of 'Towering Inferno.'" (*Id. at p. 1109*.) Largely on the strength of this evidence, the court held that there was sufficient evidence **[***27]** "of a conspiracy between General Cinema and Fox to cut off plaintiffs." (*Id. at p. 1110*.)

The opinion's repeated use of the phrase "to cut off plaintiffs" suggests that *Beech Cinema* should be accepted for the proposition that a plan to deprive a competitor of needed trade relations, which satisfies the requirements of a conspiracy, constitutes a boycott even if a single exhibitor and a single distributor are involved. (Cf. *Southway Theatres, Inc. v. Georgia Theatre Co., supra, 672 F.2d 485, 500*.) But the case is difficult to justify on its facts; the court emphasized that the offending agreement was for the mutual economic benefit of the defendants -- a factor that would seem to imply a legitimate business purpose rather than predatory intent. ***CA(6)***[] **(6) (See fn. 2.)** The decision does not attempt to distinguish the alleged conspiracy from the sort of exclusive dealing agreement sanctioned in *Klor's*. [2] On somewhat similar facts, *Columbia Pictures Industries, Inc.* v. *Moyer* (D.C.Or. 1981) *1981-1 Trade Cases* para. 63,878, rejected a boycott theory. **[**198]** (*Id*. at p. 75,554.) The result, moreover, **[***28]** is difficult to reconcile with a later Second Circuit decision, *Oreck Corp. v. Whirlpool Corp. (2d Cir. 1978) 579 F.2d 126*, cert. den. *(1978) 439 U.S. 946 [58 L.Ed.2d 338, 99 S.Ct. 340]*, which also involved an alleged conspiracy between a single distributor and a single supplier.

[*29]** ***CA(7)***[] **(7)** In the case at bar, an inference of a boycott is no doubt facilitated by market factors common to the industry -- the unique character of films and the highly consolidated market structure -- and by the existence of more than one alleged exclusive dealing agreement between Festival Enterprises and major distributors. These factors make it easier to infer that an **[*703]** exclusive dealing agreement serves to drive a competitor out of business. But appellant has produced no evidence of predatory intent. Neither has it shown that the alleged agreements were dictated by the exhibitor, concerned with its own position, rather than granted in the exercise of the distributors' independent discretion. (See *United States v. Chicago Tribune-New York News Syn., Inc. (S.D.N.Y. 1970) 309 F.Supp. 1301, 1307*; *G.H.I.I. v. MTS, Inc., supra, 147 Cal.App.3d 256, 268*.) The evidence actually suggests that the alleged agreements reflect the perceived business advantages to the distributors of dealing with large theatre circuits. This showing plainly falls short of the evidentiary threshold required to sustain a boycott theory of per se liability.

[*30]** ***CA(8)***[] **(8)** The facts may be viewed, however, not as a boycott but as a vertical restraint, suggesting a quite different analysis. Respondents have insisted that this is the proper conceptual framework for the case. Under *Continental T.V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. 36*, such vertical restraints are subject to a rule-of-reason analysis to determine their impact on competition. [3] This approach indeed is most consistent with the

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[2] The oft-repeated rule that film distributors have freedom to choose where their films will play stands as a formidable obstacle to any attempt to characterize an exclusive dealing agreement as a boycott conspiracy. It has always been the prerogative of a supplier to decide with whom it will deal. (*G.H.I.I. v. MTS, Inc. supra*, *147 Cal.App.3d 256, 267-268*.) Thus, "'[A] distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so long as he acts independently . . . .'" (*Lamb's Patio Theatre v. Universal Film Exchanges, supra, 582 F.2d 1068, 1070*; *Admiral Theatre Corp. v. Douglas Theatre Co. (8th Cir. 1978) 585 F.2d 877, 888*; *Paramount Film Distributing Corp. v. Applebaum, supra, 217 F.2d 101, 124*.) "A distributor acting independently has no legal duty to offer equally suitable theaters an equal opportunity to negotiate for or obtain films. [Citation.] Nor must it assess bids consistently or in good faith." (*Universal Amusements Co. v. Gen. Cinema Corp., supra, 635 F.Supp. 1505, 1514-1515*.) It may favor a particular exhibitor "for any reason or no reason at all." (*Id. at p. 1515*.)

[3] This conceptual issue is mirrored in the majority and dissenting opinions in *Oreck Corp. v. Whirlpool Corp., supra, 579 F.2d 126*. When Whirlpool Corp. terminated its vacuum cleaner distributorship, Oreck Corp. brought suit alleging that Whirlpool had acted at the behest of another distributor, Sears Roebuck & Co. The dissent insisted that the case should be analyzed as a boycott involving a per se violation of the Sherman Act. (*Id. at p. 138*.) The majority maintained that "[the] present case,

Supreme Court's analysis in the *Paramount Pictures* decision. The court there was concerned with a market dominated by a few major distributors. The practices of circuit dealing and franchising were enjoined because of their link with the anticompetitive market structure in the motion picture industry.

[*31]** ***CA(9)***[] **(9)** The terms "boycott" and "vertical restraint" are in fact merely labels that call for different forms of antitrust analysis -- one focusing on competitive practices, the other on broader questions of market structure. We regard the two approaches as being potentially complementary; an anticompetitive practice may be linked to anticompetitive market conditions. The question whether a specific practice offends the Sherman Act ought not to exclude a broader inquiry into market structure.

CA(10)[] **(10)** While *Continental T.V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. 36*, held definitively that ***HN4***[] the rule of reason applies to vertical restraints on territory and customers, it did not discuss the application of the rule. A suggestive footnote indicated only that the rule of reason required a "balancing [of] intrabrand and interbrand competitive effects of vertical **[*704]** restrictions . . . ." (*Id. at p. 57, fn. 27 [53 L.Ed.2d at p. 584*].) But as observed in *Valley Liquors, Inc. v. Renfield Importers, Ltd. (7th Cir. 1982) 678 F.2d 742, 745*, "[admittedly], this test of illegality is easier to state than to **[***32]** apply, the effects to be weighed being so difficult to measure or even estimate by the methods of litigation. The courts have therefore looked for shortcuts. A popular one is to say that the balance tips in the defendant's favor if the plaintiff fails to show that the defendant has significant market power (that is, power to raise price significantly above the **[**199]** competitive level without losing all of one's business)."

Since the *Sylvania* decision, several other federal courts applying the rule of reason to vertical restraints have required this threshold inquiry into the defendant's market power. (E.g., *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc., supra*, 792 F.2d 210; *Graphic Products Distributors v. Itek Corp. (11th Cir. 1983) 717 F.2d 1560*; *Muenster Butane, Inc. v. Stewart Co. (5th Cir. 1981) 651 F.2d 292*; *Ralph C.* *Wilson Indus. v. American Broadcasting (N.D.Cal. 1984) 598 F.Supp. 694*, affd. (9th Cir. 1986) *794 F.2d 1359*.) As a practical matter, market power is usually equated with market share. "Since market power can rarely be measured directly by the methods **[***33]** of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography." (*Valley Liquors, Inc. v. Renfield Importers, Ltd., supra, 678 F.2d 742, 745*; see also *Valley Liquors, Inc. v. Renfield Importers, Ltd. (7th Cir. 1987) 822 F.2d 656, 666-667*.) A similar preliminary test of market power has emerged in the area of tying arrangements. (Cf. *People v. National Association of Realtors (1981) 120 Cal.App.3d 459, 468 [174 Cal.Rptr. 728, 22 A.L.R.4th 79]*.) In *Jefferson Parish Hospital Dist. No. 2 v. Hyde (1984) 466 U.S. 2 [80 L.Ed.2d 2, 104 S.Ct. 1551]*, the Supreme Court proscribed tying only when market power "is used to impair competition on the merits in another market" so that a potentially inferior product is insulated from competitive pressures. (*Id*. at p. 14 [80 L.Ed. at p. 14].) The Department of Justice's Vertical Restraints Guidelines, published January 23, 1985, now employ very precise "market structure screen" tests, relying on market shares, to determine whether vertical **[***34]** restraints on territory or customers and tying arrangements should be subject to antitrust scrutiny. (5Trade Reg. Rep. (CCH) para. 50,473.)

Respondent urges us to adopt this approach to the case at bar. If we do so, it will lead directly to affirmance of the summary judgment. Based on ticket sales, the distributor defendants' average market shares for the five-year period at issue were only 16 percent (Warner), 15 percent (Paramount) and 3 percent (Orion). These market shares fail conspicuously to pass the threshold test establishing the defendant's market power. In the absence of **[*705]** any allegation or evidence of collusion among the distributors, the market shares cannot be aggregated to determine the defendants' collective market power. Therefore, respondents argue, there is no need to enter into any further analysis of the competitive impact of the alleged exclusive dealing agreements.

Appellant offers to prove, however, that profitable operations in the theatre business depend on the limited supply of a unique product -- popular first-run films. According to its expert witness, "[a] good picture will do business in a tent. The bad picture won't do good, won't **[***35]** do business in a top theatre." In a typical Modesto theatre, the record shows, a good film may gross as much as $ 25,000 in its first week; a poor picture as little as $ 1,000.

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involving as it does an alleged agreement between a single manufacturer and a single dealer, is, in essence, an exclusive distributorship controversy, and the 'group boycott' doctrine, is, therefore, not applicable." (*Id. at p. 131*)

Hence, if an exhibitor fails to license the rights to show "Raiders of the Lost Ark," it will avail him nothing to negotiate favorable terms for "Amazon Quest" -- a film that has eluded public attention. "Raiders of the Lost Ark" will pack the theatre; "Amazon Quest" will not cover operating expenses. Appellant's film buyer declares, "[the] name of the game in the theatre business is to keep the doors open until one gets a successful picture . . . . To survive, a theatre simply must get the good pictures." [4]

[*36] [**200]** In ***antitrust law***, the interchangeability of products is usually considered in the definition of markets; the boundary of a relevant market is defined by a significant degree of product differentiation. But there will always be some degree of product differentiation within a market -- and as the motion picture industry demonstrated -- very significant product differentiation can occasionally be found within a well-defined market. In *U.S. v. Arnold, Schwinn & Co. (1967) 388 U.S. 365, 381 [18 L.Ed.2d 1249, 1261, 87 S.Ct. 1856]*, the Supreme Court regarded "the presence of adequate sources of alternative products" as a "critical" factor in evaluating the competitive effects of vertical restraints. Holding that consignment sales subject to territorial resale restrictions were not unreasonable restraint of trade, the court relied on the fact "that other competitive bicycles are available to distributors and retailers in the marketplace, and there is no showing that they are **[*706]** not in all respects reasonably interchangeable . . . with the Schwinn product . . . ." (*Id. at p. 381 [18 L.Ed.2d at p. 1261*]; fn. deleted.) [5] Where **[***37]** alternative products are not available, an exclusive franchise agreement may merit antitrust scrutiny. [6] Thus, in *United States v. Chicago Tribune-New York News Syn. Inc., supra, 309 F.Supp. 1301, 1307*, the government challenged exclusive territorial franchises for newspaper features, such as comics and crossword puzzles. Denying a motion to dismiss, the court explained, "[the] government may be able to show at trial that there are no products available in the market which are 'equivalent' to the features of Tribune." We have earlier mentioned *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., supra, 383 F.2d 97*, in connection with boycotts. But in ruling that the jury could find an exclusive franchise agreement in violation of the Sherman Act, the court also drew from cases in the field of vertical restraints. In the court's view, the critical consideration was that "it was open to the jury to infer that competitive products were *not* 'readily available' to others." (*Id. at p. 105*; see also *Southway Theatres, Inc. v. Georgia Theatre Co., supra, 672 F.2d 485, 500*, fn. i; *Ass'n of Independent T.V. v. College Football Ass'n (W.D.Okla. 1986) 637 F.Supp. 1289, 1299* **[***38]** [note relevance of product differentiation].)

In his concurring **[***39]** opinion in *Continental T. V. Inc. v. GTE Sylvania Inc., supra, 433 U.S. 36, 64 [53 L.Ed.2d 568, 589]*, Justice White observed that economists use the criteria both of market share and product differentiation to measure market power. Product differentiation most commonly leads indirectly to a finding of market power by contracting the size of the relevant market, but it has been taken directly into account in the analysis of vertical restraints (*Graphic Products Distributors v. Itek Corp., supra, 717 F.2d 1560, 1570-1571)* and tying. (*Metrix*

[4] In *United States* v. *Columbia Pictures Industries, Inc*. (S.D.N.Y. 1980) *507 F.Supp. 412, 431*, the court accepted a similar argument with respect to the exhibition of films in the pay television industry: "While it is undoubtedly true, as the defendants argue, that the rare, outstanding film can be shown many times (even after it has appeared on commercial television) and will still draw a substantial market, the evidence is overwhelming that 'golden oldies' are not the essential element of pay television; it is the new, never-before-shown-on-television, motion picture that the subscriber pays his money for. The other new pictures of nondefendant movie producers, which would be available equally to Premiere and the rest of the market, are not sufficient to allow equality among competitors." Since "golden oldies" seldom play in commercial theatres, the importance of popular, first-run films may be greater in the theatre exhibition business.

[5] In evaluating vertical restraints, Schwinn applied the rule of reason only to consignment sales, holding that restraints on territories and customers were illegal per se where title passed to the retailer. The decision was reversed in *Continental T.V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. 36* with respect to its rule of per se illegality, but it remains valid authority for application of the rule of reason. The availability of commercially equivalent products continues to be a relevant factor in analyzing vertical restraints in post-Sylvania cases. (See *Donald B. Rice Tire v. Michelin Tire Corp. (1980) 483 F.Supp. 750, 760*.)

[6] Cf. *Lorain Journal v. United States (1951) 342 U.S. 143, 152 [96 L.Ed. 162, 72 S.Ct. 181]* (the fact that buyers cannot compete without seller's product regarded as relevant circumstance in finding violation of *section 2* of the Sherman Act).

Warehouse, Inc. v. *Daimler-Benz Aktiengesellschaft* (D.C.Md.) *1982-2 Trade Cases* para. 64,861; *Colorado Pump & Supply Co.* v. *Febco, Inc*. (10th Cir. 1973) *472 F.2d 637, 640*, cert. den. *(1973) 411 U.S. 987 [36 L.Ed.2d 965, 93 S.Ct. 2274]*.) By reducing the substitutability of products, a high level of product differentiation results in relative inelasticity of cross-product demand. This inelasticity creates opportunities for suppliers to manipulate **[**201]** the price and quantity of goods sold **[*707]** or to entrench their market position **[***40]** by creating barriers to entry in a market. [7]

CA(11a)[] **(11a)** The unusual competitive conditions of the theatre business, marked by the presence of a unique product in short supply, put an entirely different complexion on the issue of market power. Exclusive dealing agreements involving a dominant firm in an industry have long been subject to antitrust scrutiny. [8] **[***42]** But where competitive survival depends on gaining access to a unique product, these agreements may present serious antitrust questions in any well-consolidated industry even if it is dominated by no single firm. This is the situation of the motion picture industry where six major companies distribute the bulk of the most remunerative **[***41]** first-run films. The antitrust concerns may be illustrated by an analogy to a card game. Playing cards, like popular first-run motion pictures, are not substitutable; a given card and no other will complete a winning sequence. Imagine a series of contract bridge tournaments in which the king of spades and queen of hearts -- one-eighth of the face cards -- are consistently removed from the hand of one player and replaced by a numbered card. Although the player may win some hands, he is sure to place low in the competitive standings, tournament after tournament, no matter how skillfully he plays. [9]

This example suggests that if a motion picture exhibitor lacks access to a substantial share of popular first-run films, he may be placed at a grave competitive disadvantage against a competitor who has locked-in access to these films through exclusive dealing agreements. The alleged agreements with Warner Bros. and Paramount Pictures plainly present this issue. During the 3-year period of 1983 through 1985, Warner Bros. and Paramount Pictures distributed no less than 31 of the 60 pictures placing among the top 20 box office hits in each year. As usual in business, failure may beget **[*708]** failure. By getting an inferior share of major films, the theatre may experience difficulties in making prompt rental payments, resulting in strained relationships with distributors, or it may secure fewer regular customers so that, when it does show a major film, it attracts smaller crowds than it otherwise would. The record on the appellant's motion for summary judgment, of **[***43]** course, does not allow us to assess these suppositions; they may be accurate or inaccurate. We can only say that the hypothesis is implicit in appellant's offer of proof.

If this hypothesis is correct, the presence of exclusive dealing agreements between theatre circuits and major distributors may entrench the position of established motion picture exhibitors and pose formidable barriers to entrepreneurs seeking to enter (or expand operations) in the theatre business. The new entrant into the business by definition will lack comparable exclusive dealing agreements and will not easily achieve the bargaining power to negotiate them. An entrepreneur, such as appellant, seeking to enlarge a small foothold in the industry will, of course, face the same difficulties. ***CA(12a)***[] **(12a)** Both the legislative history and subsequent interpretation of

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[7] See *R.C. Dick Geothermal Corp.* v. *Thermogenics, Inc*. (N.D.Cal. 1985) *619 F.Supp. 441, 455*, appeal pending, Ninth Circuit. (The court recognized the relevance of product differentiation to ease of entry in a market. By extension, product differentiation may facilitate the creation of barriers to entry.)

[8] See Sullivan, The Law of Antitrust, *op. cit. supra*, section 149, page 429 [exclusive franchises] and 3 Areeda and Turner, ***Antitrust Law***: An Analysis of Antitrust Principles and their Application (1980), section 732, page 253 [requirements contracts]. Most cases involving such exclusive dealing agreements are decided under the Clayton Act section 3, (*Standard Co. v. Magrane-Houston Co. (1921) 258 U.S. 346 [66 L.Ed. 653, 42 S.Ct. 360]*; *Standard Oil Co. v. United States (1949) 337 U.S. 293 [93 L.Ed. 1371, 69 S.Ct. 1051]*; *Tampa Electric Co. v. Nashville Coal Co. (1961) 365 U.S. 320 [5 L.Ed.2d 580, 81 S.Ct. 623]*) but the Sherman Act contains parallel restrictions. (2 Areeda & Turner, ***Antitrust Law***: An Analysis of Antitrust Principles and their Application, *op cit. supra*, § 304, p. 6; *Interface Group, Inc. v. Mass. Port Authority (1st Cir. 1987) 816 F.2d 9, 11*; *Graphic Products Distributors v. Itek Corp., supra, 717 F.2d 1560*.)

[9] The example is, of course, purely heuristic. We do not mean to suggest that there is any precise mathematical analogy.

the **[**202]** Sherman Act reveal that it was intended to prohibit unreasonable restraints on the freedom of entrepreneurs to enter new markets or to expand a small market share.

CA(13)[] **(13)** "As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." (**[***44]** *Appalachian Coals, Inc. v. U.S. (1933) 288 U.S. 344, 359-360 [77 L.Ed. 825, 829, 53 S.Ct. 471]*; see also *Northern Pac. R. Co. v. United States, supra, 356 U.S. 1, 4 [2 L.Ed.2d 545, 549]*; *People v. Santa Clara Valley Bowling etc. Assn., supra, 238 Cal.App.2d 225, 233*.) Within American political traditions, monopoly has long been perceived as a threat to individual liberties. Jefferson had proposed that a prohibition against monopoly be included in the Bill of Rights. The rapid spread of the trust device in the 1880's merely rekindled old fears of corporate power as a threat to freedoms. (Letwin, Law and Economic Policy in America: the Evolution of the Sherman Antitrust Act (1965) pp. 53-99.) Striking the dominant theme in the congressional debates, Senator Sherman declaimed, "[Then], making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, till they are fast producing that condition in our people in which the great mass of them are the servitors of those **[***45]** who have this aggregated wealth at their command." (21 Cong. Rec. 2461 (1890); see also pp. 2457, 2469.) [10]

[*46] [*709]** ***CA(12b)***[] **(12b)** The policy of assuring access to markets thus is central to the legislative purpose of the Sherman Act. Professors Blake and Jones write, "[not] only are we interested in material well-being and distrustful of political power, but we also have a strong libertarian streak. In the absence of strong countervailing considerations, we favor freedom of action and the wide range of choice that freedom implies. The competitive system dovetails well with this sentiment . . . in providing maximum freedom of opportunity for consumers and for present and prospective businessmen as well . . . . [The] individual who wants to be an entrepreneur rather than an employee ought not to have his opportunities restricted by unnecessary barriers to entry or by trade practice designed specifically to eliminate him from the field." (Blake & Jones, *In Defense of Antitrust* (1979) 65 Colum. L.Rev. 377, 383-384.) [11] Indeed, as **[**203]** the Supreme Court noted in *United States* v. *du Pont & Co. (1956) 351 U.S. 377, 390 [100 L.Ed. 1264, 1278, 76 S.Ct. 994]*, one prominent sponsor of the Act, Senator Hoar, defined monopoly, not in terms of **[***47]** the power to influence the price or quantity of goods sold, but as the power to deny competitors a just and equal opportunity to compete. Monopoly, he asserted, "'involved something like the use of means which made it impossible for other persons to engage in fair competition.'" (*Ibid*. fn. deleted; 21 Cong. Rec. 3151 (1890).)

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[10] This central purpose of assuring freedom of opportunity in the face of accumulations of corporate wealth, now obscured by changing social concerns, was readily apparent to contemporaries. In one of the earliest and most authoritative interpretations of the Sherman Act, *Standard Oil Co. v. United States (1911) 221 U.S. 1, 50 [55 L.Ed. 619, 641, 31 S.Ct. 502]*, the Supreme Court explained, "[the] debates . . . conclusively show . . . that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." Again, in *Ramsay Co. v. Bill Posters Assn. (1923) 260 U.S. 501, 512 [67 L.Ed. 368, 370, 43 S.Ct. 167]*, the court stated that "[the] fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade."

[11] The debate over the purposes of the antitrust laws has generally acknowledged a balance of economic, social, and political goals. Particularly distinguished contributions include: *The Goals of Antitrust: A Dialogue on Policy* (1965) 65 Colum.L.Rev. 363; Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy* (1977) 125 U.Pa.L.Rev. 1182; Letwin, *Congress and the Sherman **Antitrust Law**: 1887-1890* (1956) 23 U.Chi.L.Rev. 221; Bohling, *Franchise Terminations under the Sherman Act: Populism and Relational Power* (1975) 53 Tex.L.Rev. 1180, 1189-1193; Fox, *The Modernization of Antitrust: a New Equilibrium* (1981) 66 Cornell L.Rev. 1140; Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged* (1983) *34 Hastings L.J. 65*; Rowe, *The Decline of Antitrust and the Delusions of Models: the Faustian Pact of Law and Economics* (1984) *72 Georgetown L.J. 1511*. But in recent decades a distinct school of thought has vigorously espoused economic efficiency as the only goal of antitrust. See Bork, The Antitrust Paradox: a Policy at War With Itself (1975); Posner, ***Antitrust Law***: An Economic Perspective (1976).

[*48]** **[*710]** The protection of the entrepreneur's right to compete is an especially prominent theme in the ***antitrust law*** respecting boycotts. (See *Paramount Famous Corp. v. U.S. (1930) 282 U.S. 30, 43 [75 L.Ed. 145, 150-151, 51 S.Ct. 42]*; *Fashion Guild* v. *Trade Comm'n, supra*, 312 U.S. 457, 465 [85 L.Ed. 949, 953]; *United States v. General Motors, supra, 384 U.S. 127, 140 [16 L.Ed.2d 415, 423-424]*.) In *Associated Press v. United States (1945) 326 U.S. 1 [89 L.Ed. 2013, 65 S.Ct. 1416]*, the Supreme Court considered a bylaw of a cooperative news gathering association that prohibited "all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership." (*Id. at p. 4 [89 L.Ed. 2013, 2021-2022]*.) Ruling that the bylaws violated the Sherman Act, it found, "[the] net effect is seriously to limit the opportunity of any new paper to enter these cities. Trade restraints of this character, aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and to **[***49]** frustrate the free enterprise system which it was the purpose of the Sherman Act to protect." (*Id. at pp. 13-14*, fn. deleted [*89 L.Ed. at p. 2027*].) Again, in *Silver v. New York Stock Exchange, supra, 373 U.S. 341*, the court found that a stock exchange procedure that effectively denied the plaintiff an opportunity to enter the securities business constituted a group boycott, falling outside the protection of the Securities Exchange Act (15 U.S.C. § 78 et seq.). Finally, in *Klor's v. Broadway-Hale Stores, supra, 359 U.S. 207*, as we have seen, the court held that a conspiracy to drive out of business a single small businessman violated the act. "[It] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." (*Id. at p. 213 [3 L.Ed.2d at p. 745*], quoted in *People v. Santa Clara Valley Bowling etc. Assn., supra, 238 Cal.App.2d 225, 233*.) **[***50]**

In terms of economic theory, significant barriers to entry "are the *sine qua non* of monopoly and oligopoly . . . ." (Scherer, Industrial Market Structure and Economic Performance, (1980) p. 10) These barriers are objectionable on social as well as economic grounds. As explained in *Berkey Photo, Inc. v. Eastman Kodak Co. (2d Cir. 1979) 603 F.2d 263, 273 [53 A.L.R.Fed. 768]*, cert. den. *(1980) 444 U.S. 1093 [62 L.Ed.2d 783, 100 S.Ct. 1061]*, "[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." In *Brown Shoe Co. v. United States (1962) 370 U.S. 294, 316*, footnote 28 [*8 L.Ed.2d 510, 530-531, 82 S.Ct. 1502]*, the Supreme Court quoted from the opinion of Justice Learned Hand in *United States v. Aluminum Co. of America (2d Cir. 1945) 148 F.2d 416, 429*: **[*711]** "'Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an **[***51]** organization of industry in small units which can effectively compete with each other.'" (See also *id. at pp. 427-428*; *Brown Shoe Co.* v. *United States, supra*, 370 U.S. at p. 344 [8 L.Ed.2d at p. 547].) Similarly, decisions concerning monopolies based on ownership of essential facilities, such as wholesale produce markets, have condemned policies **[**204]** that restrict the freedom of entrepreneurs to enter or expand their operations in affected markets. (*Bale v. Glasgow Tobacco Board of Trade, Incorporated (6th Cir. 1964) 339 F.2d 281, 286-287*.) Invalidating a lease restriction in a produce market, one court observed, "[the] [Sherman] Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones." (*Gamco, Inc. v. Providence Fruit & Produce Bldg. (1st Cir. 1952) 194 F.2d 484, 487*.)

Safeguarding the entrepreneur's freedom to challenge established competitors has been a central concern in the field of vertical mergers. In *Brown Shoe Co.* v. *United States, supra*, 370 U.S. 294, 323-324 [8 L.Ed.2d 510, 535], the Supreme Court declared, **[***52]** ***HN5***[↑] "[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 [93 L.Ed. 1371, 1386, 69 S.Ct. 1051]*, which '[deprivess] . . . rivals of a fair opportunity to compete.'" (Fn. deleted; quoted in *Ford Motor Co. v. United States (1972) 405 U.S. 562, 570 [31 L.Ed.2d 492, 500, 92 S.Ct. 1142]*; see also *FTC v. Procter & Gamble Co. (1967) 386 U.S. 568, 578 [18 L.Ed.2d 303, 310, 87 S.Ct. 1224]*.) While employing a multifactor analysis, the courts have examined the degree to which vertical acquisitions "may increase barriers to entry into the market or reduce competition by . . . foreclosing competitors of the selling firm . . . from access to the market or a substantial portion of it, . . ." (*Fruehauf Corp. v. F. T. C. (2d Cir. 1979) 603*

F.2d 345, 352; Mississippi River Corporation v. F. T. C. (8th Cir. 1972) 454 F.2d 1083, 1091; **[***53]** Crouse-Hinds Co. v. Internorth, Inc. (N.D.N.Y. 1980) 518 F.Supp. 416, 430.) [12]

In *United States v. Topco Associates (1972) 405 U.S. 596 [31 L.Ed.2d 515, 92 S.Ct. 1126]*, holding a horizontal system of territorial restraints to be a per se violation of the Sherman Act, the Supreme Court again invoked the **[*712]** entrepreneur's right to freely compete in new or expanded markets. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection **[***54]** of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy . . . ." (*Id. at p. 610 [31 L.Ed.2d at p. 527]*.) In another context, Justice Douglas similarly observed, "[a] nation of clerks is anathema to the American antitrust dream." (*United States v. Falstaff Brewing Corp. (1973) 410 U.S. 526, 543 [35 L.Ed.2d 475, 488, 93 S.Ct. 1096]*, conc. opn.)

HN6[] In the field of vertical restraints, the Supreme Court has said that restrictions may be justified under the rule of reason if they are "the only practicable means a small company has for breaking into or staying in business." (*White Motor Co. v. United States (1963) 372 U.S. 253, 263 [9 L.Ed.2d 738, 746, 83 S.Ct. 696]*.) Similarly, tying arrangements that would otherwise offend ***antitrust law*** have been sanctioned as a means of a firm gaining entry into a market: "Thus, unless the tying **[***55]** device is employed by a small company in an attempt to break into a market [citation], the use of a tying device can rarely be harmonized with the strictures of the antitrust laws, . . ." (*Brown Shoe Co.* v. *United States, supra*, 370 U.S. 294, 330 [8 L.Ed.2d 510, 538-539]; fn. deleted.) In *Standard Oil Co. v. United States, supra, 337 U.S. 293*, on facts presenting an analogy to the case at bar, the court held that exclusive supply contracts violated section 3 of the Clayton **[**205]** Act. [13] Although Standard Oil did not itself dominate the retail market, the other major distributors employed similar exclusive dealing agreements. The court observed, "[when] it is remembered that all the other major suppliers have also been using requirements contracts, and when it is noted that the relative share of the business which fell to each has remained about the same during the period of their use, it would not be farfetched to infer that their effect has been to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting **[***56]** away more than an insignificant portion of the market." (*Id. at p. 309 [93 L.Ed. at pp. 1383-1384]*; fn. deleted.)

[*713] A recent decision of the California Supreme Court interpreting the Cartwright Act draws attention to the ***antitrust law*** policy of securing free access to markets. In *Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920*, the court discussed restrictions imposed by a county board of realtors, "limiting its membership to persons primarily engaged in the real estate business and . . . denying nonmembers access to its multiple listing service." (*Id. at p. 924*.) **[***57]** The court noted, "[another] beneficiary of the ***antitrust law*** is the competitor himself. The preservation of competition, while indirectly aiding society by producing lower prices and higher quality goods and services, directly aids the scrupulous trader by insuring him a fair opportunity to compete on the market." (*Id. at p. 935*.) Under this standard, it held the restrictions to violate the Cartwright Act: "The problems of a nonmember of the board in competing against this colossus are manifest . . . . [One] does not need an advanced degree in economics to predict whose services a buyer or seller of a home is likely to engage. The access rule, in short, seriously hampers the competitive effectiveness of nonmember licensed brokers and salesmen." (*Id. at pp. 935-936*; fn. deleted.)

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[12] Since the 1950 amendments to the Clayton Act, antitrust litigation in this field has generally relied on the relatively expansive provisions of the Clayton Act, section 7, but the same analysis applies to the Sherman Act, *section 1*. (*Intern. Tel. & Tel. Corp.* v. *General Tel. & Elect.* *Corp. (D.Haw. 1978) 449 F.Supp. 1158, 1173*.)

[13] Although the court did not reach the issue of Sherman Act violation, the decision is relevant to the Cartwright Act. *Business and Professions Code section 16727* is patterned after section 3 of the Clayton Act. (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785, 484 P.2d 953]*.)

It will be recalled that the discussion of circuit dealing in *United States v. Paramount Pictures, supra, 334 U.S. 131*, turned essentially on the question of free access to markets. Referring to the two prevailing forms of circuit dealing, the Supreme Court stated, "they eliminate the opportunity for the small competitor to obtain the choice **[***58]** first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators." (*Id. at p. 154 [92 L.Ed. at p. 1291*].) *Paramount Pictures* remains the governing law on the subject, and it is evident that the concern expressed by the court has not subsided.

CA(11b)[] **(11b)** We conclude that the alleged agreements with Paramount Pictures and Warner Bros., if proved, would present a triable issue of an unreasonable restraint of trade under the Cartwright Act. (*Bus. & Prof. Code, § 16720*.) ***CA(14)***[] **(14)** "***HN7***[] Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. supra*, *4 Cal.3d 842, 855*.) ***CA(11c)***[] **(11c)** The summary judgment is reversed as to these defendants. In this appeal we do not need to consider whether appellant has presented a triable issue as to the *existence* of the alleged agreements. By denying appellant's motion to compel production of cutoff cards, the trial court has deprived it of potentially probative evidence. **[***59]** It would be unfair to hold that it has failed to present a triable issue of fact as to the existence of the agreements while denying it a promising avenue of proof. On remand, appellant should be allowed to renew its discovery motion, but if the motion fails to yield the probative evidence **[*714]** appellant predicts, **[**206]** our decision is not intended to preclude respondent from moving again for summary judgment on the ground that there is no triable issue of fact as to the existence of the alleged agreements.

CA(15)[] **(15)** We find no triable issue, however, as to defendant Orion. The distributor came into corporate existence in 1983 as the successor of a company called Filmways. During the period covered by the complaint, it achieved only a 3 percent market share. Most significant, none of its films were among the big money-makers in this period. [14] As Orion is itself a new entrant and a relatively marginal participant in the industry, it would be anomalous to hold that it was responsible for imposing barriers to fair competition among exhibitors.

[*60]** ***CA(16)***[] **(16)** Lastly, the summary judgment should be affirmed with respect to appellant's fraud cause of action. The complaint fails to allege the essential elements of the tort and appellant's own affidavits tend to rebut both the existence of misrepresentation and action in reliance thereon.

The summary judgment in favor of defendants Festival Enterprises, Inc., Paramount Pictures and Warner Bros. is reversed as to the Cartwright Act cause of action and affirmed as to the fraud cause of action. The summary judgment in favor of defendant Orion is affirmed.

Appellant is entitled to costs on appeal.

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[14] Appellant's claim of damages is based on failure to obtain five films from Orion. Of these, "The Terminator" ranked 25th in rentals in 1984 and "The Woman in Red" and "Breathless" each ranked 35th in rentals in 1984 and 1983 respectively.

GWC Restaurants, Inc. v. Hawaiian Flour Mills, Inc.

United States District Court for the District of Hawaii

April 27, 1988, Decided ; April 27, 1988, Filed

Civ. No. 88-00077 ACK

Reporter
691 F. Supp. 247 *; 1988 U.S. Dist. LEXIS 8880 **; 1988-2 Trade Cas. (CCH) P68,391

GWC RESTAURANTS, INC., Plaintiff, v. HAWAIIAN FLOUR MILLS, INC., an Oregon corporation, doing business as "HFM First In Foods," Defendant

Core Terms

alleges, interstate commerce, Robinson-Patman Act, practices, commerce, defense motion, transactions, restaurant, customers, merchant, margin

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

The legal standard by which to scrutinize a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, is whether plaintiff has stated a claim for relief for which relief can be granted by a federal district court. Dismissal is an extraordinary remedy which is viewed with disfavor in the federal courts. A motion to dismiss should not be granted 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 allegations of the complaint should be construed most favorably to the pleader when passing on a motion to dismiss.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

Haw. Rev. Stat. § 480-2 while amended to preclude the bringing of unfair and deceptive trade practices by businessmen or merchants between themselves, does not preclude suit for causes of action which arose prior to the effective date of amendment which was effective June 14, 1987.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN3[] Robinson-Patman Act, Claims

The Robinson-Patman Act is designed to allow for redress for customer injuries where a seller is charged with offering certain favored customers discounts or other price advantages not readily available to competing disfavored customers.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

HN4[] Robinson-Patman Act, Claims

To prove jurisdiction under *§ 2(a)* of the Robinson-Patman Act, a plaintiff must demonstrate: (1) that the defendant is engaged in interstate commerce, (2) that the price discrimination occurred in the course of such commerce, and (3) that either or any of the purchases involved in such discrimination are in commerce. The jurisdictional "in commerce" language in *§ 2(a)* is not as broad as the "affecting commerce" language in the Sherman Antitrust Act. In particular, the "purchases in commerce" requirement limits the application of *§ 2(a)* to cases where at least one of the two transactions which, when compared generate a discrimination crosses a state line.

Contracts Law > Defenses > Usury

HN5[] Defenses, Usury

Haw. Rev. Stat. § 478-6 provides that the maximum permissible interest rate is no more than one percent per month.

Commercial Law (UCC) > ... > Subject Matter > Goods > General Overview

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

Commercial Law (UCC) > ... > Subject Matter > Definitions > Merchants

HN6[] Subject Matter, Goods

Haw. Rev. Stat. § 490:2-104 provides in part the definition of merchant as a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.

Torts > Negligence > General Overview

HN7[] Torts, Negligence

Under Hawaii law, a negligence claim is stated by an allegation that the acts or omissions of a party were done negligently.

Counsel: **[**1]** James M. Sattler, Frederick W. Rohlfing, Honolulu, Hawaii, for Plaintiff.

Reinwald O'Connor Marrach & Hoskins, John Hoskins, Patricia Wall, Honolulu, Hawaii, for Defendant.

Judges: Alan C. Kay, United States District Judge.

Opinion by: KAY

Opinion

[*248] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND LEAVE TO AMEND

ALAN C. KAY, UNITED STATES DISTRICT JUDGE.

Defendant filed a motion with this court to dismiss plaintiff's complaint and for *Rule 11* sanctions. ***HN1***[] The legal standard by which to scrutinize a motion to dismiss under *Rule 12(b) (6), Fed. R. Civ. P.*, is whether plaintiff has stated a claim for relief for which relief can be granted by this court. Dismissal is an extraordinary remedy which is viewed with disfavor in the federal courts. *De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978)*; *United States v. City of Redwood, 640 F.2d 963, 966 (9th Cir. 1981)*. The U.S. Supreme Court has stated that a motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99* ***[*249]*** *(1957)*. The allegations of the complaint should be construed most favorably to the pleader when passing on **[**2]** a motion to dismiss. *De La Cruz, 582 F.2d at 48*.

Plaintiff's complaint contained counts for breach of contract, unfair and deceptive trade practices under Hawaii Rev. Stat. Ch. 480, violation of the Clayton Act (Robinson-Patman Act), usury and negligence.

BACKGROUND

Hawaiian Flour Mills (HFM) is a wholesale supplier of foods and other products to customers in the State of Hawaii. GWC Restaurants (GWC) is a customer of HFM. GWC has a balance due and owing of over $ 85,000.00 to HFM. HFM alleges that this complaint was filed by GWC in an attempt to circumvent paying the past due account.

There exists an "Agreement" which is an unsigned contract prepared by HFM which outlines the terms of business between HFM and GWC. The legal effect of this "Agreement" is partly the basis for this lawsuit.

Count I: Breach of Contract

Defendant alleges that the Statute of Frauds bars plaintiff's breach of contract claim under *Hawaii Rev. Stat. § 490:2-201* which requires a *signed* agreement for a contract to be enforceable for the sale of $ 500 or more worth of goods. Plaintiff alleges that the statute of frauds is not applicable because the goods subject to the breach of contract claim **[**3]** have been bought and payment has already been made. Plaintiff states that it has paid over $ 800,000.00 for goods from HFM between August 1, 1985 through January 31, 1988. Plaintiff therefore asserts that the statute of frauds is made inapplicable through *Hawaii Rev. Stat. § 490:2-201(3)* which provides that a contract which does not satisfy the statute of frauds but which is otherwise valid is enforceable with respect to goods for which payment has been made and accepted.

GWC alleges that the unsigned agreement relied upon by both parties and formed the basis of a valid contract. In addition, plaintiff alleges that the payment it made for goods is sufficient to make the contract allegedly formed between GWC and HFM enforceable. Because the allegations of the complaint must be taken as true for determining a motion to dismiss, this is sufficient to deny defendant's motion to dismiss as to Count I.

Count II: Unfair and Deceptive Trade Practices

Defendant alleges that plaintiff's claim for unfair and deceptive trade practices must be dismissed. However, this court finds that ***HN2***[] *Haw. Rev. Stat. § 480-2* while amended to preclude the bringing of unfair and deceptive trade practices by **[**4]** businessmen or merchants between themselves, does not preclude suit for causes of action which arose prior to the effective date of amendment which was effective June 14, 1987. Therefore, count II is not dismissed.

Count III: Clayton Act (Robinson-Patman Act)

Plaintiff alleges in Count III that defendant has violated *15 U.S.C. Section 13(a)*, *Section 2(a)* of the Clayton Act, also known as the Robinson-Patman Act (RPA). ***HN3***[] The Robinson-Patman Act was designed to allow for redress for customer injuries where a seller is charged with offering certain favored customers discounts or other price advantages not readily available to competing disfavored customers. 5 Von Kalinowski, ANTITRUST LAWS AND TRADE REGULATION § 30.01.

In its complaint, plaintiff alleges that HFM is an Oregon corporation which does business in Hawaii with Hawaii restaurant consumers among others. Plaintiff also alleges in paragraph 21.b that HFM made initial representations that its initial margin rate of 13% was customary and reasonable in the Hawaii market for a single restaurant. As defined in the complaint, a margin is the difference between the cost of the product and the selling price. The plaintiff alleges **[**5]** that under the unsigned agreement, which it followed, and the initial representations made by HFM representatives, the margin rate would be 13%. Plaintiff later found that it had been **[*250]** charged a margin rate of between 18% to 21%. The plaintiff states that it has been subject to misrepresentation regarding the margin rate that it has been charged for its accounts. For the purposes of this motion, the issue on this count is whether the plaintiff has adequately stated a claim under the RPA for price discrimination.

In *Zoslaw v. MCA Distributing Co., 693 F.2d 870 (1982)*, the Ninth Circuit discussed the jurisdictional requirements necessary to maintain a RPA action,

> ***HN4***[] To prove jurisdiction under *Section 2(a)* of the Robinson-Patman Act, a plaintiff must demonstrate: (1) that the defendant is "engaged in interstate commerce," (2) that the price discrimination occurred "in the course of such commerce," and (3) that "either or any of the purchases involved in such discrimination are in commerce." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1043 (9th Cir. 1981)*.
>
> In *Gulf Oil v. Copp Paving Co., [419 U.S. 186 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974)]*, the Supreme Court concluded that the jurisdictional "in **[**6]** commerce" language in *section 2(a)* is not as broad as the "affecting commerce" language in the Sherman Antitrust Act. In particular, the court interpreted the "purchases in commerce" requirement as limiting the section's application to cases "where 'at least one of the two transactions which, when compared generate a discrimination . . . cross[es] a state line.'"

Zoslaw at 877. (citations omitted).

The elements of a RPA claim which must be alleged in this case to maintain jurisdiction of the claim would therefore include that:

1. HFM is engaged in interstate commerce;
2. HFM's price discrimination took place in the course of interstate commerce;
3. one of HFM's discriminatory transactions was "in commerce" which crossed state lines.

Plaintiff has not alleged that HFM has engaged in interstate commerce aside from the fact that it states that HFM is an Oregon corporation. In addition, plaintiff has not alleged that the alleged price discrimination has taken place in interstate commerce. The RPA requires that any discriminatory pricing must take place in interstate commerce, not merely affect interstate commerce. *Gulf Oil v. Copp Paving Co., 419 U.S. 186, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974)*. In this **[**7]** case, plaintiff merely alleges that HFM has sold goods to Hawaii consumers without alleging that the goods have been sold across state boundaries either to them or to other competing restaurants.

Gulf Oil involved the intrastate sale of liquid asphalt paving material. Even though Gulf Oil engaged in interstate commerce, the subject transactions were purely intrastate in character. The Supreme Court held that at least one of the two transactions (to either the favored or disfavored competitor) must be alleged to have crossed a state boundary. In the instant case, plaintiff has failed to do so in its complaint and the court need not look farther to find that the jurisdictional requirements of the RPA have not been met.

Count III is dismissed with leave to amend. *Austin v. House of Vision, Inc., 385 F.2d 171 (7th Cir. 1967)*.

Count IV: Usury

The usury claim is premised upon ***HN5***[] *Hawaii Rev. Stat. § 478-6* which provides that the maximum permissible interest rate is no more than 1% per month. Defendant claims that the usury statutes are not applicable between merchants under § 478-8. The plaintiff asserts that it is not a merchant under ***HN6***[] *Hawaii Rev. Stat. § 490:2-104*, which provides **[**8]** in pertinent part the definition of merchant,

> a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. . . .

This court finds that plaintiff is a merchant under *Haw. Rev. Stat. § 490:2-104* because the transactions took place over a two year period and as a professional restaurant **[*251]** business, GWC held itself out as having the knowledge or skill peculiar to the practices or goods involved in the transaction. Accordingly, Count IV is dismissed.

Count V: Negligence

The negligence claim arises from plaintiff's assertions that the breach of contractual duties give rise to a negligence cause of action. Plaintiff states that it has alleged duties and obligations by virtue of the contract between the two parties and that Count I, II and III allege that defendant has breached those duties to plaintiff. ***HN7***[] Under Hawaii law, a negligence claim is stated by an allegation that the acts or omissions of a party were done negligently. *Taba v. Jardin, 30 Haw. 452 (1928)*; *Ciacci v. Woolley, 33 Haw. 247 (1934)*; *Morgan v. Yamada, 26 Haw. 17 (1921)*. Under Hawaii **[**9]** law, plaintiff has sufficiently stated a negligence claim. Therefore, Count V is not dismissed.

Defendants motion for *Rule 11* sanctions will be denied.

CONCLUSIONS

The court, having reviewed the motions, memoranda in support and in opposition thereto, the file, and having heard oral arguments by counsel, hereby ORDERS that defendant's motion to dismiss is denied as to Counts I, II, and V of plaintiff's complaint. Defendant's motion to dismiss is hereby granted as to Counts III (Robinson-Patman Act) and IV (usury) of plaintiff's complaint. Plaintiff is granted leave to amend its Robinson-Patman Act claim.

DATED: Honolulu, Hawaii, April 27, 1988.

LexisNexis

In re Baker

United States District Court for the District of Colorado

April 27, 1988, Decided ; April 27, 1988, Filed

Civil Action No. 87-C-1611

Reporter

86 B.R. 234 *; 1988 U.S. Dist. LEXIS 3605 **

In re Daniel George BAKER f/d/b/a DBI Enterprises and Lois Lorrine Baker, Debtor. Robert Carl ANTHONY, Plaintiff, v. Daniel George BAKER, individually and as the Deputy Sheriff of the County of El Paso, Colorado, Defendant

Core Terms

withdrawal, district court, bankruptcy court, mandatory, malicious, personal injury tort, federal law, indictment, deprive, rights, cases

Counsel: **[**1]** Alan J. Harper, Denver, Colorado, for Plaintiff.

Phillip A. Vaglica, Colorado Springs, Colorado, and Frank A. Natchez, Colorado Springs, Colorado, for Defendant.

Judges: Jim R. Carrigan, United States District Court.

Opinion by: CARRIGAN

Opinion

[*235] ORDER

JIM R. CARRIGAN, UNITED STATES DISTRICT COURT

This matter is before the court on plaintiff Robert Carl Anthony's motion for withdrawal of reference of an adversary action filed in the United States Bankruptcy Court for the District of Colorado. Jurisdiction is alleged to exist under *28 U.S.C. §§ 157(b)(5)*, *157(d)*, and *1334(a)*.

The facts surrounding this case were stated by the court in *Anthony v. Baker, 767 F.2d 657 (10th Cir. 1985)*: Plaintiff was employed as the general manager of the Springs Motor Inn ("Inn") in Colorado Springs, Colorado, when a serious fire caused substantial damage to the Inn in September 1980. On the morning of the fire, the defendant Dan Baker, a detective in the El Paso County Sheriff's Department, conducted a fire scene investigation. From his investigation he determined that the fire had been set to obtain money through insurance fraud.

On April 2, 1981, Anthony was indicted by an El Paso County Grand Jury for felony theft based on insurance fraud. The indictment was returned after the Grand **[**2]** Jury, during six sessions, heard the testimony of over twenty witnesses, including Anthony and Baker. Although El Paso County District Court Judge David Parrish concluded that the Grand Jury had probable cause to indict Anthony, he nevertheless dismissed the indictment upon determining "'that not all of the nine jurors who had voted for the indictment had been present at all the sessions where the evidence was presented.'" *767 F.2d at 659* *(citing* App. Rec. Vol. VIII at 14).

Immediately thereafter, the district attorney's office for the Fourth Judicial District of Colorado filed a direct information charging Anthony with felony theft based on insurance fraud. Following a preliminary hearing, Judge Parrish found probable cause and bound Anthony over for trial. After trial to the court, Anthony was found not guilty. At no time did the insurance companies that paid the fire insurance claims for the Inn file formal written complaints for fraud.

Plaintiff Anthony then filed an action under *42 U.S.C. § 1983* against Baker and others for malicious prosecution and deprivation of his constitutional rights. Anthony alleged, among other things, that Baker and Newton conspired to deprive him **[**3]** of his constitutional rights by: (1) making him the target of their investigation; (2) giving false information to the Grand Jury; (3) and covering up exculpatory information.

Prior to trial, Judge John P. Moore, then of this court, denied Baker's and Newton's motion to dismiss, or in the alternative for summary judgment. The court, however, granted their motion for a directed verdict after Baker had presented his case. Among other things, the court concluded that: (1) Baker's conduct was more properly described as negligent, and not malicious; (2) none of the witnesses testified or even suggested that Baker was motivated by malice with the intent to deprive Anthony of a federally guaranteed right; (3) Anthony did not meet his burden of establishing that Baker was motivated by a specific intent to deprive him of a federally guaranteed right to due process; and (4) police officers are immune from liability for conduct performed within the scope of their official duties unless the plaintiff shows that the official knew or should have known that his actions violated of established constitutional or statutory principles. The court also awarded the defendants their attorneys' fees. [1]

[4]** **[*236]** On appeal, the Tenth Circuit Court of Appeals reversed in part and remanded in part. It held that the trial record contained sufficient evidence from which the jury could find that Baker's methods in carrying out his investigation of Anthony constituted egregious conduct so as to deprive him of qualified immunity. The court stated that it did "not agree with the district court's finding that the record does not suggest by hint or indirection that Baker was motivated by malice and that Baker was entitled to immunity . . . ." *767 F.2d at 657*. The court of appeals remanded to this court.

Included in the remanded case are the plaintiff's civil rights claims against Baker and Anthony (Civil Action No. 82-C-1025). Those claims currently are pending in this court, and a jury trial has been demanded. However, by order dated July 27, 1987, I enforced indefinitely the automatic stay required by *11 U.S.C. § 362*.

On October 23, 1987, the plaintiff filed a complaint for an adversary proceeding in the bankruptcy court to determine the dischargeability of a debt under *11 U.S.C. § 523(a)(6)*, and *§ 523(c)*. Three days later, the plaintiff filed the currently pending motion to withdraw reference.

The **[**5]** Supreme Court, in *Northern Pipeline Construction Corp. v. Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982)*, recognized constitutional limits on Congress to assign certain adjudicative authority to non-Article III judges, such as federal bankruptcy judges. That decision held the then existing bankruptcy court powers unconstitutional. *Burger King Corp. v. B-K of Kansas, Inc., 64 B.R. 728, 730 (D. Kan. 1986)*. In 1984 Congress responded to *Marathon* by granting to federal district courts original jurisdiction over all cases arising under title 11 of the Bankruptcy Code. *See* *28 U.S.C. § 1334(b)*. District courts are permitted, however, to refer bankruptcy cases to the bankruptcy court. *28 U.S.C. § 157(a)*. Upon proper showing, however, that reference either may or must be withdrawn, depending on the circumstances.

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[1] The district court also determined that under no circumstances could the jury infer from the facts presented any basis that would allow recovery by the plaintiff. Additionally, the court noted that under *§ 1983* the acts of law enforcement officials leading to prosecution in state court can only be the basis of recovery when it clearly appears that those actions were taken with the intent to deprive the plaintiff of the valid exercise of a constitutional right or a clearly defined right under federal law. It reasoned that it is only when police officers or others with prosecutorial authority act maliciously or recklessly for the purpose of depriving an individual of a federally protected right that those officers or prosecutorial officials are culpable.

Plaintiff contends that withdrawal of reference of the plaintiff's claims against Baker is mandated under both 28 U.S.C. § 157(b)(5), and 28 U.S.C. § 157(d). The parties have briefed the issues and oral argument would not materially assist my decision.

28 U.S.C. § 157(b)(5).

Section 157(b)(5) provides:

> "The district court shall order that personal injury tort and **[**6]** wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

See *In re UNR Industries, Inc., 45 B.R. 322 (N.D. Ill. 1984)* (*section 157(b)(5)* required that asbestos claims against debtor be tried in district court rather than bankruptcy court).

Plaintiff argues that withdrawal is mandatory under § 157(b)(5) because his complaint filed in Civil Action 82-C-1025 alleges that the debtor/defendant is liable under § 1983 for the personal injury tort of malicious prosecution. Plaintiff obviously has alleged a personal injury tort. Therefore withdrawal appears mandatory under § 157(b)(5).

Notably, however, I am unaware of any case decided under § 157(b)(5) where the personal injury tort was alleged within a § 1983 claim. Yet I need not address the issue of whether § 157(b)(5) applies to personal injury torts pleaded under § 1983 because as discussed below, *infra,* I conclude that withdrawal of reference to the bankruptcy court is mandatory under § 157(d).

28 U.S.C. § 157(d).

Section 157(d) permits the district court **[**7]** to withdraw its reference of the case if the **[*237]** matter involves law that should or must be adjudicated by an Article III court. *Burger King, at 730*. Specifically, § 157(d) states:

> "The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 . . . . and other laws of the United States regulating organizations or activities affecting interstate commerce."

Section 157(d) provides for both permissive and mandatory withdrawal. The district court must withdraw a proceeding whose resolution will require considering both Title 11 *and* other federal law other than the Bankruptcy Code. *Burger King, supra, 64 B.R. at 731*. [2]

[8]** Much dispute has arisen from the interpretation of the § 157(d) mandatory withdrawal clause. As noted by one court:

> "The first area of dispute concerns whether the requirement that the proceeding involve consideration of both title 11 and non-Code federal law should be read literally. One theory suggests that withdrawal is mandatory when resolution of the claims will require substantial and material claims of non-bankruptcy code statutes . . . .

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[2] The district court *may* withdraw the entire case from the bankruptcy court for "cause shown." 28 U.S.C. § 157(d). In *DeLorean Motor Co. v. Allard, 49 B.R. 900, 912 (Bankr. E.D. Mich. 1985)*, the court stated that the "cause shown" test "is, to be sure, an amorphous test. It is a chameleon within the legal lexicon whose definition is created by its application." The court further observed that use of the phrase "cause shown" in § 157(d):

> "Creates a presumption that Congress intended to have bankruptcy proceedings adjudicated in the bankruptcy court unless rebutted by a contravening policy. The presumption may be overcome only by an overriding interest based on a finding by the court that the withdrawal of reference is *essential* to preserve a higher interest than that recognized by Congress and is narrowly tailored to serve that interest." *49 B.R. at 912* (emphasis in original)(citation omitted).

> The second theory holds that the statute should be literally translated, *i.e.,* mandatory withdrawal is required only when resolution of the proceeding requires consideration of *both* title 11 and non-Code federal law." *Burger King, supra, at 731* (emphasis in original; citations omitted).

In *In re White Motor Corp., 42 B.R. 693, 705 (N.D. Ohio 1984)*, the court held that mandatory withdrawal of reference is required "only if the [district court] can make an affirmative determination that resolution of the claims will require *substantial* and *material* considerations of those non-Code statutes." (Emphasis added.)

The court in *Holland America Insurance Co. v. Succession of Roy, 777 F.2d 992 (5th Cir. 1985)*, considered **[**9]** the following factors in determining the issue of withdrawal of reference under *§ 157(d)*: (1) whether the case only involves state law; (2) judicial economy; (3) uniformity in bankruptcy administration; (4) reduction of forum shopping; (5) economical use of debtor's and creditors' resources; (6) expediting the bankruptcy process; and (7) whether or not a jury trial has been requested.

In *Michigan Milk Producers Association v. Hunter, 46 B.R. 214 (N.D. Ohio 1985)*, the plaintiff filed in bankruptcy court an adversary complaint against the trustee to determine its rights as a secured creditor. The trustee counterclaimed, alleging that an agreement between the plaintiff and the debtor violated the Sherman Anti-Trust Act, *15 U.S.C. § 1*. Subsequently, the trustee filed a motion for withdrawal of reference. The district court granted the motion, reasoning that resolution of the proceedings would require substantial and material consideration of federal ***antitrust law***, as well as the plaintiff's rights as a secured creditor, and thus, "resolution of the instant adversary proceeding would require consideration of both Title 11 and non-bankruptcy federal statutes regulating organizations or **[**10]** activities affecting interstate commerce." *Id. at 216*.

In the present action the plaintiff contends that withdrawal is mandatory under *§ 157(d)* because resolution of his claim against the debtor/defendant will require **[*238]** substantial and material consideration of: (1) dischargeability issues under title 11; and (2) issues of federal law under *42 U.S.C. § 1983*, and the *Fourth*, *Fifth*, *Sixth*, *Ninth* and *Fourteenth Amendments to the United States Constitution*. [3]

The complaint in the adversary proceeding filed in bankruptcy court avers that the defendant's debt to the plaintiff is nondischargeable under *11 U.S.C. § 523(a)(6)*, and *§ 523(c)*. *Section 523(a)(6)* declares that a debtor may not receive a discharge from any debt for willful or malicious injury by the debtor to another entity or to the property of another entity. [4] In order to fall within this exception to discharge, the injury to the entity or the property must have been willful and malicious. **[**11]** "Willful" means "deliberate or intentional." 3 *Collier on Bankruptcy § 523.16* (15th ed.); *In re Louis, 49 B.R. 135, 137 (Bankr. E.D. Wis. 1985)*. A showing of willfulness requires more than proof of inadvertence or negligence, and no longer may be satisfied by merely proving "reckless disregard." *Id.*

By asserting a claim pursuant to *42 U.S.C. § 1983*, the plaintiff has alleged a claim that requires consideration of a federal statute other than the Bankruptcy Code. The legislative history behind *§ 157(d)* clearly supports this view. For example, the following colloquy occurred during the House debate on the final version of *§ 157(d)*:

> "Mr. KRAMER:
>
> * * * *

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[3] Plaintiff additionally contends that permissive withdrawal should be allowed under *§ 157(d)*. *See* note 2, *supra.* I do not address this issue, however, because of my determination that withdrawal of the reference is mandatory.

[4] ***Section 523(c), 11 U.S.C.***, states:

> "Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4) or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4) or (6), as the case may be, of subsection (a) of this section."

> My question is this: The language 'activities affecting **[**12]** interstate commerce' is very broad language. What kinds of situations or circumstances does the gentlemen intend to cover here? Or will this language become an escape hatch through which most bankruptcy matters will be removed to a district court?
> Mr. KASTENMEIER:
> I thank the gentleman for his question.
>
> This language is to be construed narrowly. It would, for example, mean related cases which may require consideration of both title 11 issues and other Federal laws including cases involving the National Labor Relations Act, *civil rights laws,* Securities and Exchange Act of 1934, and similar laws." 130 Cong. Rec. H1849-50 (daily ed. March 21, 1984)(emphasis added).

In sum, the plaintiff asserts that the debtor/defendant maliciously prosecuted him in violation of *§ 1983*, and that the debtor/defendant's liability is not dischargeable in bankruptcy. Clearly, resolution of the plaintiff's claims against Baker will require substantial consideration of both *11 U.S.C. § 523(a)(6)* and *42 U.S.C. § 1983*. Thus withdrawal of reference is mandatory under *28 U.S.C. § 157(d)*.

Defendant argues that withdrawal of reference would interfere with the stay ordered in Civil Action No. 82-C-1025. In **[**13]** *UNR Industries, supra, 45 B.R. 322*, the federal court for the Northern District of Illinois disagreed with the debtor's contention that the *§ 362* stay was applicable to *§ 157(b)(5)*. The court stated:

> "If Congress enacts a statute which, though not referring to the automatic stay section, can only be carried out by lifting that stay then the Court's duty would be to lift the stay and give effect to the statute." *Id. at 325*.

It further reasoned that adopting the debtor's argument would render *§ 157(b)(5)* superfluous because that section "could not be enforced until bankruptcy proceedings were concluded," and therefore the section "would no longer be necessary since the stay would have ended and the bankruptcy court would no longer have the power to **[*239]** hold trials relating to the concluded case." *Id. at 325-26*.

Notably, *§ 157(d)*, like *§ 157(b)(5)*, does not mention the automatic stay provision of *11 U.S.C. § 362*. I conclude that the reasoning of the court in *UNR Industries* also applies to claims withdrawn pursuant to *§ 157(d)*, and is persuasive in this case. Thus the stay imposed in Civil Action No. 82-C-1025 does not prohibit withdrawal of reference of the plaintiff's **[**14]** adversary action. Nor does it prevent the plaintiff from proceeding with his action against the defendant in this court.

Accordingly, IT IS ORDERED that:

> (1) Plaintiff's motion to withdraw reference to the bankruptcy court is granted;
> (2) The reference to the bankruptcy court of the plaintiff's adversary proceeding against the debtor in Bankruptcy Case No. 87 B 08358 is withdrawn;
> (3) The automatic stay of Civil Case No. 82-C-1025 is lifted;
> (4) This action shall be consolidated with Civil Action No. 82-C-1025 for all purposes; and
> (5) The consolidated cases shall proceed in this court.

Dated at Denver, Colorado, April 27, 1988.

Gene Cope & Associates, Inc. v. Aura Promotions, Ltd.

United States District Court for the Eastern District of Michigan, Southern Division

April 28, 1988, Decided

Civil Action No. 85-5053

Reporter

692 F. Supp. 724 *; 1988 U.S. Dist. LEXIS 9283 **; 1988-1 Trade Cas. (CCH) P68,050

GENE COPE & ASSOCIATES, INC., d/b/a VINTAGE WINE SELECTIONS and DIRECT IMPORTS, LTD., Plaintiff, v. AURA PROMOTIONS, LTD., a Delaware Corporation, as successor in interest to PIEROTH BROTHERS, INC., an Illinois Corporation, Defendant

Disposition: [1]** DISMISSED.

Core Terms

wine, lawsuit, antitrust, immune, relevant market, monopolization, monopoly power, counter-complaint, promotion, report and recommendation, state court, disparagement, allegations, sham, antitrust violation, injunctions, competitor, practices, cases, antitrust liability, antitrust claim, willfulness

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

When deciding a motion to dismiss, the material facts pleaded in the complaint must be taken as true. When dismissal for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)* is sought, the 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.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Regulated Practices, Private Actions**

Dismissals in antitrust cases should be granted very sparingly prior to full discovery since the proof is largely in the hands of the alleged conspirators. The United States Supreme Court has described the standard for dismissal in antitrust cases as "concededly rigorous."

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **International Aspects, Commerce With Foreign Nations**

Pursuant to *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, monopolization, attempts to monopolize, and combinations or conspiracies to monopolize interstate or foreign trade are condemned. This condemnation of monopolizing clearly extends to actual monopolies, and also is applicable to unilateral acts by a single actor. Monopolies are condemned under *§ 2* where a business acquires or maintains monopoly power through competitively unreasonable practices. If unreasonable practices are not utilized, the monopoly is not violative of *§ 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Monopolies & Monopolization, Attempts to Monopolize**

The elements of monopolization were clarified in case law. As set forth in case law, the elements of monopolization are: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Thus, there are three items which must be established in a *15 U.S.C.S. § 2* case. First, the relevant market must be defined. Second, consideration must be given to whether the alleged monopolizer has monopoly power. Finally, it must be determined whether monopoly power was willfully acquired or maintained.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Governments > State & Territorial Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > Judicial Immunity

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Even where a *15 U.S.C.S. § 2* violation has occurred, a monopolizing company may be immune from antitrust liability. There is a general rule of antitrust immunity for the right to petition government. This rule is known as the Noerr-Pennington doctrine for the two United States Supreme Court cases in which it was developed. These cases established that lobbying and other similar actions by businessmen to obtain legislative or executive action do not violate the antitrust laws, even though those actions are intended to eliminate competition or otherwise restrain trade.In a later case, the Noerr-Pennington doctrine was extended to immunize judicial actions taken by competitors. Hence, a competitor's conduct in instituting a lawsuit against another competitor is immune from antitrust liability unless that conduct is demonstrated to fall within the "sham exception" to the Noerr-Pennington doctrine. Under the "sham exception," judicial actions will not be immune from antitrust liability if taken to harass a competitor or bar the competitor from meaningful access to the government. The "sham exception" has been narrowly construed by courts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

When a lawsuit raises a legal issue of genuine substance, it raises a rebuttable presumption that it is a serious attempt to obtain a judgment on the merits instead of a mere sham or harassment. Thus, the evidentiary burden is on the antitrust plaintiff to prove that the action of the defendant comes within the sham exception to Noerr-Pennington in this kind of case.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN7[] **Regulated Practices, Monopolies & Monopolization**

The possession of monopoly power in itself is not illegal.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN8[] **Regulated Practices, Monopolies & Monopolization**

Monopoly power, including that achieved through acquisition, must be consciously acquired.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN9[] **Regulated Practices, Monopolies & Monopolization**

The "interchangeability in use" with alternative products must be considered when establishing the relevant market, as must the "cross-elasticity of demand."

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN10[] **Regulated Practices, Monopolies & Monopolization**

Although the threshold of sufficiency needed to survive motion to dismiss in antitrust action is low, at least direct or inferential allegations in the complaint must cover all the material elements of an antitrust claim.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Governments > Courts > Judicial Comity

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN11[] **Jurisdiction, Jurisdictional Sources**

Jurisdiction over state claims would only be vested in the court under the doctrine of pendent jurisdiction. In choosing whether to exercise jurisdiction, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Counsel: Kurt A. O'Keefe, Esq., Detroit, Michigan, for Plaintiff.

Kenneth M. Zorn, Esq., Detroit, Michigan, for Defendant.

Judges: Richard F. Suhrheinrich, United States District Judge.

Opinion by: SUHRHEINRICH

Opinion

[*725] MEMORANDUM OPINION AND ORDER

RICHARD F. SUHRHEINRICH, UNITED STATES DISTRICT JUDGE.

This matter is before the Court on the objections of plaintiff Gene Cope & Associates, d/b/a Vintage Wine Selections and Direct Imports, Ltd. (Vintage), to Magistrate Virginia M. Morgan's Report and Recommendation of April 27, 1987. [1] In her report, the magistrate recommended that this Court dismiss the plaintiff's lawsuit. Specifically, the magistrate concluded that the *Noerr-Pennington* doctrine immunized defendant Aura Promotions, Ltd. (Aura) from liability in this antitrust case, thus mandating dismissal of plaintiff's case.

The plaintiff has filed timely objections to the magistrate's report and recommendation. Plaintiff contends that the *Noerr-Pennington* doctrine **[**2]** was erroneously applied to its lawsuit. The plaintiff further contends that the magistrate erroneously concluded that a stay of this suit pending the outcome of the concurrent Wayne County Circuit Court lawsuit was appropriate. **[*726]** Finally, plaintiff alleges that dismissal of this lawsuit is improper, given the present posture of the case. As these objections effectively cover all the grounds discussed in the report and recommendation, the Court shall make a *de novo* determination of all portions of the report and recommendation. *See* 28 U.S.C. § 636(b)(1). As an aid in making its determination, the Court heard the arguments of counsel on March 22, 1988.

Standards for Dismissal Under Fed. R. Civ. P. 12(b)(6)

This matter originally came before the magistrate on defendant Aura's motion to dismiss. **HN1**[] When deciding a motion to dismiss, the material facts pleaded in the complaint must be taken as true. Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976). When dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is sought, the complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support **[**3]** of his claim which would entitle him to relief. Id. at 746; Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Further, **HN2**[] dismissals in antitrust cases should be granted very sparingly prior to full discovery since "the proof is largely in the hands of the alleged conspirators." Hospital Bldg. Co., supra, *quoting* Poller v. Columbia Broadcasting, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962). The Supreme Court has described the standard for dismissal in antitrust cases as "concededly rigorous." Hospital Bldg. Co., supra 425 U.S. at 746-47. These standards shall be utilized in making this Court's *de novo* determination of Aura's motion to dismiss.

Background

In this case, violations of the antitrust laws are alleged. Specifically, plaintiffs contend that defendant Aura has violated § 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, by three practices in which Aura has engaged. These practices are: (1) the institution of a Ten Million Dollar lawsuit against plaintiff Vintage in Wayne County Circuit Court; (2) the disparaging of plaintiff's products and services to plaintiff's clients by Aura's agents; and (3) the purchase of Wine Consultants, another wine promoting company.

The events leading up to the institution **[**4]** of the present lawsuit are not disputed. Vintage and Aura are competitors who each provide the service of wine promotion. Both Aura and Vintage are engaged in the promotion and marketing of wine and wine related products through wine samplings. Although it is unclear exactly how Aura and Vintage carry out their business, it appears that they solicit individuals to attend wine samplings at which they promote wine and wine products. The individuals then order any desired wines from wine retailers such as plaintiff Direct Imports. The wine retailers pay commissions on these sales to the involved promotion company.

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[1] Direct Imports and Vintage Wine Selections are related companies, both being owned by Guido Capaldi. Direct Imports is engaged in the retail sale and distribution of wine and wine related products, while Vintage is engaged in the promotion of wine and wine related products via wine samplings.

The relationship between Aura and Vintage has been less than smooth. On May 23, 1984, Aura filed suit against Vintage in Wayne County Circuit Court. In that case, Civil Action No. 84-415976-CZ assigned to Judge Marvin Stempien, Aura claimed that Vintage and Direct Imports via their owner and employees fraudulently misappropriated trade secrets, converting the secret information to their own use. Specifically, Aura alleged that customer list information was taken by Vintage's owner and employees. These individuals were former Aura employees. Aura amended its state complaint **[**5]** twice, once on October 30, 1984 and also on December 14, 1984.

A temporary restraining order against Vintage and Direct Imports was granted by Judge Richard C. Kaufman on May 23, 1984. A preliminary injunction was issued on September 20, 1984. Two other preliminary instructions were subsequently issued following the two amended complaints, the first on October 31, 1984 and the second on January 2, 1985. Although Vintage and Direct sought dissolution of the preliminary injunctions on January 16, 1985 and January 28, 1985, Judge Stempien did not **[*727]** dissolve the injunctions. They apparently remained in effect until Judge Stempien rendered his decision in this case on March 3, 1988.

In his opinion, Judge Stempien concluded that Aura Promotions was entitled to summary disposition against defendants Gene Cope & Associates, Vintage Wine Selections, Direct Imports, Ltd., and Guido Capaldi. The defendants companies are the same companies who constitute the plaintiff in the instant case. Judge Stempien also held that Guido Capaldi had engaged in a scheme to defraud by a series of well-planned acts. As concluded by Judge Stempien, the purpose of the scheme was to obtain Aura's customer list.

Vintage **[**6]** filed a counter-complaint in the state court action on November 8, 1984, amending it on May 17, 1985. In the counter-complaint, Vintage and Direct alleged that Aura instituted the state proceeding solely to drive Vintage out of business. It was also alleged that Aura disparaged Vintage's products, and that Aura sought maliciously to destroy Vintage's business. As a comparison of the state counter-complaint with the complaint in the instant action reveals, the two raise the same issues, albeit labeled differently. [2] Notably, Judge Stempien did not rule on the counter-complaint in his March 3 opinion. Rather, as indicated by the parties to this Court at hearing, Judge Stempien reserved his ruling on the counter-complaint.

State Lawsuit and Noerr-Pennington Immunity

Despite the undecided status of the state counter-complaint, the magistrate properly recommended dismissal of Vintage's claim that Aura's state lawsuit against Vintage constituted an antitrust violation under *§ 2* of the Sherman Act, *15 U.S.C. § 2*. ***HN3***[] Pursuant to *§ 2* of the Sherman Act, **[**7]** *15 U.S.C. § 2*, monopolization, attempts to monopolize, and combinations or conspiracies to monopolize interstate or foreign trade are condemned. This condemnation of monopolizing clearly extends to actual monopolies, and also is applicable to unilateral acts by a single actor. Monopolies are condemned under *§ 2* where a business acquires or maintains monopoly power through competitively unreasonable practices. If unreasonable practices are not utilized, the monopoly is not violative of *§ 2*.

HN4[] The elements of monopolization were clarified in *United States v. Grinnell, 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. As set forth in *Grinnell*, the elements of monopolization are: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *384 U.S. at 570-71*. *See also* *Potters Medical Center v. City Hospital Ass'n, 800 F.2d 568, 574 (6th Cir. 1986)*. Thus, there are three items which must be established in a *§ 2* case. First, the relevant market must be defined. Second, consideration must be given to whether the alleged monopolizer **[**8]** has monopoly power. Finally, it must be determined whether monopoly power was willfully acquired or maintained. W. Holmes, ***Antitrust Law*** *Handbook* § 2.03 (1987).

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[2] Thus, the state counter-complaint alleges unfair business competition, while the federal complaint alleges an antitrust violation.

However, ***HN5***[] even where a *§ 2* violation has occurred, a monopolizing company may be immune from antitrust liability. There is a general rule of antitrust immunity for the right to petition government. This rule is known as the *Noerr-Pennington* doctrine for the two Supreme Court cases in which it was developed, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* and *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. These cases established that lobbying and other similar actions by businessmen to obtain legislative or executive action do not violate the antitrust laws, even though those **[*728]** actions are intended to eliminate competition or otherwise restrain trade.

In a later case, *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*, the *Noerr-Pennington* doctrine was extended to immunize judicial actions taken by competitors. Hence, a competitor's conduct in instituting a lawsuit against another competitor is immune from antitrust liability unless **[**9]** that conduct is demonstrated to fall within the "sham exception" to the *Noerr-Pennington* doctrine. Under the "sham exception," judicial actions will not be immune from antitrust liability if taken to harass a competitor or bar the competitor from meaningful access to the government. *California Motor Transport, 404 U.S. at 510-11*. The "sham exception" has been narrowly construed by courts. *See* *Westmac, Inc. v. Smith, 797 F.2d 313 (6th Cir. 1986)*; *Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484 (8th Cir. 1985)*.

Of importance to the present case, the Sixth Circuit held in *Westmac* that ***HN6***[] "when a lawsuit raises a legal issue of genuine substance, it raises a rebuttable presumption that it is a serious attempt to obtain a judgment on the merits instead of a mere sham or harassment. *797 F.2d at 318*. Thus, "the evidentiary burden [is] on the antitrust plaintiff to prove that the action of the defendant comes within the sham exception to *Noerr-Pennington* in this kind of case." *Id*.

When the *Westmac* principles are applied to the facts of the instant case, it is clear that Vintage has not overcome the rebuttable presumption that Aura's are genuine judicial **[**10]** activities. Aura has actively pursued its state court lawsuit against Vintage, garnering three preliminary injunctions and a decision on the merits in its favor. Additionally, a review of Judge Stempien's opinion granting summary disposition for Aura demonstrates that Aura's lawsuit raised substantial issues of state law. Vintage has in no way shown that Aura's state suit was a sham. In fact, although Vintage sought on two separate occasions to have the preliminary injunctions lifted, the state court refused to dissolve the injunctions. Thus, the Court finds that Aura's state suit is a genuine judicial activity. Therefore, the *Noerr-Pennington* doctrine immunizes Aura from antitrust liability as to its state court lawsuit. Under these circumstances, the Court need not address the merits of Vintage's claim that Aura's state lawsuit constituted a *§ 2* antitrust violation.

Since *Noerr-Pennington* immunizes Aura from antitrust liability for its state suit, dismissal of that portion of the present suit which alleges the state suit is a sham is appropriate. The magistrate has recommended such dismissal in her report and recommendation, which shall be adopted as to this issue.

*Other **[**11]** Alleged Antitrust Violations*

The magistrate's report and recommendation fails to address the two other allegedly anticompetitive practices in which Vintage claims Aura engaged. As stated earlier, these practices are: (1) the disparaging of Vintage's products and services; and (2) the purchase of Wine Consultants. However, Vintage's complaint merely sets forth conclusory allegations in support of these claims. These allegations give no indication of who disparaged Vintage or how this was supposedly accomplished. There is also no indication of how Aura's acquisition of Wine Consultants constituted willful acquisition or maintenance of monopoly power. Rather, Vintage assumes that merely showing an increase in Aura's market share in Michigan is sufficient to demonstrate an antitrust violation.

It is well-established that ***HN7***[] the possession of monopoly power in itself is not illegal. *United States v. Griffith, 334 U.S. 100, 107* and n. 10, *92 L. Ed. 1236, 68 S. Ct. 941 (1948)*. Vintage must demonstrate willfulness on Aura's part or its antitrust claims fail. Such willfulness is not demonstrated by the mere allegation that Aura's percentage of a vaguely defined market increased. *See* *Grinnell, supra* (***HN8***[] monopoly power, **[**12]** including that achieved through acquisition, must be consciously acquired). Vintage's argument that Aura **[*729]** engaged in anticompetitive behavior based on Aura's increase in Michigan market share begs the question in two ways. First, it assumes that the relevant geographic market is Michigan. Second, it assumes that wine promotion services is the relevant product market. These assumptions fail to take into account Supreme Court cases establishing that ***HN9***[] the "interchangeability in use" with alternative products must be considered when establishing the relevant market, as must the "cross-elasticity of demand." *United States v. E.I.* *duPont de Nemours & Co., 351 U.S. 377, 394-95, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. That is, the relevant market must take into account whether there are geographic or product substitutes for Michigan wine promotion services. [3] As the complaint does not consider such substitutes, Vintage has not properly defined the relevant market. Notably, at hearing, Vintage admitted that its definition of the relevant market was lacking.

[13]** In view of the inadequate relevant market definition contained in Vintage's complaint, the Court finds Vintage's market share analysis faulty. Without an adequate relevant market definition, the share a company has in a market cannot be ascertained. Therefore, the Court cannot determine if Aura had monopoly power in the relevant market.

Since Vintage's amended complaint fails to adequately establish any of the basic elements of a *§ 2* monopolization claim, the Court finds that dismissal of the complaint as to the disparagement claim and as to the purchase of Wine Consultants is appropriate. Taking the facts plead in the complaint as true, it is apparent that Vintage can prove no set of facts in support of its claim which would entitle it to relief under the federal antitrust laws. Although dismissals of federal antitrust cases are to be granted very sparingly, *Hospital Bldg. Co., supra* *425 U.S.at 746*, the present case is one in which dismissal is appropriate. *See* *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th Cir. 1984)* ***HN10***[] (although threshold of sufficiency needed to survive motion to dismiss in antitrust action is low, at least direct or inferential allegations in the complaint **[**14]** must cover all the material elements of an antitrust claim). Due to Vintage's total failure to establish the elements of its monopolization claim, no federal antitrust claim has been stated. Dismissal of the complaint is, therefore, appropriate. The dismissal shall extend to all federal antitrust issues as to which Aura was not heretofore immunized by the *Noerr-Pennington* doctrine.

Although the Court is dismissing Vintage's antitrust claims which are based on Aura's alleged disparagement of Vintage and Aura's purchase of Wine Consultants, it shall allow Vintage to file a second amended complaint as to those claims. The Court finds that the interests of justice require it to allow such amendment. In amending its complaint, Vintage is specifically directed to properly establish the relevant market, to provide the Court with a proper indication of whether Aura possesses monopoly power, and to set forth such facts as are necessary to demonstrate willfulness on Aura's part. If on amendment no antitrust claim is stated by Vintage's complaint, the Court shall dismiss that complaint with prejudice.

State Claims

Although Vintage's lawsuit may present state claims, the Court finds it **[**15]** unnecessary to rule on those claims. ***HN11***[] Jurisdiction over the state claims would only be vested in this Court under the doctrine of pendent jurisdiction. In choosing whether to exercise jurisdiction,

> [A] federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in **[*730]** order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Carnegie-Mellon University v. Cohill, 484 U.S 343, 98 L. Ed. 2d 720, 729-30, 108 S. Ct. 614 (1988).

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[3] As set forth by the Supreme Court in *Grinnell, 384 U.S. at 572*, "we see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities."

In the present case, the Court declines jurisdiction over the pendent state claims. These claims, embodied in Vintage's state counter-complaint, are currently pending in state court. Notably, the state counter-complaint was filed before the instant lawsuit was filed. Comity, judicial economy, convenience, and fairness **[**16]** will clearly be best served if this Court declines jurisdiction of any state claims which may be embodied in Vintage's complaint. Therefore, the Court shall dismiss any state law claims which Vintage's amended complaint may present without prejudice so that they may properly be decided by the state court.

For the reasons set forth above,

IT IS HEREBY ORDERED that Magistrate Virginia M. Morgan's Report and Recommendation of April 27, 1987 is ACCEPTED and ADOPTED IN PART as to defendant Aura Promotion's *Noerr-Pennington* antitrust immunity for its state court lawsuit, and REJECTED IN PART inasmuch as it recommends dismissing the entire complaint filed by plaintiff Gene Cope & Associates, d/b/a Vintage Wine Selections and Direct Imports, on the basis of the *Noerr-Pennington* doctrine.

IT IS FURTHER ORDERED that plaintiff's complaint is DISMISSED inasmuch as it alleges that defendant Aura Promotions' state lawsuit constituted a federal antitrust violation.

IT IS FURTHER ORDERED that defendant Aura Promotions' motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that plaintiff's complaint is DISMISSED without prejudice for failure to state a claim as to its allegations that disparagement **[**17]** of Vintage by Aura and Aura's purchase of Wine Consultants, Inc. constituted an antitrust violation; however, plaintiff may amend its complaint as to those claims in accordance with the directions contained in the accompanying opinion within 20 days of the date of this order.

IT IS FURTHER ORDERED that any state law claims which may be embodied in the plaintiff's complaint are DISMISSED without prejudice.

DATED: April 28, 1988

New York v. Cedar Park Concrete Corp.

United States District Court for the Southern District of New York

April 28, 1988, Decided ; April 28, 1988, Filed

Nos. 85 CIV 1887 (LBS), 86 CIV 8128 (LBS)

Reporter

684 F. Supp. 1229 *; 1988 U.S. Dist. LEXIS 3639 **; 1988-1 Trade Cas. (CCH) P68,008

State Of New York, Plaintiff, v. Cedar Park Concrete Corp., et al., Defendants. State Of New York, Plaintiff, v. Century-Maxim Construction Corp., et al., Defendants

Core Terms

due diligence, fraudulent concealment, complaints, ignorance, statute of limitations, actual knowledge, cause of action, concealment, damages, laches, motion to dismiss, conspiracy, antitrust, bid

LexisNexis® Headnotes

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Time Limitations

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

Governments > Legislation > Statute of Limitations > Tolling

HN1[] **Tolling of Statute of Limitations, Fraud**

Section 4B of the Clayton Act, *15 U.S.C.S. § 15b*, provides that any action to enforce any cause of action under the antitrust statutes shall be forever barred unless commenced within four years after the cause of action accrued. Fraudulent concealment of a plaintiff's claims, an equitable doctrine, may be applied to toll the running of the statute of limitations in an antitrust suit if the plaintiff proves: (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Tolling

Governments > Legislation > Statute of Limitations > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

A plaintiff may prove the concealment element necessary for tolling the statute of limitations in an antitrust action by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or that the wrong itself was of such a nature as to be self-concealing.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN3[] **Statute of Limitations, Time Limitations**

The Second Circuit continues to follow the rule that the statute of limitations does not begin to run until the plaintiff either acquires actual knowledge of the facts that comprise his cause of action or should have acquired such knowledge through the exercise of reasonable diligence after being apprised of sufficient facts to put him on notice.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN4[] **Tolling of Statute of Limitations, Fraudulent Concealment**

A laches defense requires that the defendant show that the plaintiff was guilty of unreasonable delay with resulting prejudice. Although the fraudulent concealment doctrine for statute of limitations analysis requires the pleading of specific elements, there is no similar requirement to counter a laches defense against equitable relief.

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Golenbock & Barell, Attorneys for the DIC Concrete Corp., DIC Industries, Inc., Underhill Construction Corp., Underhill Industries, Inc., the DIC Concrete Corp. and Underhill Construction Corp., a joint venture, and IIJ Enterprises, Inc.

Obermaier, Morvillo & Abramowitz, P.C., **[**2]** Attorneys for Joseph DePaola, Walter Goldstein and Frank Phelan.

Patrick M. Wall, P.C., Attorneys for Alvin O. Chattin.

Judges: Leonard B. Sand, U.S.D.J.

Opinion by: SAND

Opinion

[*1230] HONORABLE LEONARD B. SAND, U.S.D.J.

In the cases before us, the defendants previously moved to dismiss the antitrust claims brought by the State of New York under section 4 of the Clayton Act, *15 U.S.C. § 15*, and under *sections 340* and *342-b* of the New York General Business Law ("Donnelly Act") for alleged participation in a continuing scheme to rig bids and to allocate shares of the market for reinforced-concrete construction work. [1] **[**3]** In our Opinion of June 25, 1987, *665 F. Supp. 238 (S.D.N.Y. 1987)*, we found, *inter alia*, that the State of New York, as *parens patriae*, is a proper party to seek injunctive relief, but that it could not claim treble damages on behalf of unidentified state subdivisions. *Id. at 242*. We therefore dismissed those federal and state antitrust damages claims that were alleged on behalf of state subdivisions other than the identified Urban Development Corporation, without prejudice to repleading within sixty days. [2] Apart from the issues on which we **[*1231]** now opine, we denied all other motions by the defendants. [3]

Currently before the Court are three issues on which we reserved decision: whether portions of the complaints are barred by the applicable statutes of limitations; whether this Court has jurisdiction to impose civil penalty claims asserted under the Donnelly Act; and whether the State should be compelled to elect between seeking treble damages or civil penalties.

I. STATUTE **[**4]** OF LIMITATIONS

Section 4B ***HN1***[] of the Clayton Act provides that "any action to enforce any cause of action under [the antitrust statutes] shall be forever barred unless commenced within four years after the cause of action accrued." *15 U.S.C. § 15b*. [4] Fraudulent concealment of a plaintiff's claims, an equitable doctrine first described in *Bailey v. Glover, 88*

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[1] The amended complaint in *State of New York v. Cedar Park, et al*., 85 Civ. 1887, and the complaint in *State of New York v. Century-Maxim Construction Corp., et al*., 86 Civ. 8128, ("the complaints") are identical except for the named defendants and co-conspirators.

[2] The State of New York notified the Court and all parties that it would not assert any additional damage claims. *See* Letters of September 15 and September 22, 1987 from Alice McInerney, Assistant Attorney General.

[3] The other allegations by the defendants included: a) that the complaints violate *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, by failing to allege sufficiently that the State or its subdivisions directly purchased products from the defendants; b) that there had been improper use of grand jury material and unlawful disclosures between individuals in the Attorney General's office; c) and that the complaints were either insufficient or required a more definite statement as to G & G Concrete Corporation and the individual defendants. *See generally 665 F. Supp. 238, 242-48*.

[4] As we have not yet addressed this Court's jurisdiction to award civil penalties under New York's Donnelly Act, we do not fully discuss the statute of limitations argument under the state ***antitrust law***. We note, however, that *N.Y. Gen. Bus. L. § 340(5)* has

U.S. (21 Wall.) 342, 22 L. Ed. 636 (1874), may be applied to toll the running of the statute of limitations in an antitrust suit if the plaintiff proves

> (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part.

[5]** State of New York v. Hendrickson Brothers, Inc., Amfar Asphalt Corp., et al., 840 F.2d 1065, 1083 (2d Cir. 1988). *See also* City of Detroit v. Grinnell Corporation, 495 F.2d 448, 461 (2d Cir. 1974) ("*Grinnell*").

The complaints in the instant actions, 85 Civ. 1887 (*Cedar Park*) and 86 Civ. 8128 (*Century Maxim*), were filed on March 20, 1985 [5] and on October 22, 1986 respectively, seeking injunctive relief, damages and penalties for actions occurring from 1978 and continuing through the time of the filing. The defendants assert that portions of the plaintiff's damages and penalties claims are barred by the applicable statutes of limitations since the relevant period described in the complaints exceeds the federal four-year statute and the state three-year limit, and that laches bars the equitable claims. Further, the defendants argue, fraudulent concealment cannot be applied in this situation to toll the statutes because the plaintiff has not sufficiently alleged the doctrine's required three elements.

We reserved **[**6]** decision on this argument because it appeared that the critical legal issues were under consideration by the Second Circuit in the appeal from *State of New York v. Amfar Asphalt Corp*., 1987-1 Trade Cases (CCH) para. 67,417 (E.D.N.Y. 1986). In *State of New York v. Hendrickson Brothers, Inc., Amfar Asphalt Corp., et al*. ("*Hendrickson*"), *supra*, the Second Circuit was asked to determine, *inter alia*, whether the defendants were entitled to either a judgment notwithstanding the verdict or to a new trial on the grounds that the State's claims of conspiracy to obtain highway construction contracts and to fix **[*1232]** prices were barred by the statute of limitations.

The Second Circuit noted that ***HN2***[] "the plaintiff may prove the concealment element by showing either that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim . . . *or* that the wrong itself was of such a nature as to be self-concealing." *Id. at 1083* (emphasis added). In affirming the judgment below, the Second Circuit found that the record adequately established fraudulent concealment because a bid-rigging conspiracy is inherently self-concealing and because there was sufficient evidence of **[**7]** affirmative acts of concealment. *See id. at 1083-84*.

We note that our determination, unlike that in *Hendrickson*, is in the context of motions to dismiss so that we look only to the allegations contained within the four corners of the complaint. We find, therefore, that the plaintiff State of New York has sufficiently alleged the first prong of fraudulent concealment by alleging a bid-rigging conspiracy. Under *Hendrickson*, to meet this first element, there is no need at this point to look additionally for the pleading of affirmative actions taken by the defendant to prevent the plaintiff's discovery of its claim. *See id*.

The second and third elements of the doctrine relate to whether the plaintiff had sufficient information to commence an action at an earlier point. The defendants claim that the State's assertion of ignorance of the information necessary to bring an action is negated by its formal investigation, commenced in July 1982, and its issuing of subpoenas over four years before bringing suit. Letter of March 17, 1988 from Ronald W. Meister, Esq. at 2 ("Meister Letter"). Therefore, the defendants assert, the four-year statute of limitations bars the federal **[**8]** damages claims against the *Century-Maxim* defendants, and the three-year statute bars the state law civil penalties claims against all the defendants.

The State cites cases related to this litigation to support its contention that it exercised the requisite due diligence by attempting to investigate the industry's practices, but that its efforts were impeded by actions by these defendants

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the same four-year statute of limitations as described in 15 U.S.C. § 15(b) and that N.Y. G. Bus. L. § 342-a requires that an "action . . . be brought within three years after the commission of the act upon which it is based."

[5] The State of New York filed an amended complaint in *Cedar Park* on October 22, 1986, the same day it filed the complaint in *Century Maxim*.

and others. *See* Memorandum of Law of the State of New York Concerning the Applicability of *New York v. Hendrickson Bros*. at 7. *See, e.g., Big Apple Concrete Corp. v. Abrams, 103 A.D.2d 609, 481 N.Y.S.2d 335 (1st Dept. 1984)* (Appellate Division reversed the quashing of subpoenas issued pursuant to antitrust investigation of ready-mix concrete industry).

Although the pleading of a defendant's affirmative acts of concealment are not required under *Hendrickson* to meet the first prong of the doctrine in a case of an alleged bid-rigging scheme, such pleading may be necessary to sufficiently allege the second and third elements, *i.e*., plaintiff's ignorance and due diligence. Paragraphs 45-48 of the complaints describe the State's attempts at due diligence and the defendants' alleged affirmative **[**9]** acts to conceal the wrong. The State pleads that it demonstrated due diligence to discover its already-existing claims by commencing an investigation into the industry on July 27, 1982, and to prevent the future occurrence of fraud in contracts for reinforced concrete construction work by using a "sealed bid system, apprising each bidder of its non-collusion policy and requiring an affirmative non-collusion declaration from each bidder." Complaints para. 45. The State alleges further that the defendants violated this system by filing false statements certifying that the bid proposals were determined "without consultation or collusion with any competitor." Complaints para. 47(a).

HN3[] The Second Circuit continues to follow the rule it first adopted in *Grinnell, 495 F.2d at 461*, that the statute of limitations does not begin to run until "the plaintiff either acquires actual knowledge of the facts that comprise his cause of action or should have acquired such knowledge through the exercise of reasonable diligence after being apprised of sufficient facts to put him on notice." *See, e.g., Cerbone v. ILGWU, 768 F.2d 45, 48 (2d Cir. 1985)*. The defendants urge us to employ the interpretation **[**10]** of some courts, that **[*1233]** "suspicion is equated with actual knowledge," in determining whether the requisite due diligence has been utilized in such situations. Meister Letter at 2, *citing Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1423, 1443 (S.D.N.Y. 1986)*. [6]

[11]** For the reasons stated below, we find that the State has not adequately pleaded the second and third prongs of the fraudulent concealment doctrine, *i.e*. plaintiff's ignorance and due diligence. The State has pleaded its ignorance about its claims as follows:

> Despite the exercise of due diligence plaintiff was unaware of, did not discover, and in the exercise of due diligence could not have discovered the facts underlying the claims set forth until well after an investigation into the concrete industry . . . was commenced by the State of New York on July 27, 1982.

Complaints para. 45. The plaintiff has cited its investigation and the measures it adopted to prevent collusive bids to demonstrate its due diligence. *Id*. Although the prevailing law in this circuit under *Grinnell* does not define "actual knowledge" to encompass suspicion, we note that the Second Circuit in *Hendrickson* found no error in the lower court's jury instruction that "the State had not met its burden if it had a suspicion of collusive bidding on a single contract or any other information that should have alerted it to its claim of an overall conspiracy." *Hendrickson, 840 F.2d at 1085*.

We cannot **[**12]** accept the State's general assertions of its ignorance and due diligence without more specific explanation about its delay in bringing suit. Nowhere in either the *Cedar Park* amended complaint or in the *Century*

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[6] In noting that "facts that should arouse suspicion . . . are equated with actual knowledge of the claim," *633 F. Supp. at 1443*, Judge Ward cited *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)*. In *Dayco*, a case in which a corporation brought an antitrust action against the competitor to which it had sold one of its divisions, the Sixth Circuit affirmed the district court's finding that the plaintiff's assertions of due diligence were insufficient. The *Dayco* court held that the plaintiff's suspicions should have been aroused by congressional proceedings that had been conducted more than ten years before it brought its suit, "and that its failure to investigate further at that time was not the exercise of due diligence required . . . to employ the fraudulent concealment doctrine . . . ." *Dayco, 523 F.2d at 394*.

Similarly, in *Donahue*, where defendant's former employees alleged that the defendant corporation had resumed a resale price maintenance agreement, the court found that the plaintiffs had not adequately alleged fraudulent concealment because "neither the complaint nor the proposed amended complaint contain[ed] specific allegations of acts by defendant to conceal the antitrust violation . . . ." *Donahue, 633 F. Supp. at 1443*.

Maxim complaint, both filed in October 1986, does the State assert more specifically when it acquired the "actual knowledge" of its causes of action against either the various defendants individually, or even as between the two sets of defendants. Describing the time of "actual knowledge" as being "well after" the commencement of an investigation is too general to meet the requirements of pleading fraudulent concealment. While the alleged affirmative acts of filing false documents may be some indication of the State's ignorance of its causes of action, we find that they alone do not explain the State's delay in initially filing suit almost three years after starting its investigation. More specific information is required as to the difficulties, if any, with the progression of the investigation to more clearly allege the State's due diligence between 1982 and 1985. Plaintiff's brief citation in its Memorandum of Law to the state court litigation history of this case **[**13]** may be more properly set forth in its complaint. Moreover, plaintiff should allege with more specificity when, despite these obstacles, it acquired "actual knowledge."

Accordingly, we grant the defendants' motions to dismiss the portions of the complaints that seek damages and penalties for claims that arose after the applicable statutes of limitation had run, without prejudice to plaintiff's repleading the fraudulent concealment sections within sixty days.

II. LACHES

HN4[] The laches defense requires that the defendant show that the plaintiff was guilty of unreasonable delay with resulting **[*1234]** prejudice. *Gardner v. Panama Railroad, 342 U.S. 29, 31, 96 L. Ed. 31, 72 S. Ct. 12 (1951)* (per curiam); *Russell v. Todd, 309 U.S. 280, 287, 84 L. Ed. 754, 60 S. Ct. 527 (1940)*; *Larios v. Victory Carriers, Inc., 316 F.2d 63, 66-67 (2d Cir. 1963)*. Although the fraudulent concealment doctrine requires the pleading of specific elements, there is no similar requirement to counter the laches defense against equitable relief. Therefore, we find that, in the context of a motion to dismiss, the State's delay in bringing these suits was not unreasonable in view of its investigation into the industry and of the allegations that the defendants affirmatively **[**14]** acted to conceal their conspiracy by filing false documents. We hereby deny the defendants' motions to dismiss the equitable claims on the grounds of laches.

III. JURISDICTION UNDER THE DONNELLY ACT AND THE ELECTION BETWEEN REMEDIES

We decline to decide these issues at this point of the litigation in view of our previous finding that the state law claims require no discovery or proceedings which differ from those for the federal claims and in light of our current decision on the statute of limitations issue.

IV. CONCLUSION

We grant the motions to dismiss, without prejudice to repleading the fraudulent concealment sections, within sixty (60) days, as to those portions of the complaint seeking damages and penalties for claims arising after the applicable statutes of limitations had run. We deny the motions to dismiss the claims for injunctive relief on the grounds of laches. We reserve decision on the Donnelly Act and election of remedies issues as indicated.

SO ORDERED.

Dated: April 28, 1988 New York, New York

Business Electronics Corp. v. Sharp Electronics Corp.

Supreme Court of the United States

January 19, 1988, Argued ; May 2, 1988, Decided

No. 85-1910

Reporter

485 U.S. 717 *; 108 S. Ct. 1515 **; 99 L. Ed. 2d 808 ***; 1988 U.S. LEXIS 2033 ****; 56 U.S.L.W. 4387; 1988-1 Trade Cas. (CCH) P67,982

BUSINESS ELECTRONICS CORP. v. SHARP ELECTRONICS CORP.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: 780 F.2d 1212, affirmed.

Core Terms

dealer, manufacturer, vertical, terminate, retailers, nonprice, prices, restraint of trade, price cutting, price competition, illegality, Sherman Act, antitrust, horizontal, cases, Electronics, common law, ancillary, naked, cartel, retail price, price level, anticompetitive, per se rule, ultimatum, exclusive territory, resale price, intrabrand, products, franchise agreement

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN1[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . 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**

Whether particular concerted action violates *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, is determined through case-by-case application of the so-called rule of reason -- that is, 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.

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**

Certain categories of agreements have been held to be per se illegal, dispensing with the need for case-by-case evaluation.

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**

Per se rules are appropriate only for conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.

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**

Agreements are per se illegal only if their nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.

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**

The premises of GTE Sylvania and Monsanto are: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of GTE Sylvania.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN8[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality was explicitly rejected in GTE Sylvania, as it had to be, since a horizontal agreement to divide territories is per se illegal, while GTE Sylvania held that a vertical agreement to do so is not.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN9[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A vertical restraint is not illegal per se unless it includes some agreement on price or price levels.

Lawyers' Edition Display

Decision

Agreement between manufacturer and dealer to terminate another dealer for price cutting held not per se illegal under 1 of Sherman Act (*15 USCS 1*) absent agreement on price or price levels.

Summary

A manufacturer of electronic calculators appointed a retailer as its sole dealer in a metropolitan area, but subsequently became dissatisfied with that dealer's performance and appointed a second dealer. Neither dealer was obligated to adhere to the manufacturer's suggested retail price list, but the second dealer usually did so, while the first dealer commonly sold the calculators for below list price. The second dealer, allegedly concerned about the first dealer's "free riding" on the second dealer's investment in product promotion and educational services as well as about the price cutting, demanded that the manufacturer terminate the first dealer and threatened to terminate its own dealership if this were not done. The manufacturer terminated the first dealer, who then brought suit against the manufacturer in the United States District Court for the Southern District of Texas, in which action it was alleged (1) that the manufacturer and the second dealer had conspired to terminate the first dealer, and (2) that such conspiracy was illegal per se under 1 of the Sherman Act (*15 USCS 1*). The District Court instructed the jury that an agreement to terminate a dealer because of its price cutting unreasonably restrains trade and cannot be justified for any reason, and the jury, having found that there was such an agreement in this case, rendered judgment in favor of the first dealer. In reversing that judgment and remanding the case for further proceedings, the United States Court of Appeals for the Fifth Circuit held that the District Court's jury instructions were erroneous, because in order for a vertical agreement between a manufacturer and a dealer terminating another dealer to be illegal per se under

1, the agreeing dealer must expressly or impliedly agree to set its prices at some level, though not a specific one (*780 F2d 1212*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and Brennan, Marshall, Blackmun, and O'Connor, JJ., it was held (1) that a vertical restraint of trade is not illegal per se under 1 unless it includes some agreement on price or price levels, and specifically (2) that an agreement between a manufacturer and one of its dealers to terminate another dealer because of that dealer's price cutting, as in the present case, is not per se illegal unless the first dealer expressly or impliedly agrees to set its prices at some level.

Stevens, J., joined by White, J., dissented, expressing the view that the agreement between the manufacturer and the second dealer was a naked agreement to restrain the trade of a third party, with the goal of eliminating price competition at the dealer level, and as such was illegal per se under 1.

Kennedy, J., did not participate.

Headnotes

PRACTICES §9 > per se rule -- vertical nonprice restraints -- termination of dealership -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]***LEdHN[1G]***[] [1G]

A vertical restraint of trade--that is, a restraint imposed by agreement between firms at different levels of distribution--is not illegal per se under 1 of the Sherman Act (*15 USCS 1*) unless it includes some agreement on price and price levels; thus, an agreement between a manufacturer and one of its dealers to terminate another dealer because of the latter's price cutting is not per se illegal unless the first dealer expressly or impliedly agrees to set its prices at some level, and a Federal District Court errs in instructing the jury in such a case that such an agreement is necessarily illegal if the manufacturer's purpose is to eliminate the price cutting, where there has been no showing that an agreement between a manufacturer and a dealer to terminate a price cutter, without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output; fear of the remaining dealer's possible assertion of dominant retail power cannot justify adopting a rule of per se illegality, given that such power is rare and was not found to exist in this case; nor can such a rule be justified as a prophylactic measure on the theory that vertical price agreements generally underlie agreements to terminate a price cutter, as this proposition has not been supported in the present case and is incompatible with the recognition, in previous decisions, that manufacturers are often motivated by a desire to have dealers provide services and that price cutting is frequently made possible by "free riding" on the services provided by other dealers. (Stevens and White, JJ., dissented from this holding.)

PRACTICES §16 > rule of reason -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

Ordinarily, whether particular concerted action violates 1 of the Sherman Act (*15 USCS 1*) is determined through case-by-case application of the so-called rule of reason--that is, 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; there is a presumption in favor of this rule-of-reason standard, and any departure from this standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than by formalistic distinctions.

PRACTICES §36 > vertical price restraints -- > Headnote:
LEdHN[3][] [3]

Vertical agreements on retail prices are illegal per se under 1 of the Sherman Act (*15 USCS 1*).

PRACTICES §6 > purpose of antitrust laws -- > Headnote:
LEdHN[4][] [4]

Interbrand competition is the primary concern of the antitrust laws.

EVIDENCE §383 > presumption -- retail market power -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

For purposes of applying the federal antitrust laws, retail market power should not be assumed but rather must be proved.

PRACTICES §9 > ancillary agreement -- > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

An agreement may be "ancillary," for purposes of determining whether it violates the federal antitrust laws, even though it is not designed to enforce a contractual obligation of one of the parties to the contract.

PRACTICES §9 > horizontal restraints -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]

For purposes of determining whether a restraint of trade violates the federal antitrust laws, a restraint is horizontal if it is imposed by agreement among competitors; a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.

PRACTICES §4 > statutory phrases -- "restraint of trade" -- relation to common law -- > Headnote:
LEdHN[8][] [8]

The term "restraint of trade" in 1 of the Sherman Act (*15 USCS 1*), like the term at common law, refers not to a particular list of agreements but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances; thus, common-law precedent as to what constituted "restraint of trade" at the time the Sherman Act was adopted is not dispositive of the present-day application of the Act; however, in determining whether an agreement between a manufacturer and a dealer whereby the former terminates another dealer for price cutting is illegal per se under 1 of the Sherman Act, it is relevant (1) whether the common law of restraint of trade ever prohibited such an agreement as illegal per se and (2) whether the United States Supreme Court's decisions under 1 have ever expressed or necessarily implied such a prohibition, since the common law--both in general and as embodied in the Sherman Act--does not lightly assume that the economic realities underlying earlier decisions have changed or that earlier judicial perceptions of those realities were in error.

PRACTICES §31 > resale price control rule -- application to dealer termination -- > Headnote:
LEdHN[9][] [9]

The rule that a resale price maintenance agreement is per se illegal under 1 of the Sherman Act (*15 USCS 1*), which is based on the common-law judgment that such a resale restriction is an unlawful restraint on alienation, is not applicable to a case considering whether an agreement between a manufacturer and a dealer whereby the manufacturer terminates another dealer for price cutting is illegal per se under 1 where no agreement on resale price or price level, and hence no restraint on alienation, was found by the jury and the common-law rationale thus does not apply.

PRACTICES §9 > per se rule -- vertical and horizontal restraints -- > Headnote:
LEdHN[10][] [10]

Under 1 of the Sherman Act (*15 USCS 1*), the scope of per se illegality of horizontal restraints of trade is not equivalent to the scope of per se illegality of vertical restraints of trade.

PRACTICES §53 > agreements not to compete -- market territories -- > Headnote:
LEdHN[11][] [11]

A horizontal agreement to divide territories is per se illegal under 1 of the Sherman Act (*15 USCS 1*).

Syllabus

Petitioner and another retailer (Hartwell) were authorized by respondent manufacturer to sell its electronic calculators in the Houston area. In response to Hartwell's complaints about petitioner's prices, respondent terminated petitioner's dealership. Petitioner brought suit in Federal District Court, alleging that respondent and Hartwell had conspired to terminate petitioner and that such conspiracy was illegal *per se* under *§ 1* of the Sherman Act. The court submitted a liability interrogatory to the jury asking whether there was an agreement or understanding between respondent and Hartwell to terminate petitioner's dealership because of its price cutting, and instructed the jury that the Sherman Act is violated **[****2]** when a seller enters into such an agreement or understanding with one of its dealers. The jury answered the interrogatory affirmatively, awarding damages, and the court entered judgment for petitioner for treble damages. The Court of Appeals reversed and remanded for a new trial, holding that, to render illegal *per se* a vertical agreement between a manufacturer and a dealer to terminate a second dealer, the first dealer must expressly or impliedly agree to set its prices at some level.

Held: A vertical restraint of trade is not *per se* illegal under *§ 1* of the Sherman Act unless it includes some agreement on price or price levels. Pp. 723-736.

(a) Ordinarily, whether particular concerted action violates *§ 1* is determined through case-by-case application of the rule of reason. *Per se* rules are appropriate only for conduct that is manifestly anticompetitive. Although vertical agreements on resale prices are illegal *per se*, extension of that treatment to other vertical restraints must be based on demonstrable economic effect rather than upon formalistic line drawing. *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36*, which held that **[****3]** vertical nonprice restraints are not *per se* illegal, recognized that such restraints have real potential to stimulate interbrand competition; that a rule of *per se* illegality for such restraints is not needed or effective to protect intrabrand competition; and that such restraints do not significantly facilitate cartelizing. There has been no showing here that different characteristics attend an agreement between a manufacturer and a dealer to terminate a "price cutter," without a further agreement on the price or price levels to be charged by the remaining dealer. A quite plausible purpose of the vertical restriction here was to enable Hartwell to provide better services under its sales franchise agreement with respondent. There is also no merit to petitioner's contention that an agreement on the remaining dealer's price or price levels will so often follow from terminating another dealer because of its price cutting that prophylaxis against resale price maintenance warrants the District Court's *per se* rule. Pp. 723-731.

(b) The term "restraint of trade" in the Sherman Act, like the term at common law before the statute was adopted, refers not to a particular list **[****4]** of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. Moreover, this Court's precedents do not indicate that the pre-Sherman Act common law prohibited as illegal *per se* an agreement of the sort made here. Nor is the District Court's rule of *per se* illegality compelled by precedents under the Sherman Act holding certain horizontal agreements to constitute price fixing and thus to be *per se* illegal even though they did not set prices or price levels. The notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected in *GTE Sylvania*. Finally, earlier vertical price-fixing cases are consistent with the proposition that vertical *per se* illegality requires an agreement setting a price or a price level. Pp. 731-735.

Counsel: Gary V. McGowan argued the cause and filed briefs for petitioner.

Harold R. Tyler, Jr. argued the cause for respondent. With him on the brief was Lance Gotthoffer. [*]

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[*] Briefs of amici curiae urging reversal were filed for Forty-two States by J. Joseph Curran, Jr., Attorney General of Maryland, and Michael F. Brockmeyer and Craig J. Hornig, Assistant Attorneys General, by Anthony J. Celebrezze, Jr., Attorney General of Ohio, and Gregory E. Young and Matthew C. Lawry, Assistant Attorneys General, by Don Siegelman, Attorney General of Alabama, and James Prude, Assistant Attorney General, by Grace Berg Schaible, Attorney General of Alaska, and Richard D. Monkman, Assistant Attorney General, by Robert K. Corbin, Attorney General of Arizona, and Alison B. Swan, Assistant Attorney General, by John Steven Clark, Attorney General of Arkansas, and Jeffrey A. Bell, Deputy Attorney General, by Duane Woodard, Attorney General of Colorado, Thomas P. McMahon, First Assistant Attorney General, and David S. Harmon and James R. Lewis, Assistant Attorneys General, by Joseph Lieberman, Attorney General of Connecticut, and Robert M. Langer, Assistant Attorney General, by Robert A. Butterworth, Attorney General of Florida, by James T. Jones, Attorney General of Idaho, by Neil F. Hartigan, Attorney General of Illinois, and Robert E. Davy, Jr., Assistant Attorney General, by Linley E. Pearson, Attorney General of Indiana, and Frank A. Baldwin, Deputy Attorney General, by Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, by Robert T. Stephan, Attorney General of Kansas, and Carl M. Anderson, Assistant Attorney General, by DAvid L. Armstrong, Attorney General of Kentucky, by William J. Guste, Jr., Attorney General of Louisiana, by James M. Shannon, Attorney General of Massachusetts, and Barbara Anthony, Assistant Attorney General, by Frank J. Kelley, Attorney General of Michigan, Louis J. Caruso, Solicitor General, and Frederick H. Hoffecker and Robert C. Ward, Assistant Attorneys General, by Hubert H. Humphrey III, Attorney General of Minnesota, by Edwin L. Pittman, Attorney General of Mississippi, and Robert E. Sanders, Special Assistant Attorney General, by William L. Webster, Attorney General of Missouri, by Mike Greely, Attorney General of Montana, and Joe Roberts, Assistant Attorney General, by Robert M. Spire, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, by Brian McKay, Attorney General of Nevada, and P. Gregory Giordano, Deputy Attorney General, by Stephen E. Merrill, Attorney General of New Hampshire, and Amy L. Ignatius, Senior Assistant Attorney General, by W. Cary Edwards, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, by Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Lloyd E.

[**5]**

Judges: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, post, p. 736. KENNEDY, J., took no part in the consideration or decision of the case.

Opinion by: SCALIA

Opinion

[*814]** **[*719]** **[**1517]** JUSTICE **SCALIA** delivered the opinion of the Court.

LEdHN[1A][] [1A]Petitioner Business Electronics Corporation seeks review of a decision of the United States Court of Appeals for the **[*720]** Fifth Circuit holding that a vertical restraint is *per se* illegal under *§ 1* of the Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. § 1*, only if there is an express or implied agreement to set resale prices at some level. *780 F.2d 1212, 1215-1218 (1986)*. We granted certiorari, *482 U.S. 912 (1987)*, to resolve a conflict in the Courts of Appeals regarding the proper dividing line between the rule that vertical price restraints are illegal per se and the rule that vertical nonprice restraints are to be judged under the **[****6]** rule of reason. [1]

[*721] I

In 1968, petitioner became the exclusive retailer in the Houston, Texas, area of electronic calculators manufactured by respondent Sharp Electronics Corporation. In 1972, respondent appointed Gilbert Hartwell as a second retailer in the Houston **[**1518]** area. During the relevant period, **[****7]** electronic calculators were primarily sold to business customers for prices up to $ 1,000. While much of the evidence in this case was conflicting -- in particular, concerning whether petitioner was "free riding" on Hartwell's provision of presale educational and promotional services by providing inadequate services itself -- a few facts are undisputed. Respondent published a list of suggested minimum retail prices, but its written dealership agreements with petitioner and Hartwell did not obligate either to observe them, or to charge any other specific price. Petitioner's **[***815]** retail prices were often below

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Constantine, Assistant Attorney General, by Leroy S. Zimmerman, Attorney General of Pennsylvania, and Eugene F. Waye, Deputy Attorney General, by James E. O'Neil, Attorney General of Rhode Island, by Roger A. Tellinghuisen, Attorney General of South Dakota, and Jeffrey P. Hallem, Assistant Attorney General, by W. J. Michael Cody, Attorney General of Tennessee, and Perry A. Craft, Deputy Attorney General, by Jim Mattox, Attorney General of Texas, Mary F. Keller, Executive Assistant Attorney General, and J. L. Covington and Allene D. Evans, Assistant Attorneys General, by David L. Wilkinson, Attorney General of Utah, and Rihard M. Hagstrom, Assistant Attorney General, by Jeffrey L. Amestoy, Attorney General of Vermont, and Glenn A. Jarrett, Assistant Attorney General, by Mary Sue Terry, Attorney General of Virginia, and Allen L. Jackson, Assistant Attorney General, by Kenneth O. Eikenberry, Attorney General of Washington, and John R. Ellis, Deputy Attorney General, by Charles G. Brown, Attorney General of West Virginia, C. William Ullrich, First Deputy Attorney General, and Mark D. Kindt, Deputy Attorney General, by Donald J. Hanaway, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General, and by Joseph B. Meyer, Attorney General of Wyoming; for K mart Corporation by Robert W. Steele, Robert E. Hebda, and James C. Tuttle; and for the National Mass Retailing Institute by William D. Coston and Robert J. Verdisco.

Briefs of amici curiae urging affimance were filed for the Consumer Electronics Group of the Electronic Industries Association by Gary J. Shapiro; for the National Association of Manufacturers by Jan S. Amundson, Quentin Riegel, and Donald I. Baker; and for the National Office Machine Dealers Association by Samuel Schoenberg.

[1] The Seventh, Eighth, and Tenth Circuits have agreed with the analysis of the Fifth. See *Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1440 (CA7 1986)*; *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323, 329 (CA8 1986)*, cert. pending, No. 86-1101; *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1223-1224 (CA10 1986)*, cert. pending, No. 86-484. Decisions of the Third and Ninth Circuits have disagreed. See *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168-170 (CA3 1979)*; *Zidell Explorations, Inc. v. Conval Int'l, Ltd., 719 F.2d 1465, 1469-1470 (CA9 1983)*.

respondent's suggested retail prices and generally below Hartwell's retail prices, even though Hartwell too sometimes priced below respondent's suggested retail prices. Hartwell complained to respondent on a number of occasions about petitioner's prices. In June 1973, Hartwell gave respondent the ultimatum that Hartwell would terminate his dealership unless respondent ended its relationship with petitioner within 30 days. Respondent terminated petitioner's dealership in July 1973.

Petitioner brought suit in the United States District Court for the Southern District **[****8]** of Texas, alleging that respondent and Hartwell had conspired to terminate petitioner and that such conspiracy was illegal *per se* under *§ 1* of the Sherman Act. The case was tried to a jury. The District Court submitted a liability interrogatory to the jury that asked whether "there was an agreement or understanding between Sharp Electronics Corporation and Hartwell to terminate Business Electronics as a Sharp dealer because of Business Electronics' price cutting." Record, Doc. No. 241. The District Court instructed the jury at length about this question:

[*722] "The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting. Plaintiff contends that Sharp terminated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival.

"If you find that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting, you should answer yes to Question Number 1.

. . . .

"A combination, agreement or understanding to terminate a dealer because **[****9]** of his price cutting unreasonably restrains trade and cannot be justified for any reason. Therefore, even though the combination, agreement or understanding may have been formed or engaged in . . . to eliminate any alleged evils of price cutting, it is still unlawful. . . .

"If a dealer demands that a manufacturer terminate a price cutting dealer, and the manufacturer agrees to do so, the agreement is illegal if the manufacturer's purpose is to eliminate the price cutting." App. 18-19.

The jury answered Question 1 affirmatively and awarded $ 600,000 in damages. The District Court rejected respondent's motion for judgment notwithstanding the verdict or a new trial, holding that the jury interrogatory and instructions had properly stated the law. It entered judgment for petitioner for treble damages plus attorney's fees.

The Fifth Circuit reversed, holding that the jury interrogatory and instructions were erroneous, and remanded for a new trial. It held that, to render illegal *per se* a vertical agreement between a manufacturer and a dealer to terminate a second dealer, the first dealer "must expressly or impliedly agree to set its prices at some level, though not a **[***816]** **[****10]** specific one. **[*723]** The distributor cannot retain complete freedom to set whatever price it chooses." *780 F.2d, at 1218*.

[1519]** II

A

LEdHN[2A][] [2A]*Section 1* of the Sherman Act ***HN1***[] provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U. S. C. § 1*. Since the earliest decisions of this Court interpreting this provision, we have recognized that it was intended to prohibit only unreasonable restraints of trade. *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85, 98 (1984)*; see, *e. g., Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911)*. ***HN2***[] Ordinarily, whether particular concerted action violates *§ 1* of the Sherman Act is determined through case-by-case **[****11]** application of the so-called rule of reason -- that is, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)*. ***HN3***[] Certain categories of agreements, however, have been held to be *per se* illegal, dispensing with the need for case-by-case evaluation. We have said ***HN4***[] that *per se* rules are appropriate only for "conduct that is manifestly anticompetitive," *id., at 50*, that is, conduct "'that would always or almost always tend to restrict competition and decrease output,'" *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-290 (1985)*, quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979)*. See also *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458-459 (1986)* **[****12]** ("We have been slow . . . to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"); *National Collegiate **[*724]** Athletic Assn. v. Board of Regents of University of Oklahoma, supra, at 103-104* ("***HN5***[] *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct"); *National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)* (***HN6***[] agreements are *per se* illegal only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

LEdHN[3][] [3]Although vertical agreements on resale prices have been illegal *per se* since *Dr. Miles Medical Co **[****13]** . v. John D. Park & Sons Co., 220 U.S. 373 (1911)*, we have recognized that the scope of *per se* illegality should be narrow in the context of vertical restraints. In *Continental T. V., Inc. v. GTE Sylvania Inc., supra*, we refused to extend *per se* illegality to vertical nonprice restraints, specifically to a manufacturer's termination of one dealer pursuant to an exclusive territory agreement with **[***817]** another. We noted that especially in the vertical restraint context "departure from the rule-of-reason standard must be based on demonstrable economic effect rather than . . . upon formalistic line drawing." *Id., at 58-59*. We concluded that vertical nonprice restraints had not been shown to have such a "'pernicious effect on competition'" and to be so "'lacking [in] . . . redeeming value'" as to justify *per se* illegality. *Id., at 58*, quoting *Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958)*. Rather, we found, they had real potential to stimulate interbrand competition, "the primary concern of ***antitrust law***," *433 U.S., at 52, n. 19*:

[1520]** **[****14]** "New manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers **[*725]** to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products. . . . The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called 'free-rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did." *Id., at 55*.

Moreover, we observed that a rule of *per se* illegality for vertical nonprice restraints was not needed or effective to protect *intra*brand competition. First, so long as interbrand competition existed, that would provide a "significant check" **[****15]** on any attempt to exploit intrabrand market power. *Id., at 52, n. 19*; see also *id., at 54*. In fact, in order to meet that interbrand competition, a manufacturer's dominant incentive is to lower resale prices. *Id., at 56*, and n. 24. Second, the *per se* illegality of vertical restraints would create a perverse incentive for manufacturers to integrate vertically into distribution, an outcome hardly conducive to fostering the creation and maintenance of small businesses. *Id., at 57, n. 26*.

Finally, our opinion in *GTE Sylvania* noted a significant distinction between vertical nonprice and vertical price restraints. That is, there was support for the proposition that vertical price restraints reduce *inter*brand price competition because they "'facilitate cartelizing.'" *Id., at 51, n. 18*, quoting Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 294 (1975). The authorities cited by the Court suggested how vertical price agreements might assist horizontal **[****16]** price fixing at the manufacturer level (by reducing the manufacturer's incentive to cheat on a cartel, since its retailers could not **[***818]** pass on lower prices to consumers) or might be used to **[*726]** organize cartels at the retailer level. See R. Posner, Antitrust: Cases, Economic Notes and Other Materials 134 (1974); E. Gellhorn, ***Antitrust Law*** and Economics 252, 256 (1976); Note, Vertical Territorial and Customer

Restrictions in the Franchising Industry, 10 Colum. J. L. & Soc. Prob. 497, 498, n. 12 (1974). Similar support for the cartel-facilitating effect of vertical nonprice restraints was and remains lacking.

We have been solicitous to assure that the market-freeing effect of our decision in *GTE Sylvania* is not frustrated by related legal rules. In *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763 (1984)*, which addressed the evidentiary showing necessary to establish vertical concerted action, we expressed concern that "if an inference of such an agreement may be drawn from highly ambiguous evidence, there is considerable danger that the doctrine enunciated in *Sylvania* . . . will be seriously eroded." See also *id., at 761, n. 6*. **[****17]** We eschewed adoption of an evidentiary standard that "could deter or penalize perfectly legitimate conduct" or "would create an irrational dislocation in the market" by preventing legitimate communication between a manufacturer and its distributors. *Id., at 763, 764*.

LEdHN[1B][] [1B] ***LEdHN[2B]***[] [2B] ***LEdHN[4]***[] [4]Our approach to the question presented in the present case is guided by ***HN7***[] the premises of *GTE Sylvania* and *Monsanto*: that there is a presumption in favor of a rule-of-reason standard; that departure **[**1521]** from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*. These premises lead us to conclude **[****18]** that the line drawn by the Fifth Circuit is the most appropriate one.

LEdHN[1C][] [1C] ***LEdHN[5A]***[] [5A]There has been no showing here that an agreement between a manufacturer and a dealer to terminate a "price cutter," without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends **[*727]** to restrict competition and reduce output. Any assistance to cartelizing that such an agreement might provide cannot be distinguished from the sort of minimal assistance that might be provided by vertical nonprice agreements like the exclusive territory agreement in *GTE Sylvania*, and is insufficient to justify a *per se* rule. Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier. Cf. *Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563 (1925)*; *Cement Mfrs. Protective Assn. v. United States, 268 U.S. 588 (1925)*; **[****19]** see generally *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 590 (1986)*. Without an agreement with the remaining dealer on price, the manufacturer both retains its incentive to cheat on any manufacturer-level cartel (since lower prices can still be passed on to consumers) **[***819]** and cannot as easily be used to organize and hold together a retailer-level cartel. [2]

[**20]** The District Court's rule on the scope of *per se* illegality for vertical restraints would threaten to dismantle the doctrine of *GTE Sylvania*. Any agreement between a manufacturer and a dealer to terminate another dealer who happens to have charged lower prices can be alleged to have been directed against the terminated dealer's "price cutting." In the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate services, since price cutting and **[*728]** some measure of service cutting usually go hand in hand. Accordingly, a manufacturer that agrees to give one dealer an exclusive territory and terminates another dealer pursuant to that agreement, or even a manufacturer that agrees with one dealer to terminate another for failure to provide contractually obligated services, exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter. Moreover, even vertical restraints that do not result in dealer termination, such as the initial granting of an exclusive territory or the requirement that certain services be provided,

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[2] ***LEdHN[1D]***[] [1D] ***LEdHN[5B]***[] [5B]

The dissent's principal fear appears to be not cartelization at either level, but Hartwell's assertion of dominant retail power. This fear does not possibly justify adopting a rule of *per se* illegality. Retail market power is rare, because of the usual presence of interbrand competition and other dealers, see *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977)*, and it should therefore not be assumed but rather must be proved. Cf. Baxter, The Viability of Vertical Restraints Doctrine, *75 Calif. L. Rev. 933, 948-949 (1987)*. Of course this case was not prosecuted on the theory, and therefore the jury was not asked to find, that Hartwell possessed such market power.

can be attacked as designed to allow **[****21]** existing dealers to charge higher prices. Manufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties.

We cannot avoid this difficulty by invalidating as illegal *per se* only those agreements imposing vertical restraints that contain the word "price," or that affect the "prices" charged by dealers. Such formalism was explicitly rejected in *GTE Sylvania*. As the above discussion indicates, all vertical restraints, including the exclusive **[**1522]** territory agreement held not to be *per se* illegal in *GTE Sylvania*, have the potential to allow dealers to increase "prices" and can be characterized as intended to achieve just that. In fact, vertical nonprice restraints only accomplish the benefits identified in *GTE Sylvania* because they reduce intrabrand price competition to the point where the dealer's profit margin permits provision of the desired services. As we described it in *Monsanto*: "The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical **[****22]** features of the product, and will want to see that 'free-riders' do not interfere." *465 U.S., at 762-763*. See also *GTE Sylvania, 433 U.S., at 55*.

LEdHN[1E][] [1E] ***LEdHN[6A]***[] [6A] ***LEdHN[7A]***[] [7A]The dissent erects a much more complex analytic structure, which ultimately rests, however, upon the same discredited **[*729]** premise that the only function this **[***820]** nonprice vertical restriction can serve is restraint of dealer-level competition. Specifically, the dissent's reasoning hinges upon its perception that the agreement between Sharp and Hartwell was a "naked" restraint -- that is, it was not "ancillary" to any other agreement between Sharp and Hartwell. *Post*, at 736-742, 744-745. But that is not true, unless one assumes, contrary to *GTE Sylvania* and *Monsanto*, and contrary to our earlier discussion, that it is not a quite plausible purpose of the restriction to enable Hartwell to provide better services under the sales franchise agreement. **[****23]** [3] From its **[*730]** faulty conclusion that what we have before us is a "naked" restraint, the dissent proceeds, by reasoning we do not entirely follow, to the further conclusion that it is therefore a horizontal rather than a vertical restraint. We pause over this only to note that in addition to producing what we think the wrong result in the present case, it introduces needless confusion into antitrust terminology. Restraints imposed by agreement between **[**1523]** competitors have traditionally been denominated as

[3] ***LEdHN[6B]***[] [6B]

The conclusion of "naked" restraint could also be sustained on another assumption, namely, that an agreement is not "ancillary" unless it is designed to enforce a contractual obligation of one of the parties to the contract. The dissent appears to accept this assumption. See *post*, at 739-741, and n. 3, 744-746. It is plainly wrong. The classic "ancillary" restraint is an agreement by the seller of a business not to compete within the market. See *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); ***Restatement (Second) of Contracts § 188(2)(a)*** (1981). That is not ancillary to any other contractual obligation, but, like the restraint here, merely enhances the value of the contract, or permits the "enjoyment of [its] fruits." *United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (CA6 1898)*, aff'd, *175 U.S. 211 (1899)*; cf. ***Restatement (Second) of Contracts §§ 187***, ***188*** (1981) (restraint may be ancillary to a "transaction *or relationship"*) (emphasis added); R. Bork, The Antitrust Paradox 29 (1978) (hereinafter Bork) (vertical arrangements are ancillary to the "transaction of supplying and purchasing").

More important than the erroneousness of the dissent's common-law analysis of "naked" and "ancillary" restraints are the perverse economic consequences of permitting nonprice vertical restraints to avoid *per se* invalidity only through attachment to an express contractual obligation. Such an approach is contrary to the express views of the principal scholar on whom the dissent relies. See 7 P. Areeda, ***Antitrust Law*** § 1457c, p. 170 (1986) (hereinafter Areeda) (legality of terminating price cutter should not depend upon formal adoption of service obligations that termination is assertedly designed to protect). In the precise case of a vertical agreement to terminate other dealers, for example, there is no conceivable reason why the existence of an exclusivity commitment by the manufacturer to the one remaining dealer would render anticompetitive effects less likely, or the procompetitive effects on services more likely -- so that the dissent's line for *per se* illegality fails to meet the requirement of *Continental T. V., Inc. v. GTE Sylvania Inc., supra, at 59*, that it be based on "demonstrable economic effect." If anything, the economic effect of the dissent's approach is perverse, encouraging manufacturers to agree to otherwise inefficient contractual provisions for the sole purpose of attaching to them efficient nonprice vertical restraints which, only by reason of such attachment, can avoid *per se* invalidity as "naked" restraints. The dissent's approach would therefore create precisely the kind of "irrational dislocation in the market" that legal rules in this area should be designed to avoid. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984)*.

horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints. [4]

[**25] [*731] [***821]** *LEdHN[1F]*[] [1F]Finally, we do not agree with petitioner's contention that an agreement on the remaining dealer's price or price levels will so often follow from terminating another dealer "because of [its] price cutting" that prophylaxis against resale price maintenance warrants the District Court's *per se* rule. Petitioner has provided no support for the proposition that vertical price agreements generally underlie agreements to terminate a price cutter. That proposition is simply incompatible with the conclusion of *GTE Sylvania* and *Monsanto* that manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by "free riding" on the services provided by other dealers. The District Court's *per se* rule would therefore discourage conduct recognized by *GTE Sylvania* and *Monsanto* as beneficial to consumers.

B

LEdHN[8][] [8]In resting our decision upon the foregoing economic analysis, we do not ignore common-law **[****26]** precedent concerning what constituted "restraint of trade" at the time the Sherman Act was adopted. But neither do we give that pre-1890 precedent the dispositive effect some would. The term "restraint of trade" in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. The changing content of the term "restraint of trade" was well recognized at the time the Sherman Act was enacted. See *Gibbs v. Consolidated Gas Co., 130 U.S. 396, 409 (1889)* (noting that English case laying down the common-law rule **[*732]** that contracts in restraint of trade are invalid "was made under a condition of things, and a state of society, different from those which now prevail, [and therefore] the rule laid down is not regarded as inflexible, and has been considerably modified"); see also *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S., at 406* ("With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation **[****27]** to modern conditions"); B. Cardozo, The Nature of the Judicial Process 94-96 (1921).

[*822]** The Sherman Act adopted the term "restraint of trade" along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890. See *GTE Sylvania, 433 U.S., at 53, n. 21*; *Standard Oil Co. v. United States, 221 U.S., at 51-60*; see also *McNally v. **[**1524]** United States, 483 U.S. 350, 372-373 (1987)* (STEVENS, J., joined by O'CONNOR, J., dissenting); *Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 533, n. 28, 539-540*, and n. 43 (1983); Bork 37. If it were otherwise, not only would the line of *per se* illegality have to be drawn today precisely where it was in 1890, but also case-by-case evaluation of legality (conducted where *per se* rules do not apply) would have to be governed by 19th-century notions of reasonableness. It would make no sense to create out of the

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[4] **[****24]** *LEdHN[7B]*[] [7B]

The dissent apparently believes that whether a restraint is horizontal depends upon whether its anticompetitive *effects* are horizontal, and not upon whether it is the product of a horizontal agreement. *Post*, at 745-747, and n. 10. That is of course a conceivable way of talking, but if it were the language of antitrust analysis there would be no such thing as an unlawful vertical restraint, since all anticompetitive effects are by definition horizontal effects. The dissent quotes a statement of Professor Areeda as supposed adoption of its definition of horizontal restraint. *Post*, at 745-746, n. 10, quoting Areeda § 1457d, p. 174. That statement seems to us to be, to the contrary, Professor Areeda's attempt to explain a peculiar usage of the term "horizontal" in *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (CA3 1979)*, noting that (even though *Cernuto* did not involve a horizontal restraint) the use of the term "horizontal" was "appropriate to capture the fact that dealer interests opposed to those of the manufacturer were being served." Areeda § 1457d, p. 174. The dissent also seeks to associate Judge Bork with its terminological confusion. See *post*, at 746, n. 10, quoting Bork 288. What the quoted passage says, however, is that a facially vertical restraint imposed by a manufacturer only because it has been coerced by a "horizontal cartel" agreement among his distributors is in reality a horizontal restraint. That says precisely what we say: that a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.

single term "restraint of trade" a chronologically schizoid statute, in which a "rule of reason" evolves with new circumstances **[****28]** and new wisdom, but a line of *per se* illegality remains forever fixed where it was.

Of course the common law, both in general and as embodied in the Sherman Act, does not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error. It is relevant, therefore, whether the common law of **[*733]** restraint of trade ever prohibited as illegal *per se* an agreement of the sort made here, and whether our decisions under *§ 1* of the Sherman Act have ever expressed or necessarily implied such a prohibition.

LEdHN[9][] [9]With respect to this Court's understanding of pre-Sherman Act common law, petitioner refers to our decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co., supra.* Though that was an early Sherman Act case, its holding that a resale price maintenance agreement was *per se* illegal was based largely on the perception that such an agreement was categorically impermissible at common law. *Id., at 404-408*. As the opinion made plain, however, the basis for that common-law **[****29]** judgment was that the resale restriction was an unlawful restraint on alienation. See *ibid*. As we explained in *Boston Store of Chicago v. American Graphophone Co., 246 U.S. 8, 21-22 (1918)*, *"Dr. Miles* . . . decided that under the general law the owner of movables . . . could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another." In the present case, of course, no agreement on resale price or price level, and hence no restraint on alienation, was found by the jury, so the common-law rationale of *Dr. Miles* does not apply. Cf. *United States v. General Electric Co., 272 U.S. 476, 486-488 (1926)* (*Dr. Miles* does not apply to restrictions on price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer).

[**30]** ***LEdHN[10]***[] [10] ***LEdHN[11]***[] [11] Petitioner's principal contention has been that the District **[***823]** Court's rule on *per se* illegality is compelled not by the old common law, but by our more recent Sherman Act precedents. First, petitioner contends that since certain horizontal agreements have been held to constitute price fixing (and **[*734]** thus to be *per se* illegal) though they did not set prices or price levels, see, *e. g., Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647-650 (1980)* *(per curiam)*, ***HN8***[] it is improper to require that a vertical agreement set prices or price levels before it can suffer the same fate. This notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected in *GTE Sylvania*, see *433 U.S., at 57, n. 27* -- as it had to be, since a horizontal agreement to divide territories is *per se* illegal, see *United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972)*, while **[****31]** *GTE Sylvania* held that a vertical agreement to do so is not. See also *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 390-391 (1967)* (Stewart, J., joined by Harlan, J., concurring in part and dissenting in part); *White Motor Co. v. United States, 372 U.S. 253, 263 (1963)*.

Second, petitioner contends that *per se* illegality here follows from our two cases holding *per se* illegal a group boycott of a dealer because of its price cutting. See *United States v. General Motors Corp., 384 U.S. 127 (1966)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)*. This second contention is merely a restatement of the first, since both cases involved horizontal combinations -- *General Motors, supra, at 140, 143-145*, at the dealer level, [5] and *Klor's, supra, at 213*, at the manufacturer and wholesaler levels. Accord, *GTE Sylvania, supra, at 58, n. 28*, *United States v. Arnold, Schwinn & Co., 388 U.S., at 373, 378*; *id., at 390* (Stewart, J., joined by Harlan, J., concurring in part and dissenting in part); **[****32]** *White Motor Co. v. United States, supra, at 263*.

[*735] Third, petitioner contends, relying on *Albrecht v. Herald Co., 390 U.S. 145 (1968)*, and *United States v. Parke, Davis & Co., 362 U.S. 29 (1960)*, that our vertical price-fixing cases have already rejected the proposition that *per se* illegality requires setting a price or a price level. We disagree. In *Albrecht*, the maker of the product

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[5] Contrary to the dissent, *post*, at 742-743, 747, *General Motors* does not differ from the present case merely in that it involved a three-party rather than a two-party agreement. The agreement was among competitors in *General Motors*; it was between noncompetitors here. Cf. Bork 330 (defining "boycotts" as "agreements among competitors to refuse to deal").

formed a combination to force a retailer to charge the maker's advertised retail price. See *390 U.S., at 149*. This combination had two aspects. Initially, the maker **[****33]** hired a third party to solicit customers away from the noncomplying retailer. This solicitor "was aware that the aim of the solicitation campaign was to force [the **[***824]** noncomplying retailer] to lower his price" to the suggested retail price. *Id., at 150*. Next, the maker engaged another retailer who "undertook to deliver [products] at the suggested price" to the noncomplying retailer's customers obtained by the solicitor. *Ibid*. This combination of maker, solicitor, and new retailer was held to be *per se* illegal. *Id., at 150, 153*. It is plain that the combination involved both an explicit agreement on resale price and an agreement to force another to adhere to the specified price.

In *Parke, Davis*, a manufacturer combined first with wholesalers and then with retailers in order to gain the "retailers' adherence to its suggested minimum retail prices." *362 U.S., at 45-46*, and n. 6. The manufacturer also brokered an agreement among its retailers not to advertise prices below its suggested retail prices, which agreement was held to be part of the *per se* illegal combination. This holding also does not support **[****34]** a rule that an agreement on price or price level is not required for a vertical restraint to be *per se* illegal -- first, because the agreement not to advertise prices was part and parcel of the combination that contained the price agreement, *id., at 35-36*, and second because the agreement among retailers that the manufacturer organized was a *horizontal* conspiracy among competitors. *Id., at 46-47*.

LEdHN[1G][] [1G]In sum, economic analysis supports the view, and no precedent opposes it, that **HN9**[] a vertical restraint is not illegal *per se* **[*736]** unless it includes some agreement on price or price levels. Accordingly, the judgment of the Fifth Circuit is

Affirmed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

Dissent by: STEVENS

Dissent

[1526]** JUSTICE **STEVENS**, with whom JUSTICE **WHITE** joins, dissenting.

In its opinion the majority assumes, without analysis, that the question presented by this case concerns the legality of a "vertical nonprice **[****35]** restraint." As I shall demonstrate, the restraint that results when one or more dealers threaten to boycott a manufacturer unless it terminates its relationship with a price-cutting retailer is more properly viewed as a "horizontal restraint." Moreover, an agreement to terminate a dealer because of its price cutting is most certainly not a "nonprice restraint." The distinction between "vertical nonprice restraints" and "vertical price restraints," on which the majority focuses its attention, is therefore quite irrelevant to the outcome of this case. Of much greater importance is the distinction between "naked restraints" and "ancillary restraints" that has been a part of our law since the landmark opinion written by Judge (later Chief Justice) Taft in *United States v. Addyston Pipe & Steel Co., 85 F. 271 (CA6 1898)*, aff'd, *175 U.S. 211 (1899)*.

I

The plain language of *§ 1* of the **[***825]** Sherman Act prohibits "every" contract that restrains trade. [1] Because such a literal reading of the statute would outlaw the entire body of private contract law, and because Congress

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[1] *Section 1* of the Sherman Act, as set forth in *15 U. S. C. § 1*, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

plainly intended **[*737]** the Act to be interpreted in the light of **[****36]** its common-law background, the Court has long held that certain "ancillary" restraints of trade may be defended as reasonable. As we recently explained without dissent:

"The Rule of Reason suggested by *Mitchel* v. *Reynolds* [1 P. Wms. 181, 24 Eng. Rep. 347 (1711)] has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States* v. *Addyston Pipe & Steel Co*. . . ." *National Society of Professional Engineers v. United States, 435 U.S. 679, 689 (1978)*.

[**37]** Judge Taft's rejection of an argument that a price-fixing agreement could be defended as reasonable was based on a detailed examination of common-law precedents. He explained that in England there had been two types of objection to voluntary restraints on one's ability to transact business. "One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others." *85 F., at 279*. Certain contracts, however, such as covenants not to compete in a particular business, for a certain period of time, within a defined geographical area, had always been considered reasonable when necessary to carry out otherwise procompetitive contracts, such as the sale of a business. *Id., at 280-282*. The difference between ancillary covenants that **[*738]** may be justified as reasonable and those that are "void" because there is "nothing to justify **[****38]** or excuse the restraint," *id., at 282-283*, was described in the opinion's seminal discussion:

"The contract must be one in which there is a main purpose, to which the **[**1527]** covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the **[***826]** necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have **[****39]** a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster." *Ibid*.

Although Judge Taft was writing as a Circuit Judge, his opinion is universally accepted as authoritative. We affirmed **[*739]** his decision without dissent, we have repeatedly cited it with approval, [2] and it is praised by a respected scholar as "one of the greatest, if not the greatest, antitrust opinions in the history of the law." R. Bork, The Antitrust Paradox 26 (1978). In accordance with the teaching in that opinion, it is therefore appropriate to look more closely at the character of the restraint of trade found by the jury in this case.

[**40]** II

It may be helpful to begin by explaining why the agreement in this case does not fit into certain categories of agreement that are frequently found in antitrust litigation. First, despite the contrary implications in the majority

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[2] See, *e. g., Arizona v. Maricopa County Medical Society, 457 U.S. 332, 350, n. 22 (1982)*; *United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972)*; *Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958)*.

opinion, this is not a case in which the manufacturer is alleged to have imposed any vertical nonprice restraints on any of its dealers. The term "vertical nonprice restraint," as used in *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)*, and similar cases, refers to a contractual term that a dealer must accept in order to qualify for a franchise. Typically, the dealer must agree to meet certain standards in its advertising, promotion, product display, and provision of repair and maintenance services in order to protect the goodwill of the manufacturer's product. Sometimes a dealer must agree to sell only to certain classes of customers -- for example, wholesalers generally may only sell to retailers and may be required not to sell directly to consumers. In *Sylvania*, to take another example, we examined agreements between a manufacturer and its dealers that included "provisions barring the retailers from selling **[****41]** franchised products from locations other than those specified in agreements." *Id., at 37.* **[***827]** Restrictions of that kind, which are a part of, or ancillary to, **[*740]** the basic franchise agreement, are perfectly lawful unless the "rule of reason" is violated. Although vertical nonprice restraints may have some adverse effect on competition, as long as they serve the main purpose of a **[**1528]** procompetitive distribution agreement, the ancillary restraints may be defended under the rule of reason. And, of course, a dealer who violates such a restraint may properly be terminated by the manufacturer. [3]

[**42]** In this case, it does not appear that respondent imposed any vertical nonprice restraints upon either petitioner or Hartwell. Specifically, respondent did not enter into any "exclusive" agreement, as did the defendant in *Sylvania*. It is true that before Hartwell was appointed and after petitioner was terminated, the manufacturer was represented by only one retailer in the Houston market, but there is no evidence that respondent ever made any contractual commitment to give either of them any exclusive rights. This therefore is not a case in which a manufacturer's right to grant exclusive territories, or to change the identity of the dealer in an established exclusive territory, is implicated. The case is one in which one of two competing dealers entered into an agreement with the manufacturer to terminate a particular competitor without making any promise to provide better or more efficient services and without receiving any guarantee of exclusivity in the future. The contractual relationship between respondent and Hartwell was exactly **[*741]** the same after petitioner's termination as it had been before that termination.

Second, this case does not involve a typical **[****43]** vertical price restraint. As the Court of Appeals noted, there is some evidence in the record that may support the conclusion that respondent and Hartwell implicitly agreed that Hartwell's prices would be maintained at a level somewhat higher than petitioner had been charging before petitioner was terminated. *780 F.2d 1212, 1219 (CA5 1986)*. The illegality of the agreement found by the jury does not, however, depend on such evidence. For purposes of analysis, we should assume that no such agreement existed and that respondent was perfectly willing to allow its dealers to set prices at levels that would maximize their profits. That seems to have been the situation during the period when petitioner was the only dealer in Houston. Moreover, after respondent appointed Hartwell as its second dealer, it was Hartwell, rather than respondent, who objected to petitioner's pricing policies.

Third, this is not a case in which the manufacturer acted independently. Indeed, given the jury's verdict, it is not even a case in which the **[***828]** termination can be explained as having been based on the violation of any distribution policy adopted by respondent. The termination **[****44]** was motivated by the ultimatum that respondent received from Hartwell and that ultimatum, in turn, was the culmination of Hartwell's complaints about

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[3] Thus, in *Morrison v. Murray Biscuit Co., 797 F.2d 1430 (CA7 1986)*, cited *ante*, at 720, n. 1, the plaintiff had been terminated because he violated a lawful restriction on the customers to whom he could sell. As the court correctly explained:

"As long as the supplier's motive is not to keep his established dealers' prices up but only to maintain his system of lawful nonprice restrictions, he can terminate noncomplying dealers without fear of antitrust liability even if he learns about the violation from dealers whose principal or perhaps only concern is with protecting their prices." *797 F.2d, at 1440*.

There was no such justification for the termination in this case.

petitioner's competitive price cutting. The termination was plainly the product of coercion by the stronger of two dealers rather than an attempt to maintain an orderly and efficient system of distribution. [4]

[**45]** **[*742]** **[**1529]** In sum, this case does not involve the reasonableness of any vertical restraint imposed on one or more dealers by a manufacturer in its basic franchise agreement. What the jury found was a simple and naked "'agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting.'" *Ante*, at 722.

III

Because naked agreements to restrain the trade of third parties are seldom identified with such stark clarity as in this case, there appears to be no exact precedent that determines the outcome here. There are, however, perfectly clear rules that would be decisive if the facts were changed only slightly.

Thus, on the one hand, if it were clear that respondent had acted independently and decided to terminate petitioner because respondent, for reasons of its own, objected to petitioner's pricing policies, the termination would be lawful. See *United States v. Parke, Davis & Co., 362 U.S. 29, 43-45 (1960)*. On the other hand, it is equally clear that if respondent had been represented by three dealers in the Houston market instead of only two, and if two of them had threatened to terminate **[****46]** their dealerships "unless respondent ended its relationship with petitioner within 30 days," *ante*, at 721, an agreement to comply with the ultimatum would be an obvious violation of the Sherman Act. See, *e. g., United States v. General Motors Corp., 384 U.S. 127 (1966)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)*. [5] The **[*743]** question then is whether **[***829]** the two-party agreement involved in this case is more like an illegal three-party agreement or a legal independent decision. For me, the answer is plain.

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[4] "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. 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." *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (CA3 1979)*.

[5] Thus, a boycott "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S., at 213*, (footnote omitted). Again, Judge Adams' analysis in the *Cernuto* opinion, n. 4, *supra*, is relevant:

"The importance of the horizontal nature of this arrangement is illustrated by *United States v. General Motors Corp., 384 U.S. 127 . . . (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. So here, if [the manufacturer and the sales representative acted at the nonterminated dealer's] 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." *595 F.2d, at 168* (footnote omitted).

As we said in *General Motors*:

"The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." *384 U.S., at 148*.

[**47]** The distinction between independent action and joint action is fundamental in antitrust jurisprudence. [6] Any attempt **[*744]** to define **[**1530]** the boundaries of *per se* illegality by the number of parties to different agreements with the same anticompetitive consequences can only breed uncertainty in the law and confusion for the businessman.

[**48]** More importantly, if instead of speculating about irrelevant vertical nonprice restraints, we focus on the precise character of the agreement before us, we can readily identify its anticompetitive nature. Before the agreement was made, there was price competition in the Houston retail market for respondent's products. The stronger of the two competitors was unhappy about that competition; it wanted to have the power to set the price level in the market and therefore it "complained to respondent on a number of occasions about petitioner's prices." *Ante*, at 721. Quite obviously, if petitioner had agreed with either Hartwell or respondent to discontinue its competitive pricing, there would have been no ultimatum from Hartwell and no termination by respondent. It is equally obvious that either of those agreements would have been illegal *per se*. [7] Moreover, it is also reasonable to **[***830]** assume that if respondent were to replace petitioner with another price-cutting dealer, there would soon be more complaints and another ultimatum from Hartwell. Although respondent has not granted Hartwell an exclusive dealership -- it retains the right to appoint multiple dealers **[****49]** -- its **[*745]** agreement has protected Hartwell from price competition. Indeed, given the jury's finding and the evidence in the record, that is the *sole function* of the agreement found by the jury in this case. It therefore fits squarely within the category of "naked restraints of trade with no purpose except stifling of competition." *White Motor Co. v. United States, 372 U.S. 253, 263 (1963)*.

[**50]** This is the sort of agreement that scholars readily characterize as "inherently suspect." [8] **[****51]** When a manufacturer responds to coercion from a dealer, instead of making an independent decision to enforce a predetermined distribution policy, the anticompetitive character of the response is evident. [9] As Professor Areeda has correctly noted, the fact that the agreement is between only one complaining dealer and the manufacturer does not prevent it from imposing a "horizontal" restraint. [10] **[****52]** If two critical facts are present -- a **[*746]** naked

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[6] See *United States v. Colgate & Co., 250 U.S. 300, 307-308 (1919)*. In *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984)*, we noted that "the basic distinction between concerted and independent action" was "not always clearly drawn by parties and courts." In its opinion today the majority virtually ignores that basic distinction. Thus, *ante*, at 728, the majority discusses the manufacturer's risks arising out of its agreement "with one dealer to terminate another for failure to provide contractually obligated services." But if such a breach of contract has occurred, the manufacturer should have an independent motivation for acting and need not enter into any agreement with a dealer to do so. As we held in *Monsanto*, the mere fact that the breach of contract may have been called to the manufacturer's attention by another dealer does not make the manufacturer's independent decision to terminate a price-cutting dealer unlawful.

[7] "We have not wavered in our enforcement of the *per se* rule against price fixing." *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 347 (1982)*. Thus, in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)*, the Court determined that vertical price fixing is *per se* invalid because resale price maintenance plans serve the profit motives of the dealers, not the manufacturers, and are thereby similar to plans pursuant to which the dealers themselves conspire to fix prices. *Id., at 407-408*. There is no doubt that horizontal intrabrand price fixing is *per se* illegal, even if the conspirators lack the market power to affect interbrand competition in a manner that would violate the rule of reason.

[8] "Scenarios that involve a firm or firms at one level of activity using vertical restraints deliberately to confer market power on firms at an adjacent level are inherently suspect. To do so is, typically, to inflict self-injury, just as it would be for consumers to confer market power on the retailers from whom they buy." Baxter, The Viability of Vertical Restraints Doctrine, *75 Calif. L. Rev. 933, 938 (1987)*.

[9] "Termination responses reflecting the manufacturer's own distribution policy differ greatly from those imposed upon him by a complaining dealer. In the latter case, the manufacturer's compliance with the complainer's demand is more likely to be anticompetitive. There is a superficial resemblance to *Parke Davis* in that three parties are involved, but my earlier analysis suggested that the key to that case was 'complex enforcement,' which is absent where a complaining dealer simply threatens to abandon the manufacturer who continues selling to discounting dealers." 7 P. Areeda, ***Antitrust Law*** § 1457, p. 166 (1986).

purpose **[**1531]** to eliminate price competition as such and **[***831]** coercion of the manufacturer [11] **[****53]** -- the conflict with antitrust policy is manifest. [12]

[**54]** **[*747]** Indeed, since the economic consequences of Hartwell's ultimatum to respondent are identical to those that would result from a comparable ultimatum by two of three dealers in a market -- and since a two-party

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[10] Commenting on Judge Adams' opinion in *Cernuto*, see nn. 4 and 5, *supra*, Professor Areeda wrote:

"That the complainer was a single firm did not weaken the 'horizontal' characterization. Because the elimination of price competition was the purpose of the complaint and the termination, the court declared that per se illegality would be appropriate. However, the court made clear that no illegal agreement would be found if United was implementing its own unilaterally chosen distribution policy. Thus, the court's implicit theory was that an agreement arose when the manufacturer bowed to the complainer's will. In that situation, the 'horizontal' characterization is appropriate to capture the fact that dealer interests opposed to those of the manufacturer were being served." Areeda, *supra*, at 174 (footnotes omitted).

See also R. Bork, The Antitrust Paradox 288 (1978):

"A restraint -- whether on price, territory, or any other term -- is vertical, according to the usage employed here, when a firm operating at one level of an industry places restraints upon rivalry at another level for its own benefit. (This definition excludes restraints, vertical in form only, that are actually imposed by horizontal cartels at any level of the industry, *e. g*., resale price maintenance that is compelled not by the manufacturer but by the pressure of organized retailers.)"

[11] The two critical facts that had not yet been determined by a jury in the *Cernuto* case are perfectly plain in this case. As Professor Areeda explained:

"The *Cernuto* case was decided on summary judgment which accepted the plaintiff's view of the facts. But two facts critical for the court will often be obscure. *First*, was it the manufacturer's purpose to eliminate price competition as such? Let us assume that termination was not based on such completely independent grounds as non-payment of bills. Even so, the existence of an inevitable price effect does not establish a purpose to control prices in a forbidden way. A purpose to facilitate point-of-sale services or to protect minimum economies of scale could induce a manufacturer to limit intrabrand competition. Notwithstanding price effects, such limitations are lawful when reasonable and not subject to automatic condemnation. Indeed, termination of one dealer in order to grant another exclusive distribution rights in an area is generally lawful. Nevertheless, so long as the manufacturer is not implementing his own interest but that of the complainer, the vice of eliminating 'horizontal' competition with the complainer's rivals seems equally present when the complainer thereby succeeds in eliminating horizontal competition with respect to customers or territories. *Second*, was the manufacturer coerced or was he indulging his own preferences? As we have seen, this question cannot be answered in the abstract. The court correctly acknowledged that the manufacturer might also be implementing his own unilateral vision of optimal distribution without regard to the complainer's desires and held that no illegal agreement would arise if that were the case." Areeda, *supra*, at 174-175 (footnotes omitted).

[12] "Let us defer for the moment problems of proof and assume that a manufacturer does not wish to terminate the plaintiff dealer but does so to placate the complaining dealer, who would otherwise cease handling the product. This manufacturer would rather keep both dealers but, when forced to choose between them, concludes that terminating the plaintiff hurts him less (considering sales lost, transaction costs in finding and perhaps training a replacement, and any spillover effects upon his relations with other dealers) than losing the complainer's patronage.

"The present situation is *Colgate* in reverse. In *Colgate*, it was the supplier who was controlling the dealer's behavior. Here a dealer is conditioning his patronage in a way that controls the manufacturer's behavior. The agreement concept seems parallel. But the economic effects can be very different. From the policy viewpoint, it can matter greatly whether manufacturer or dealer interests are being served. The former is more likely to seek efficient distribution, which stimulates interbrand competition; the latter is more likely to seek excess profits, which dampen interbrand competition. Accordingly, antitrust policy can be more hospitable toward manufacturer efforts to control dealer prices, customers, or territories than toward the efforts of dealers to control *their* competitors through the manufacturer.

"Of course, manufacturer and dealer interests are not necessarily antagonistic. Like the manufacturer, dealers might also believe that restricted distribution increases dealer services and sales and thus strengthens interbrand competition. However, this objective seems unlikely when the manufacturer is forced to violate the distribution policy he thinks best. Although he might be mistaken about what his optimal distribution policy ought to be, he should be presumed a better judge of that than coercing dealers who always desire excess profits unnecessary for efficient distribution." Areeda, *supra*, at 167-168 (footnotes omitted).

price-fixing agreement is just as unlawful as a three-party price-fixing agreement -- **[**1532]** it is appropriate to employ the term "boycott" to characterize this agreement. In my judgment the case is therefore controlled by our decision in *United States v. General Motors Corp., 384 U.S. 127 (1966)*.

The majority disposes quickly of both *General Motors and Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207* ***[***832]*** *(1959)*, by concluding that "both cases involved horizontal combinations." *Ante*, at 734. But this distinction plainly will **[*748]** not suffice. In *General Motors*, a group of Chevrolet dealers conspired with General Motors to eliminate sales from the manufacturer to discounting dealers. We held that "elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act," *384 U.S., at 145*, and explained that "inherent **[****55]** in the success of the combination in this case was a substantial restraint upon price competition -- a goal unlawful *per se* when sought to be effected by combination or conspiracy." *Id., at 147*. Precisely the same goal was sought and effected in this case -- the elimination of price competition at the dealer level. Moreover, the method of achieving that goal was precisely the same in both cases -- the manufacturer's refusal to sell to discounting dealers. The difference between the two cases is not a difference between horizontal and vertical agreements -- in both cases the critical agreement was between market actors at the retail level on the one hand and the manufacturer level on the other. Rather, the difference is simply a difference in the number of conspirators. Hartwell's coercion of respondent in order to eliminate petitioner because of its same-level price competition is not different in kind from the Chevrolet dealers' coercion of General Motors in order to eliminate other, price-cutting dealers; the only difference between the two cases -- one dealer seeking a naked price-based restraint in today's case, many dealers seeking the same end in **[****56]** *General Motors* -- is merely a difference in degree. Both boycotts lack any efficiency justification -- they are simply naked restraints on price competition, rather than integral, or ancillary, parts of the manufacturers' predetermined distribution policies.

IV

What is most troubling about the majority's opinion is its failure to attach any weight to the value of intrabrand competition. In *Continental T. V., Inc. v. GTE Sylvania Inc.,* ***[*749]*** *433 U.S. 36 (1977)*, we correctly held that a demonstrable benefit to interbrand competition will outweigh the harm to intrabrand competition that is caused by the imposition of vertical nonprice restrictions on dealers. But we also expressly reaffirmed earlier cases in which the illegal conspiracy affected only intrabrand competition. [13] Not a word in the *Sylvania* opinion implied that the elimination of intrabrand competition could be justified as reasonable without any evidence of a purpose to improve interbrand competition.

[**57]** In the case before us today, the relevant economic market was the sale at retail in the Houston area of calculators manufactured by respondent. [14] There is no dispute **[**1533]** that an **[***833]** agreement **[*750]** to fix

[13] See *433 U.S., at 58, n. 28* (citing *United States v. General Motors Corp., 384 U.S. 127 (1966)*, and *United States v. Topco Associates, Inc., 405 U.S. 596 (1972))*.

[14] "It might be helpful to note at this point that although the majority mentions only the reduction of *inter*brand competition as a justification for a *per se* rule against vertical price restraints, see *ante*, at 725-726, our opinion in *Sylvania* was quite different. As we stated then:

"The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. Significantly, the Court in *Schwinn* did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers." *433 U.S., at 51-52* (footnotes omitted).

In the following pages, we pointed out that because vertical nonprice restrictions imposed by manufacturers may serve to advance interbrand competition, the restriction on intrabrand competition should be subject only to a rule of reason analysis. Along these same lines, we explained that "economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products." *Id., at 56*. Thus, although the majority neglects to mention it, fostering intrabrand competition has been recognized as an important goal of prices in that market, either horizontally between petitioner and Hartwell or vertically between respondent and either or both of the two dealers, would violate the Sherman Act. The "quite plausible" assumption, see *ante*, at 729, that such an agreement might enable the retailers to provide better services to their customers would not have avoided the strict rule against price fixing that this Court has consistently enforced in the past.

[**58] [*751]** Under petitioner's theory of the case, an agreement between respondent and Hartwell to terminate petitioner because of its price cutting was just as indefensible as any of those price-fixing agreements. At trial the jury found the existence of such an agreement to eliminate petitioner's price competition. Respondent had denied that any agreement **[***834]** had been made and asked the jury to find that it had independently decided to terminate petitioner because of its poor sales performance, [15] but after hearing several days of testimony, the jury concluded that this defense was pretextual.

[**59]** Neither the Court of Appeals nor the majority questions the accuracy of the jury's resolution of the factual issues in this case. Nevertheless, the rule the majority fashions today is based largely on its concern that in other cases juries will be unable to tell the difference between truthful **[**1534]** and pretextual defenses. Thus, it opines that "even a manufacturer that agrees with one dealer to terminate another for failure to provide contractually obligated services, exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter." *Ante*, at 728. But such a "plausible" concern in a hypothetical case that is so different from this one should not be given greater weight than facts that can be established by hard evidence. If a dealer has, in fact, failed to provide contractually obligated services, and if the manufacturer has, in fact, terminated the dealer for that reason, both of those objective facts should be provable by admissible **[*752]** evidence. [16] **[****61]** Both in its disposition

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antitrust law, and although a manufacturer's efficiency-enhancing vertical nonprice restraints may subject a reduction of intrabrand competition only to a rule of reason analysis, a similar reduction without the procompetitive "redeeming virtues" of manufacturer-imposed vertical nonprice restraints, *id., at 54*, causes nothing but economic harm. As one commentator has recently stated:

"Intrabrand competition can benefit the consumer, and it is therefore important to insure that a manufacturer's motive for a vertical restriction is not simply to acquiesce in his distributors' desires to limit competition among themselves. The Supreme Court has recognized that restrictions on intrabrand competition can only be tolerated because of the countervailing positive impact on interbrand competition." Piraino, The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution, *63 Notre Dame L. Rev. 1, 17 (1988)* (footnotes omitted).

See also H. R. Rep. No. 100-421, pp. 23, 38 (1987) (accompanying bill H. R. 585, the Freedom from Vertical Price Fixing Act of 1987, passed by the House and currently pending before the Senate; criticizing the Fifth Circuit's decision in this case, and restating "plainly and unequivocally that *all forms* of resale price maintenance are illegal per se under the antitrust laws," including "where a conspiracy exists between a supplier and distributor to terminate or cut off supply to a second distributor because of the second distributor's pricing policies") (emphasis in original); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. 99-180, 99 Stat. 1169-1170 (congressional resolution that Department of Justice Vertical Restraints Guidelines "are inconsistent with established ***antitrust law***, . . . in maintaining that such policy guidelines do not treat vertical price fixing when, in fact, some provisions of such policy guidelines suggest that certain price fixing conspiracies are legal if such conspiracies are 'limited' to restricting intrabrand competition; . . . in stating that vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an 'explicit agreement as to the specific prices'"); Report of Attorney General's National Committee to Study the Antitrust Laws 149-155 (1955) (criticizing laws that permit resale price maintenance as a "throttling of price competition in the process of distribution").

[15] The court instructed the jury:

"Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an agreement or understanding with Hartwell to eliminate price cutting by Business Electronics, then you should answer 'no' to question number 1."

22 Record 1587.

See also nn. 18-19, *infra*.

of this case and in its attempt to justify a new approach to agreements to eliminate price competition, the majority exhibits little confidence in **[****60]** the judicial process as a means of ascertaining the truth. [17]

[*753] **[***835]** The majority fails to consider that manufacturers such as respondent will only be held liable in the rare case in which the following can be proved: First, the terminated dealer must overcome the high hurdle of *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)*. A terminated dealer **[****62]** must introduce "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id., at 764*. Requiring judges to adhere to the strict test for agreement laid down in *Monsanto*, in their jury instructions or own findings of fact, goes a long way toward ensuring that many legitimate dealer termination decisions do not succumb improperly to antitrust liability. [18]

[**63]** **[**1535]** Second, the terminated dealer must prove that the agreement was based on a purpose to terminate it because of its price cutting. Proof of motivation is another commonplace in antitrust litigation of which the majority appears apprehensive, but as we have explained or demonstrated many times, see, *e. g., Aspen Skiing Co. v. Aspen Highlands Skiing* ***[*754]*** *Corp., 472 U.S. 585, 610-611 (1985)*; *McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 243 (1980)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-226, n. 59*

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[16] In *Morrison v. Murray Biscuit Co., 797 F.2d 1430 (CA7 1986)*, cited *ante*, at 720, n. 1, Morrison, a wholesale distributor, sued Murray Biscuit, a producer of cookies and crackers, charging a conspiracy between Murray Biscuit and Feldman, a food broker, to suppress price competition between Feldman and Morrison. *Id*., at 1431. But it was quite clear that Murray Biscuit "had assigned particular customers to particular middlemen, whether brokers [like Feldman] or warehouse distributors [like Morrison]." *Id., at 1435*. Judge Posner's opinion explained:

"Suppose that after *Sylvania* was decided, a seller that had a price-fixing agreement (illegal per se) with its dealers adopted a lawful customer allocation agreement pursuant to which it terminated a dealer. That dealer could not sue for price fixing, even if the price-fixing agreement had never been rescinded, *unless he could show that his breach of the customer allocation agreement was not the real reason for his termination; maybe the agreement was a mask behind which the illegal price fixing continued*. The reason for Morrison's termination was that he tried to take away a customer who had been assigned to Feldman; there is no indication that the assignment was a mask for resale price maintenance. Since Feldman had the exclusive right to sell Murray Biscuit's products to the Certified account, Morrison had no business selling to Certified at any price." *Id., at 1439* (emphasis added).

Judge Posner thus made it clear that although Morrison had been terminated pursuant to a valid vertical nonprice restraint, a terminated dealer might prevail if it could prove that the nonprice agreement was "a mask behind which the illegal price fixing continued." *Ibid*.

[17] "When faced with conflicting evidence, the jury must determine whether the nonprice justifications for the termination advanced by the defendant are legitimate, or are mere pretext to disguise a per se illegal agreement with the nonterminated dealer to maintain resale prices. It is the Court's duty under *Monsanto* to decide whether sufficient evidence was presented for a jury to make that determination." *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323, 329 (CA8 1986)*, cited *ante*, at 720, n. 1.

See also L. Sullivan, Law of Antitrust 202 (1977) ("A shorthand method which may help to identify a restraint affecting price as naked is to examine the arguments which are being pressed in justification of the practice").

[18] Although at trial respondent had asked the jury to find that it had acted independently, see n. 15, *supra*, and accompanying text, respondent has not disputed, either in the Court of Appeals or here, the jury's finding of an agreement. (Respondent has, of course, contended that no agreement was reached requiring some level of resale price maintenance. As I have argued, though, such an agreement is not needed to invoke the *per se* rule in a case such as this.) Respondent did argue before the District Court for an instruction explaining that "it must be shown that the manufacturer agreed with the complaining dealer to terminate the existing dealer and that, in so agreeing, the manufacturer shared with the complaining dealer the same desire of eliminating price competition for the complaining dealer." 1 Record 151. Respondent later objected to the court's decision not to give this instruction, 1 Record 54, 22 Record 1599, but the court in fact had quite carefully explained to the jury that "what a preponderance . . . of the evidence in the case must show in order to establish the existence of the required combination, agreement, or understanding is that Sharp and Hartwell knowingly came to a common and mutual understanding to accomplish or to attempt to accomplish an unlawful purpose." *Id*., at 1584-1585.

(1940); *Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918)*; see also Piraino, The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution, *63 Notre Dame L. Rev. 1, 4, 16-19 (1988)*, in antitrust, as in many other areas of the law, motivation matters and factfinders are able to distinguish bad from good intent.

Third, the manufacturer may rebut the evidence tending to prove that the sole purpose of the agreement was to eliminate a price cutter by offering evidence that it entered the agreement **[****64]** for legitimate, nonprice-related reasons.

Although in this case the jury found a naked agreement to terminate a dealer because of its price **[***836]** cutting, *ante*, at 721-722, the majority boldly characterizes the same agreement as "this nonprice vertical restriction." *Ante*, at 729. That characterization is surely an oxymoron when applied to the agreement the jury actually found. Nevertheless, the majority proceeds to justify it as "ancillary" to a "quite plausible purpose . . . to enable Hartwell to provide better services under the sales franchise agreement." *Ante*, at 729. There are two significant reasons why that justification is unacceptable.

First, it is not supported by the jury's verdict. Although it did not do so with precision, the District Court did instruct the jury that in order to hold respondent liable it had to find that the agreement's purpose was to eliminate petitioner because of its price cutting and that no valid vertical nonprice restriction existed to which the motivation to eliminate price competition at the dealership level was merely ancillary. [19]

[**65]** **[*755]** **[**1536]** Second, the "quite plausible purpose" the majority hypothesizes as salvation for the otherwise anticompetitive elimination of price competition -- "to enable Hartwell to provide better services under the sales franchise agreement," *ante*, at 729 -- is simply not the type of concern we sought to protect in *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)*. I have emphasized in this dissent the difference between restrictions imposed in pursuit of a manufacturer's structuring of its product distribution, and those imposed at the behest of retailers who care less about the general efficiency of a product's promotion than their own profit margins. *Sylvania* stressed the importance of the former, not the latter; we referred to the use that *manufacturers* can **[*756]** make of vertical nonprice restraints, see *id., at 54-57*, and nowhere did we discuss the benefits of permitting dealers to structure intrabrand competition at the retail level by coercing **[***837]** manufacturers into essentially anticompetitive agreements. Thus, while Hartwell may indeed be able to provide better services under **[****66]** the sales franchise agreement with petitioner out of the way, one would not have thought, until today, that the mere possibility of such a result -- at the expense of the elimination of price competition and absent the salutary overlay

[19] The Court instructed the jury:

"The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting. Plaintiff contends that Sharp terminated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival.

"If you find that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting, you should answer 'yes' to question number 1.

"Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an agreement or understanding with Hartwell to eliminate price cutting by Business Electronics, then you should answer 'no' to question number 1." 22 Record 1587.

Respondent had asked for an instruction requiring the jury to consider circumstantial evidence as proof of a motivation to eliminate price competition only if such evidence could not "equally be interpreted to show that Sharp terminated Business Electronics Corporation for other business reasons and not pursuant to any agreement with Mr. Hartwell to fix resale prices of calculators." 1 Record 148. Respondent objected to the failure to give this instruction, *id*., at 54, and also objected, more specifically, to the instruction that was given on the ground that "it allows the jury to find against the defendant even if they do not believe that Sharp cared about [Business Electronics'] price cutting or if they believe that Sharp had a dual motive in making the termination." 22 Record 1599. The instruction quoted above, though, makes it highly unlikely that the jury would have found for petitioner although finding respondent's motives to be mixed ones.

of a manufacturer's distribution decision with the entire product line in mind -- would be sufficient to legitimate an otherwise purely anticompetitive restraint. See n. 14, *supra*. In fact, given the majority's total reliance on "economic analysis," see *ante*, at 735, it is hard to understand why, if such a purpose were sufficient to avoid the application of a *per se* rule in this context, the same purpose should not also be sufficient to trump the *per se* rule in all other price-fixing cases that arguably permit cartel members to "provide better services."

If, however, we continue to accept the premise that competition in the relevant market is worthy of legal protection -- that we should not rely on competitive pressures exerted by sellers in other areas and purveyors of similar but not identical products -- and if we are faithful to the competitive philosophy that has animated our antitrust jurisprudence since Judge Taft's opinion **[****67]** in *Addyston Pipe*, we can agree that the elimination of price competition will produce wider gross profit margins for retailers, but we may not assume that the retailer's self interest will result in a better marketplace for consumers.

"The Sherman Act reflects a legislative judgment that ultimately competition will produce not only 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. FTC, 340 U.S. 231, 248*. The assumption that competition is the best **[*757]** method of allocating resources in a 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." *National Society of Professional Engineers v. United States, 435 U.S., at 695*.I

The "plausible purpose" posited by the majority as its sole **[****68]** justification for this mischaracterized "nonprice vertical restriction" is inconsistent with the legislative judgment that underlies the Sherman Act itself. Under the facts as found by the jury in this case, the agreement before us is one whose "sole object is to restrain trade in order to avoid the competition **[**1537]** which it has always been the policy of the common law to foster." *United States v. Addyston Pipe & Steel Co., 85 F., at 283*, aff'd, *175 U.S. 211 (1899)*.

V

In sum, this simply is not a case in which procompetitive vertical nonprice restraints have been imposed; in fact, it is not a case in which *any* procompetitive agreement **[***838]** is at issue. [20] The sole purpose of the agreement between respondent **[*758]** and Hartwell was to eliminate price competition at Hartwell's level. As Judge Bork has aptly explained:

"Since the naked boycott is a form of predatory behavior, there is little doubt that it should be a per se violation of the Sherman Act." Bork, The Antitrust Paradox, at 334.

[**69]** I respectfully dissent.

References

[20] Thus, the Courts of Appeals decisions cited by the majority as supporting its view, see *ante*, at 720, n. 1, are, in fact, consistent with the rule that a naked intent to eliminate price competition is *per se* invalid. Each of the opinions contains a discussion that distinguishes between, on the one hand, an agreement between manufacturer and dealer to eliminate a price-cutting competitor based solely on an intent to eliminate price competition, and, on the other hand, an agreement between manufacturer and dealer to eliminate a price-cutting competitor that is grounded not only in an antipathy to price competition, but also in a purpose to implement a procompetitive system of vertical nonprice restraints. See *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d, at 329-330*; *Morrison v. Murray Biscuit Co., 797 F.2d, at 1439-1440*; *Westman Commission Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1223 (CA10 1986)*. Moreover, none of these opinions proposes the rule that the majority sanctions today: that an agreement as to some level of resale price maintenance is necessary for invocation of the *per se* rule in these situations.

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 30-32, *50*, *74*

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:81, 48:83, 48:101

12 Am Jur Legal Forms 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 178:64

43 Am Jur Proof of Facts 2d 577, Wrongful Termination of Dealership

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 1

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9, 31

Index to Annotations, Dealers and Distributors; Price Fixing; Restraints of Trade and Monopolies

[**70]** Annotation References:

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 USCS 1 et seq.*). *64 L Ed 2d 997*.

Propriety of preliminary injunctive relief in private antitrust actions involving dealership terminations. 79 ALR Fed 44.

Refusals to deal as violations of the federal antitrust laws. 41 ALR Fed 175.

Environmental Tectonics v. W.S. Kirkpatrick, Inc.

United States Court of Appeals for the Third Circuit

November 20, 1987, Argued ; May 2, 1988, Filed

Nos. 87-5328, 87-5546

Reporter

847 F.2d 1052 *; 1988 U.S. App. LEXIS 5865 **; 1988-1 Trade Cas. (CCH) P67,994; 25 Fed. R. Evid. Serv. (Callaghan) 1021

Environmental Tectonics v. W.S. Kirkpatrick, Inc., Development International Corporation, DIC (Holding) Inc., IDC International S.A. Luxembourg, Harry G. Carpenter c/o W.S. Kirkpatrick, Inc. and Benson "Tunde" Akindele John M. Krankel, Emro Engineering Co., Inc. Robert W. Ruppert c/o Emro Engineering Co., Inc., Ross E. Saxon c/o Nautilus Environmental Systems, Inc. & R.H. Edwards Environmental Tectonics Corporation International Appellant in 87-5328 W.S. Kirkpatrick & Co., Inc., W.S. Kirkpatrick & Co., International and D.I.C. (Holding) Inc., Appellants in No. 87-5546

Subsequent History: **[**1]** As Amended May 9, 1988.

Prior History: On Appeal from the United States District Court for the District of New Jersey, D.C. Civil Action No. 86-0796.

Core Terms

act of state doctrine, district court, amended complaint, air force, motivation, courts, sovereign, bribery, allegations, antitrust, foreign government, judicial inquiry, bid, embarrassment, decisions, foreign relations, racketeering, violations, illegal payment, foreign policy, state grounds, circumstances, commissions, defendants', deposition, questions, military, charges, cases, pattern of racketeering activity

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN1[] **Appellate Review, Standards of Review**

On review of a district court's grant of summary judgment, an appellate court utilizes the same standard that the district court was required to apply.

International Law > Dispute Resolution > Act of State Doctrine

HN2[] **Dispute Resolution, Act of State Doctrine**

The act of state doctrine is the judiciary's institutional response to the foreign relations tensions that can be generated when a United States court appears to sit in judgment on a foreign state's regulation of its internal affairs. Under the doctrine, the courts of the United States will refrain from judging the validity of a foreign state's governmental acts in regard to matters within that country's borders. The party moving for the doctrine's application has the burden of proving that dismissal is an appropriate response to the circumstances presented in the case.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

International Law > Dispute Resolution > Act of State Doctrine

International Law > Dispute Resolution > General Overview

HN3[] **Jurisdiction, Jurisdictional Sources**

Courts are required to decline to exercise jurisdiction over cases that may embarrass or impede the political branches of government in their conduct of foreign affairs.

International Law > Dispute Resolution > Act of State Doctrine

HN4[] **Dispute Resolution, Act of State Doctrine**

There are no rigid rules to govern the act of state doctrine's application. The lower courts are left to determine whether a conflict between the judicial and political branches exists in a particular case.

Governments > State & Territorial Governments > Claims By & Against

International Law > Dispute Resolution > Act of State Doctrine

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

International Law > Foreign & International Immunity > General Overview

HN5[] **State & Territorial Governments, Claims By & Against**

Under the terms of the commercial exception to the act of state doctrine, a court will not abstain from deciding a case involving the purely commercial act of a sovereign or one of its instrumentalities. To determine whether an act is purely commercial in character, a court looks not to the purpose of the act but to its nature, i.e., whether the activity is of the type that an individual would carry on for profit.

International Law > Dispute Resolution > Act of State Doctrine

HN6[] **Dispute Resolution, Act of State Doctrine**

While the act of contracting will in many circumstances be properly characterized as commercial conduct, the decision to award a defense contract to one bidder or another is by its very nature governmental.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

International Law > Dispute Resolution > Act of State Doctrine

International Law > Authority to Regulate > Anticompetitive Activities

HN7[] **Federal Regulations, Antitrust Regulations**

A private litigant is not necessarily immune from antitrust liability simply because the illegal scheme involves some acts by an agent of a foreign government.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

International Law > Dispute Resolution > Act of State Doctrine

HN8[] **Federal Regulations, Antitrust Regulations**

The act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations.

International Law > Dispute Resolution > Act of State Doctrine

HN9[] **Dispute Resolution, Act of State Doctrine**

The formulation of the act of state doctrine outlined in Mannington Mills and Curtiss-Wright does not allow a court to invoke the doctrine on the basis of mere conjecture about the effect that the disclosure of certain facts might have on the sensibilities of foreign governments. Instead, these cases require that a defendant come forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN10[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Allegations of illegal conduct that constitute a single, completed criminal episode are in some circumstances sufficient to describe a pattern of racketeering activity. To determine whether a "pattern" exists, a court should consider a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

HN11[] Procedural Due Process, Self-Incrimination Privilege

The court in resolving the issue of risk of foreign prosecution under the U.S. Const. amend. V must focus on whether there is an existing or potential prosecution of the witness; what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a likelihood that his testimony given in the United States would be disclosed to the foreign government.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Evidence > Privileges > Self-Incrimination Privilege > General Overview

HN12[] Procedural Due Process, Self-Incrimination Privilege

To permit assertion of the U.S. Const. amend. V privilege against self-incrimination, the apprehension of the risk of foreign prosecution must be a real and reasonable one, based on objective facts as distinguished from subjective speculation.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN13[] Types of Price Discrimination, Brokerage, Commissions & Compensation

See 15 U.S.C.S. § 13(c).

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

HN14[] Antitrust & Trade Law, Robinson-Patman Act

Although as a general matter commercial bribery is actionable under § 2(c) of the Robinson-Patman Act, 15 U.S.C.S. § 13(c), a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice versa.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN15[] Private Actions, Remedies

Not every plaintiff who alleges an actionable claim under the antitrust laws has standing to bring a private antitrust action. In order to proceed with a claim, a plaintiff must be able to demonstrate that it is within the class of those injured in their business or property who, based on a variety of factors, are best suited to further the purposes of the statute by remedying the violation alleged.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN16[] **Robinson-Patman Act, Claims**

A private plaintiff does not have to prove price discrimination to recover for a violation of § 2(c) of the Robinson-Patman Act, *15 U.S.C.S. § 13(c)*, but the plaintiff must still meet the standing requirements to proceed.

Civil Procedure > ... > Justiciability > Standing > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

HN17[] **Justiciability, Standing**

A direct competitor of a company that obtains a contract through commercial bribery has standing to press a claim against the briber under § 2(c) of the Robinson-Patman Act, *15 U.S.C.S. § 13(c)*.

Counsel: Thomas H. Sear, Esq. (Argued) Rhonda D. Orin, Esq, Spengler, Carlson, Gubar, Brodsky & Frischling, New York, New York, Attorneys for Appellee-Cross-Appellant, W.S. Kirkpatrick & Co., Inc., et al.

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Theodore V. Wells, Jr., Esq., Robert L. Krakower, Esq. (Argued) Lowenstein, Sandler, Kohl, Fisher & Boylan, Roseland, New Jersey, Attorneys for Appellee-Cross-Appellant, Harry G. Carpenter.

Judges: Greenberg and Scirica, Circuit Judges and Pollak, District Judge. *

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Opinion by: POLLAK

Opinion

[*1054] OPINION OF THE COURT

POLLAK, District Judge:

Appellant Environmental Tectonics Corporation International ("ETC"), a Pennsylvania corporation, brought this action to recover damages against several defendants for, *inter alia*, violations **[**2]** of the federal Racketeering Influenced Corrupt Organizations Acts, *18 U.S.C. §§ 1962-1968*, the New Jersey Anti-Racketeering Act, 2C N.J.C.S. § 41-1 et seq., and the Robinson-Patman Act, *15 U.S.C. § 13(c)*. Essentially, ETC claims to have been injured by an apparently successful scheme, allegedly participated in by all of the defendants, to influence the award of a Nigerian defense contract through bribery of Nigerian government officials. The district court concluded that the act of state doctrine barred adjudication of ETC's claims, and dismissed the action in its entirety. In the **[*1055]** alternative, the court also ruled on other substantive and procedural issues.

I.

This action arose from the award of a contract by the Federal Republic of Nigeria to defendants W. S. Kirkpatrick & Co. ("Kirkpatrick") and W. S. Kirkpatrick & Co. International ("Kirkpatrick International"), both of which are New Jersey corporations. Kirkpatrick is in the business of selling and brokering aircraft equipment, parts and facilities to airlines and foreign air forces. Kirkpatrick International, its wholly-owned subsidiary, was formed to carry out Kirkpatrick's **[**3]** duties under the contract to be awarded by the Nigerian government. Also named as defendants were Kirkpatrick's parent corporations, DIC (Holding) Inc. ("DIC"), a Delaware Corporation, and International Development Corporation, S.A. ("IDC"), a Luxembourg corporation.

In 1980, when the events alleged in the amended complaint [1] began, defendant Harry Carpenter was chairman of Kirkpatrick's board of directors and the company's chief executive officer. In 1980, Carpenter learned that the Nigerian government was interested in purchasing aeromedical equipment, and in constructing and equipping an aeromedical center for the Nigerian Air Force at Kaduna Air Force Base (the "Air Force contract"). Kirkpatrick contracted with defendants Emro Engineering Co., Inc. ("EMRO") and Nautilus Environmedical Systems, Inc. ("Nautilus") to provide engineering, design and related assistance needed to build the proposed facility and to supply the equipment.

[4]** Carpenter hired a Nigerian national, defendant Benson ("Tunde") Akindele, to act as Kirkpatrick's local agent in all matters pertaining to the Air Force contract. In or around March of 1981, Carpenter and Nautilus president Ross Saxon [2] met with Akindele to discuss their bid strategy. According to a contemporaneous memorandum written by Carpenter, Akindele told Carpenter and Saxon that to secure the bid Kirkpatrick should be prepared to pay a sales commission totalling twenty percent (20%) of the contract price. Most of this commission was to be paid to Nigerian political and military officials. [3] Akindele explained that Nigerian officials generally expected such payments from contract bidders, and that American companies often lost Nigerian defense contracts to their European competitors because they failed to make such arrangements.

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[1] The following factual recital is based primarily on the amended complaint.

[2] Saxon and Robert Ruppert, Emro's president, were also named as defendants. Two other Kirkpatrick officers, Robert H. Edwards and John M. Krankel, were named as well.

[3] ETC alleged in its complaint that the 20% commission was to be distributed as follows: 2 1/2% for Akindele, 5% for the Nigerian Air Force, 2 1/2% for the medical group, 5% for a political party, 2 1/2% for the relevant cabinet minister, and 2 1/2% for other key defense personnel.

[5]** Through a written agreement with Akindele, Kirkpatrick agreed to pay the commissions to two Panamanian corporations. In May of 1981, these corporations -- which were controlled by Akindele -- were established to receive the commissions and to distribute them to Nigerian officials. On March 19, 1982, the Nigerian Defense Ministry entered into an agreement awarding the Air Force contract to Kirkpatrick International. In September of 1982, the Nigerian government made the first of four contract payments to Kirkpatrick. The remaining payments were made in December of 1982, in February of 1983, and in August of 1983. After each of the four contract payments, the defendants via the United States mails and wire transfers paid a portion of the promised commissions to Akindele's Panamanian corporations, whence the monies were distributed to Nigerian officials. In the end, Kirkpatrick's commission payments to the Panamanian corporations, and thus, to Akindele and various Nigerian officials, totalled over $ 1.7 million.

In the latter half of 1981 and 1982, while Kirkpatrick was implementing the bid strategy described above, ETC, which is also in the business of selling aeromedical **[*1056]** **[**6]** equipment to foreign governments, was preparing its own bid for the Air Force project. ETC submitted its pricing information to the Nigerian government in February of 1981, and it continued in contact with Nigerian military and diplomatic officials throughout the course of that year. ETC's president met with Nigerian officials in Nigeria, and submitted a formal bid for the Air Force contract in December of 1981. ETC submitted its final formal bid in February of 1982, a month before the Nigerian government awarded the contract to Kirkpatrick.

ETC states that it decided to investigate the Nigerian government's award of the Kaduna contract to Kirkpatrick in April of 1983, after learning that its bid had been far lower than Kirkpatrick's. ETC reported its findings to the Nigerian Air Force [4] and to the United States Embassy in Lagos, Nigeria. After an investigation by the United States Justice Department, Carpenter and Kirkpatrick each were charged with violating the Foreign Corrupt Practices Act, *15 U.S.C. § 78dd-2* (hereinafter "FCPA").

[7]** As part of their plea negotiations on the United States charges, Kirkpatrick and Carpenter both agreed to offers of proof which outlined the Air Force contract scheme in its entirety, including Carpenter's hiring of Akindele, and Akindele's control of the Panamanian corporations. Both offers of proof also stated that Akindele and Carpenter agreed that the money paid to the Panamanian corporations as commissions would be distributed to Nigerian political and military officials. Carpenter and Kirkpatrick both pleaded guilty to one FCPA violation, and were eventually sentenced: Carpenter to two hundred hours of community service and a fine of $ 10,000, and Kirkpatrick to a fine of $ 75,000, payable over a five-year period. [5]

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[4] Both bribery and the acceptance of a bribe by a government official are illegal under Nigerian law. *See* Decree No. 38 (November 22, 1975) in Federal Republic of Nigeria Official Gazette Extraordinary, No. 59, December 2, 1975.

[5] At Kirkpatrick's sentencing on January 6, 1986, Assistant United States Attorney Steven Levy, who was in charge of Carpenter's and Kirkpatrick's prosecutions, made the following representation to the court:

> Your Honor, I guess I would also like to say that the political impact of this case, of this case cannot be underestimated [sic]. . . . I can say that the government of Nigeria as well as the State Department [of the United States] have shown a vital interest in this case. In fact, the State Department has been very concerned about the possible political impact upon the government of Nigeria if the Grand Jury disclosed certain information about who possibly received the payments which are set forth in the memorandum that Mr. Carpenter wrote to other senior officers of the corporation.
>
> I have as attorney for the Government [of the United States], your Honor, been resisting attempts by the Nigerian government to find out this information because I have not had a disclosure order and the State Department has its concerns about what would happen if the government of Nigeria actually knew who was involved in this scheme to sort of rip off money from this Nigerian contract.
>
> This is not a case where there is not a victim. Shagari, who was the president of Nigeria at the time of this contract[,] is now under house arrest. Some of these other individuals[,] and I can name them if the Court is interested, are very prominent military figures who are still in power in Nigeria. The Nigerian government would certainly like to have their names, ...

Transcript of Sentencing of Kirkpatrick, dated January 6, 1986, p. 9, 1.21 to p. 10, 1. 22.

[8]** ETC filed this action shortly after Kirkpatrick's sentencing. Defendants filed a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, which contended, *inter alia*, that the plaintiff had failed to allege a "pattern of racketeering activity" as required by the federal and state [Text Deleted by Court Emendation] racketeering statutes. ETC filed an amended complaint that responded to some of the issues raised by the defendants' motion to dismiss, and that added common law counts to ETC's antitrust, RICO, and anti-racketeering counts. ETC also filed an answer to the remainder of the defendants' motion to dismiss.

In their reply to ETC's answer to their motion, defendants moved for dismissal of the action in its entirety on act of state grounds. The district court requested further submissions from the parties in the form of answers to specific questions. The court also requested a *Bernstein* letter, **[*1057]** i.e., an opinion from the State Department on whether the act of state doctrine should be applied in the circumstances presented by this case. [6] Legal Adviser Abraham Sofaer responded to the court's request in a letter dated December 10, 1986, which is **[**9]** appended to this opinion. Treating defendants' motion to dismiss as a motion for summary judgment, the district court dismissed the action on act of state grounds. *See* *Environmental Tectonics Corp., International v. W.S. Kirkpatrick & Co., Inc., 659 F. Supp. 1381 (D.N.J. 1987)*.

[10]** Although the dismissal on act of state grounds embraced ETC's entire claim against all the defendants, the district court went on to rule, in the alternative, on other issues: The court rejected defendants' contention that ETC lacked standing to assert antitrust and RICO claims. The court did, however, dismiss the RICO count for failure to allege a pattern of racketeering activity. For the same reason, the court dismissed the New Jersey Anti-Racketeering count. In addition, the court upheld a magistrate's determination that Carpenter was entitled to decline to answer, on *Fifth Amendment* grounds, certain questions put to him on deposition. Finally, the court held that ETC's amended complaint adequately stated a case for holding IDC and DIC legally responsible for Kirkpatrick's scheme to obtain the Air Force contract.

ETC appeals from the act of state, [Text Deleted by Court Emendation] racketeering, and *Fifth Amendment* rulings. The defendants, in addition to urging the correctness of these rulings, have cross-appealed from those alternative rulings that were adverse to them. Since the district court's grant of summary judgment on act of state grounds, if affirmed here, would obviate **[**11]** consideration of all other issues, we turn first to the act of state question.

II.

HN1[] On review of a district court's grant of summary judgment, we utilize the same standard that the district court was required to apply. *See* *Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3rd Cir. 1987)*. There is no real disagreement on the facts relevant to the district court's act of state determination. On this appeal, therefore, we are called upon to decide whether the appellees were entitled to judgment as a matter of law. *See* *Fed. R. Civ. P. 56(c)*.

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[6] The term "*Bernstein* letter" is derived from the Second Circuit's opinion in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2nd Cir. 1954)*. Plaintiff Bernstein, a German national, owned a corporation that was confiscated by the Nazi government during World War II. The corporation's main asset was a ship; Bernstein was forced to relinquish title to the ship, as well as all other interest in the corporation. The Second Circuit initially dismissed Bernstein's suit against the ship's subsequent owners on act of state grounds. *See* *Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2nd Cir. 1947)*. The court reversed itself after receiving a letter from the State Department's Legal Adviser, which stated that it was United States policy to permit the courts to exercise jurisdiction over claims to recover property expropriated by Nazi officials.

The Supreme Court subsequently determined that, while it was proper for a federal court to consider a *Bernstein* letter, the Legal Adviser's recommendation in any given case was not to be considered binding on the court. In *First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 32 L. Ed. 2d 466, 92 S. Ct. 1808 (1972)*, Justice Rehnquist, announcing the judgment of the court, argued that the federal courts should defer to the view of the State Department; but only two other members of the court, Chief Justice Burger and Justice White, joined in his opinion. Justices Douglas and Powell, each of whom concurred separately, rejected the view that the State Department's view should control. So, too, did Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun in dissent.

ETC's challenge to the district court's grant of summary judgment raises important issues about the proper application of the act of state doctrine. ***HN2***[] The doctrine is the judiciary's institutional response to the foreign relations tensions that can be generated when a United States court appears to sit in judgment on a foreign state's regulation of its internal affairs. Under the doctrine, the courts of this country will refrain from judging **[**12]** the validity of a foreign state's governmental **[*1058]** acts in regard to matters within that country's borders. *See Restatement (Revised) of Foreign Relations Law of the United States* § 469[428] (1986). The party moving for the doctrine's application has the burden of proving that dismissal is an appropriate response to the circumstances presented in the case. *See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 694, 48 L. Ed. 2d 301, 96 S. Ct. 1854 (1976)*; *Williams v. Curtiss-Wright, 694 F.2d 300, 303 n.4 (3rd Cir. 1982)*.

Although earlier formulations of the doctrine were grounded in notions of comity among sister states, [7] the core concern of modern act of state jurisprudence is preserving the separation of powers between the federal judiciary and the political branches of our government -- especially, the executive branch, where primary responsibility for the conduct of foreign affairs is lodged. As explained by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964)*, the doctrine "expresses the strong sense of the Judicial Branch that its engagement in **[**13]** the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id. at 423*. Thus, ***HN3***[] courts are required to decline to exercise jurisdiction over cases that may embarrass or impede the political branches of government in their conduct of foreign affairs. *See First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765-68, 32 L. Ed. 2d 466, 92 S. Ct. 1808 (1972)* (hereinafter "*Citibank*").

Sensitively applied, the doctrine can prevent judicial entanglement in international conflicts that are more appropriately resolved through political channels. **[**14]** Individual litigants and the enforcement of national policies pay a price, however, for this institutional self-discipline -- its application in effect means that "on occasion individual litigants may have to forgo decisions on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy." *Citibank*, 406 U.S. at 769 (opinion of Rehnquist, J.). For this reason, the Supreme Court has not laid down ***HN4***[] rigid rules to govern the doctrine's application, but leaves it to the lower courts to determine whether a conflict between the judicial and political branches exists in a particular case. *See id. at 775-76* (Powell, J. concurring); *Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1293 (3rd Cir. 1979)* (courts should analyze the nature of the questioned conduct and the effect upon the parties in addition to appraising the sovereign's role).

The main issue raised by ETC's appeal involves the proper application of the doctrine when a litigant invokes the doctrine as **[**15]** a defense to a suit for damage or injury stemming from a course of events that included some acts by officials of a foreign government. *Sabbatino* and the Supreme Court's other modern act of state cases have focused on state expropriations of private property, the clearest example of a political act that, to paraphrase Justice Harlan, touches on the nerves of the international community. *See Sabbatino, 376 U.S. at 428*. This has, however, left a broad range of governmental conduct -- *e.g.*, court decisions; the granting of a license, patent, or some other state monopoly; or, as in this case, the award of a construction or procurement contract -- for lower courts to consider.

The appellant has advanced several objections to the district court's act of state determination. Two of these objections lack merit. First, we agree with the district court's conclusion that the award of a military procurement contract can be, in certain circumstances, a sufficiently formal expression of a government's public interests to trigger application of the doctrine. It is true that certain governmentally authorized acts, such as the award of a patent or the acts of a bankruptcy **[**16]** trustee, are considered so routine as to be not of substantial **[*1059]** concern to the political branches in their conduct of foreign policy. *See Remington Rand Corp. v. Business Systems, Inc., 830 F.2d 1260, 1265 (3rd Cir. 1987)*; *Mannington Mills, 595 F.2d at 1294*. But the award of a major

[7] *See Underhill v. Hernandez, 168 U.S. 250, 252, 42 L. Ed. 456, 18 S. Ct. 83 (1898)*; *Restatement (Revised) of U.S. Foreign Relations Law* § 469 [428] comment a.

defense contract generally does not result from a near-mechanical exercise of narrowly-defined governmental discretion. The award of a military contract, particularly one for a major project, is usually influenced by national security considerations -- considerations that are far from routine.

We also agree with the district court that the so-called "commercial" exception to the act of state doctrine -- an exception endorsed by a plurality of the Supreme Court but neither acquiesced in nor rejected by a majority, *see* Alfred Dunhill of London v. Cuba, 425 U.S. 682, 48 L. Ed. 2d 301, 96 S. Ct. 1854 (1976) -- has no application to this case. [8] ***HN5***[] Under the commercial exception's terms, a court would not abstain from deciding a case involving the purely **[**17]** commercial act of a sovereign or one of its instrumentalities. *See* Dunhill, 425 U.S. at 695 (plurality opinion of White, J.). To determine whether an act is purely commercial in character, a court looks not to the purpose of the act but to its nature, i.e., whether the activity is of the type that an individual would carry on for profit. *Cf.* *Letelier v. Republic of Chile, 748 F.2d 790, 797 (2nd Cir. 1984)* (applying the Foreign Sovereign Immunity Act's definition of "commercial"), *cert. denied 471 U.S. 1125, 86 L. Ed. 2d 273, 105 S. Ct. 2656 (1985)*; *Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300, 310 (2nd Cir. 1981)* (same), *cert. denied 454 U.S. 1148, 71 L. Ed. 2d 301, 102 S. Ct. 1012 (1982)*. ***HN6***[] While the act of contracting will in many circumstances be properly characterized as commercial conduct, the decision to award a defense contract to one bidder or another is by its very nature governmental. *See* *Curtiss-Wright, 694 F.2d at 302*.

[18]** We part company with the district court, however, on the remainder of its act of state analysis. The district court employed a formulation of the doctrine that barred the adjudication of ETC's claims "if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of the foreign policy of the United States." *ETC*, 659 F. Supp. at 1392-93. The court found that adjudication of ETC's claims would lead inevitably to an examination of the Nigerian government's motives in awarding the Nigerian contract to Kirkpatrick. Because the district court was convinced that such a finding would be interpreted as criticism of the Nigerian Government, it concluded that this case presents the type of situation which precludes judicial inquiry. *See* *id. at 1393*.

In reaching its conclusion, the district court relied primarily on the interpretation of the act of state doctrine advanced in a Ninth Circuit case, *Clayco Petroleum v. Occidental Petroleum, 712 F.2d 404 (9th Cir. 1983)*, *cert. denied 464 U.S. 1040, 79 L. Ed. 2d 168, 104 S. Ct. 703 (1984)*. **[**19]** In *Clayco*, the plaintiff and the defendant, Occidental Petroleum, were in competition for an off-shore oil concession offered by Um Al Quywayn. Clayco alleged that it was first offered the concession, but that Um Al Quywayn's oil minister awarded Occidental the contract after Occidental paid the minister and his son over $ 400,000 in bribes. After the media discovered and reported the bribery scheme, the SEC brought an action against Occidental that charged violations of the Securities Exchange Act of 1934, based on the allegedly illegal payments. Occidental agreed to a permanent injunction, and to an internal review of its bidding practices. Clayco brought suit after the report prepared pursuant to that review revealed that illegal payments had in fact been made. *See* *Clayco, 712 F.2d at 405-06*. The district court dismissed *Clayco's* lawsuit on act of state grounds.

[*1060] In a *per curiam* opinion, the Ninth Circuit affirmed the dismissal, concluding that the act of state doctrine barred adjudication of Clayco's claims. Although calling for a "flexible" approach to the doctrine's application, the court expressed its unwillingness to permit judicial **[**20]** inquiry into the motivation behind Um Al Quywayn's award of the concession. Since a determination that bribery had in fact occurred would "impugn or question the nobility of a foreign nation's motivation," and since "the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery," the court concluded that the executive's conduct of foreign affairs was sure to be embarrassed by such a proceeding. *See* *Clayco, 712 F.2d at 407*.

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[8] In *Curtiss-Wright, 694 F.2d at 302 n.2*, this court noted that the commercial exception has not been endorsed by a majority of the Supreme Court. We have no occasion here for going beyond what was said in *Curtiss-Wright*.

Clayco's expansive application of the act of state doctrine seems at variance with the principle which has guided this court, that the doctrine "is not lightly to be imposed. . . ." [9] *Mannington Mills, 595 F.2d at 1293*. In *Mannington Mills*, the plaintiff claimed that defendant Congoleum violated the antitrust laws by using patents it allegedly procured by fraud to restrict the plaintiff's trade abroad. In bringing its suit, plaintiff did not ask the court to declare the foreign patents invalid. Instead, Mannington argued that its action was concerned only with proving Congoleum's violations of United States trade regulations. *See* *Mannington Mills, 595 F.2d at 1290-91*. **[**21]**

[22]** In *Mannington Mills* this court held, through Judge Weis, that the act of state doctrine did not bar adjudication of the plaintiff's claims. The court focused on the nature of the questioned conduct -- the grant of a patent, an essentially routine act that raised no serious foreign policy concerns. *See* *id. at 1294*. But implicit in the opinion was an unwillingness to allow litigants to shield themselves from the consequences of illegal conduct abroad by invoking the act of state doctrine as a defense in American courts. *See* *id. at 1293*.

What was implicit in *Mannington Mills* became explicit in *Williams v. Curtiss-Wright*. Plaintiff Williams alleged that defendant Curtiss-Wright monopolized the international market for a certain kind of jet engine, and claimed violations of the federal antitrust laws, as well as injury caused by common-law torts. Curtiss-Wright moved to dismiss Williams' complaint on act of state grounds, arguing that the doctrine precluded the examination of foreign governments' motives in refusing to buy engine parts from the plaintiff. The district court denied Curtiss-Wright's motion. *See* *Curtiss-Wright, 694 F.2d at 301-02*. **[**23]**

On appeal, this court, again speaking through Judge Weis, affirmed. This court rejected an approach to the doctrine that would in all circumstances foreclose judicial scrutiny of the motivations behind the military procurement decisions of a foreign government. Judge Weis noted that ***HN7***[] a private litigant is not necessarily immune from antitrust liability simply because the illegal scheme involves some acts by an agent of a foreign government. *See* *id. at 304* (citing *Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962))*. The opinion stressed the importance of insuring that the act of state doctrine not interfere with the implementation of the policies served by antitrust and other regulatory statutes. ***HN8***[] "The act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a **[*1061]** showing that adjudication may hinder international relations. . . ." *See* *id. at 304* (citations **[**24]** omitted). Having found that the record did not show that litigation of Williams' claims would impede the executive's conduct of foreign relations, this court held that application of the doctrine was not called for.

HN9[] The formulation of the act of state doctrine outlined in *Mannington Mills* and *Curtiss-Wright* does not allow a court to invoke the doctrine on the basis of mere conjecture about the effect that the disclosure of certain facts might have on the sensibilities of foreign governments. Instead, these cases require that a defendant come forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government.

In the instant case, the district court's dismissal was based on little more than speculation about the effect that ETC's lawsuit might have on relations between the United States and Nigeria. The traditional justification for involving the doctrine, i.e., avoiding a judicial determination of the legal validity of a state's act within its own **[**25]** borders, is not present in this case. Appellant does not seek to have the Air Force contract invalidated, nor does it

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[9] One commentator has noted that *Clayco* has adopted the "strict" view of the act of state doctrine favored by other courts, most notably the Second Circuit in *Hunt v. Mobil Oil, 550 F.2d 68* (2nd Cir.), *cert. denied 434 U.S. 984, 54 L. Ed. 2d 477, 98 S. Ct. 608 (1977)*, that precludes examination of a foreign sovereign's motivations. *See* Bazyler, *Abolishing the Act of State Doctrine*, *134 U. Pa. L. Rev. 325, 357 n.190 (1986)*. Courts and commentators alike have criticized this interpretation of the doctrine as discouraging effective enforcement of United States regulatory policies against those who violate the law by engaging in illegal or anticompetitive conduct abroad. *See, e.g.,* *Industrial Investment Development Corp. v. Mitsui & Co., Ltd., 594 F.2d 48, 55 (5th Cir. 1979)*, *cert. denied 445 U.S. 903, 100 S. Ct. 1078, 63 L. Ed. 2d 318 (1980)*; *Sage International, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896 (E.D. Mich. 1981)*; *Bazyler, supra*, at 347. This court has expressed similar concerns with too sweeping an application of the doctrine. *See* *Curtiss-Wright, 694 F.2d at 304* & n.5.

seek compensation for its alleged losses from the Nigerian government. No Nigerian official is named as a defendant in the complaint.

Thus, to resolve ETC's claims on their merits, the district court would be called on simply to determine as a factual matter whether the appellees' alleged bribery of Nigerian officials motivated the award of the contract. The only information before the court authoritatively measuring the impact such a determination might have on the executive's conduct of foreign policy was the letter from Legal Adviser Sofaer. [10] That official pronouncement of State Department policy, as it relates to this litigation, reads in pertinent part, as follows:

> In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court: **[**26]**
>
> While judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions. . . .
>
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted **[**27]** expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied.
>
> These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the **[*1062]** motivations of the government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the court from adjudicating this dispute.

See Letter from Abraham D. Sofaer, Appendix to this Opinion (December 10, 1986) (emphasis in original).

In sum, the State Department is satisfied **[**28]** that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of ETC's lawsuit. [11] **[**29]** We appreciate, of course, that

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[10] Assistant United States Attorney Levy's representations at Kirkpatrick's sentencing, *supra* note 5, were not made in the course of these proceedings, were not addressed to act of state questions, and antedated the Legal Adviser's letter by nearly a year.

[11] The Legal Adviser's letter does urge the court to exercise "caution and due regard for foreign sensibilities" at each stage of the litigation. In particular, the court is asked "to endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." Interpreting this passage as a failure on the part of the Legal Adviser to "sign off" completely on the act of state question, the district court dismissed the Legal Adviser's caveats with respect to the production of evidence as impractical and unconstitutional. *See ETC*, 659 F. Supp. at 1398.

The Legal Adviser's expressions of concern about the possible damage to foreign relations that may result from wide-ranging discovery against foreign officials should not have been interpreted as a sign of ambivalence about the act of state question. Rather, the Legal Adviser simply urged the court to exercise appropriate supervision over discovery and other trial preparation to limit damage to foreign sensibilities. This advice is far from impractical. Foreign governments have often expressed their dissatisfaction with the wide discovery authorized under the Federal Rules, finding it intrusive and overbroad when compared to the European version of the fact-finding process. *See* Comment, *Antitrust Suits Involving Foreign Commerce*, 135 U. Pa. L. Rev.

the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts. [12] But the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect. [13] As against that assessment, defendants have not developed a factual record "showing that adjudication may hinder international relations . . . ." Curtiss-Wright, 694 F.2d at 304.

This litigation falls squarely within the teaching of *Curtiss-Wright*. In both cases, the plaintiff sought damages from defendants who allegedly used illegal tactics to influence a foreign government's award of a contract. In both cases, adjudicating the claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts. And, finally, the defendants in each case failed to demonstrate that the litigation process was bound to result in the type of institutional conflict between the political and judicial branches that would justify invoking the doctrine. We therefore will reverse the court's grant of summary judgment, and will remand the case for further proceedings. [14] **[**30]**

III.

Having found that the act of state doctrine is no bar to appellant's claims, we turn to the remaining issues presented. First, ETC argues that the district court erred in dismissing the state and federal racketeering claims. Second, ETC seeks reversal of the district court's order barring the deposition testimony of defendant Carpenter, who asserted his Fifth Amendment **[*1063]** privilege when examined about Kirkpatrick's Air Force contract bid. Third, all of the defendants challenge the district court's determination that ETC has standing **[**31]** to bring its antitrust and [Text Deleted by Court Emendation] racketeering claims. And, fourth, defendant DIC reiterates its contention that it is insulated from liability for any misdeeds of Kirkpatrick and Carpenter. We address these questions in turn.

A.

The district court dismissed ETC's state and federal [Text Deleted by Court Emendation] racketeering claims because it concluded that the amended complaint failed to allege facts establishing a pattern of racketeering activity. Noting that this court had not formulated a definition of the pattern requirement, the district court adopted a definition of pattern which would have required the appellant to allege facts establishing either (1) more than one criminal scheme undertaken by the defendants, or (2) a single, open-ended scheme. *See* Environmental Tectonics v. W. S. Kirkpatrick & Co., et al., 659 F. Supp. 1381, 1390 (D.N.J. 1987). The district court found that ETC's amended complaint met neither prong of this test because it alleged a single scheme which was neither "continuous" nor "on-going."

The pattern requirement accepted by the district court has since been rejected by this court. In Barticheck v. Fidelity Union Bank, 832 F.2d 36 (3rd Cir. 1987), **[**32]** this court held that **HN10**[] allegations of illegal conduct that constitute a single, completed criminal episode are in some circumstances sufficient to describe a pattern of racketeering activity. To determine whether a "pattern" exists, a court should consider a combination of specific

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1003, 1013-17 (1987). American judicial insensitivity to this foreign reaction has resulted in the enactment of "blocking" laws, *i.e.* laws that are specifically designed to block the Federal Rules' discovery provisions. *See id.* at 1016. The State Department's advice on this matter should be read as nothing more than a reminder to the district court of the complaints about American litigation with which the executive has become familiar.

[12] *See supra* note 6.

[13] That respect is, in our judgment, enhanced when the Legal Adviser is one who, in his former capacity as a federal judge, has addressed act of state problems with marked sensitivity and rigor in a particularly demanding context. *See* Sharon v. Time, 599 F. Supp. 538 (S.D.N.Y. 1984).

[14] ETC has also argued that *Mannington Mills'* ten-factor balancing test should not result in a dismissal of the case on the basis of international comity. *See* Mannington Mills, 595 F.2d at 1297-98. Since the issue apparently was not raised below, and the record is substantially devoid of the sort of information called for by the *Mannington Mills* test, it would be inappropriate for this issue to be examined for the first time on appeal.

factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. *See id. at 38-39*; *Saporito et al. v. Combustion Engineering, 843 F.2d 666*, Slip Op. at 24 (1988).

The factual allegations in ETC's amended complaint satisfy this more flexible interpretation of RICO's pattern requirement. The predicate acts alleged in the amended complaint -- mail and wire fraud, bribery, and violations of the Foreign Corrupt Practices Act -- were all committed in connection with (or, to facilitate) the payments by Kirkpatrick to the Panamanian corporations. One could view these payments as a single illegal payment separated into installments, **[**33]** and thus as a one-time affair, rather than as "criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." *Marshall-Silver Construction Co. v. Mendel, et al., 835 F.2d 63, 66-67 (3rd Cir. 1987)*. But, to focus only on the series of payments -- i.e., one bribe divided into four parts -- is to ignore the complexity of Kirkpatrick's scheme. If the appellant's allegations are true, a European conglomerate, and two American corporations -- successfully, and over a two-year period -- organized to influence a foreign country's award of a procurement contract by illegal means. To facilitate their scheme, they hired a consultant who had contacts with Nigerian officials who were amenable to such an arrangement. This consultant also developed a sophisticated and outwardly legal front for the payments, thereby increasing the difficulty already inherent in detecting such a scheme. The wire and mail communications used to implement this undertaking account for numerous violations of federal law.

The nature of the acts alleged and the number of victims are **[**34]** also important considerations in this analysis. *See Barticheck, 832 F.2d at 39*. ETC claims to have suffered direct economic injury from the appellees' scheme. By illegally influencing the decisions of appellees' public officials, however, appellees have also created an even larger class of victims, the citizens of Nigeria. *Cf. Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1268 (3rd Cir. 1987)* (two separate schemes to bribe local government officials made victims of the "taxpayers and residents of the Town of Kearny"). Moreover, **[*1064]** because bribery of foreign officials by American businessmen diminishes this nation's stature and influence abroad, conduct of the kind here alleged victimizes the citizens of this nation as well.

Our assessment of the amended complaint in light of *Barticheck's* specific factors persuades us that ETC has alleged a "pattern of racketeering activity" within the meaning of the statute. ETC may proceed on its RICO claim, and -- assuming, as have the district court and the parties, that the pattern requirements for the New Jersey Anti-Racketeering act are substantially similar -- on its **[**35]** state racketeering claims as well.

B.

ETC's final ground of appeal challenges the district court's decision that the *Fifth Amendment* privilege against self-incrimination shielded Carpenter from responding to deposition questions the answers to which might yield evidence that Carpenter had committed crimes under Nigerian law. ETC argues that the record does not establish any significant likelihood that responding to deposition questions here would expose Carpenter to trial in the courts of Nigeria. ETC also argues that, in any event, the *Fifth Amendment* is not a shield against foreign prosecution.

As summarized by the court below, the evidence adduced by Carpenter to establish the risk of criminal prosecution in Nigeria was as follows:

> Prior to his deposition, Carpenter submitted an affidavit . . . setting forth his reasons for fearing criminal prosecution in Nigeria and detailing the factual basis of the privilege. As discussed earlier in the opinion, defendants Kirkpatrick and Carpenter both pled guilty to violations of the FCPA in connection with the Nigerian Contract. According to Akindele, Carpenter's plea and sentencing were receiving considerable media attention **[**36]** and were "front page news" in Nigeria. Apparently, local news coverage of Carpenter's plea and sentencing were subsequently reported by Nigerian newspapers. Akindele also told Carpenter of certain Nigerian government officials' desire to prosecute Carpenter in connection with the Nigerian contract. Akindele further warned Carpenter not to travel to Nigeria and to exercise care in travelling in Europe or Africa because there was a risk he would be taken by force to Nigeria. In January, 1986, Carpenter's attorney was informed by

> a United States Government official that "the Nigerians wanted to get [Carpenter] to Nigeria." This information, which originally came from Interpol, was relayed to Carpenter. Carpenter has since been again warned not to travel abroad "and that the Nigerian interest in [his] case has not abated."

The magistrate reviewed this evidence in the light of the factors relevant to the risk of foreign prosecution enumerated by the Second Circuit in *In re Grand Jury Subpoena of Flanagan, 691 F.2d 116, 121 (2nd Cir. 1982)*:

> ***HN11***[] The court in **[**37]** resolving the issue [must focus on] whether there is an existing or potential prosecution of [the witness]; what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a likelihood that his testimony given here would be disclosed to the foreign government.

The magistrate found "that, by defendant Carpenter's affidavit, there is a real fear that he might involuntarily be subject to the criminal jurisdiction of Nigeria." The district court concluded that "the Magistrate's decision has not been shown to be clearly erroneous or contrary to law." *ETC, 659 F. Supp. at 1401*.

We disagree. We have no doubt that the testimony ETC sought to elicit at deposition might aid in a criminal prosecution of Carpenter by Nigeria, if such a prosecution were undertaken. However, it is not contended that Carpenter, who has already pleaded guilty to the criminal charges brought by the United States, could be extradited to Nigeria for the alleged **[*1065]** bribes. The entire **[**38]** risk of prosecution in Nigeria rests, therefore, on the possibility that Carpenter would be kidnapped by Nigerian authorities; and we do not think that possibility comes close enough to being a significant likelihood to carry the day. We are prepared to assume that a real fear, substantially grounded in fact, of being kidnapped by the agents of a foreign government with a view to prosecution by that government might well justify a witness' assertion of his or her *fifth amendment* privilege. But the fact that Carpenter has been admonished to avoid being kidnapped does not, in our judgment, constitute substantial proof that the feared conspiracy is more than gossamer. Nothing in this record supports an inference that kidnapping foreigners not resident in Nigeria in order to bring them to trial in Nigeria is characteristic of Nigerian law enforcement personnel.

That Carpenter is sincere in his apprehension of the risk does not mean that the apprehension justifies his assertion of the privilege. ***HN12***[] "The apprehension," as the court noted in *Flanagan*, "must be a real and reasonable one, based **[**39]** on objective facts as distinguished from subjective . . . speculation." *Flanagan, 691 F.2d at 121*. And this is because, as the Supreme Court made plain in *Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 92 S. Ct. 1670 (1972)*, rejecting the *Fifth Amendment* claim presented there, "the privilege protects against real dangers, not remote and speculative possibilities." In short, we think the record made by Carpenter does not constitute substantial evidence of "real dangers." [15]

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[15] Carpenter might have met his burden under this standard if he had been officially warned by the United States Government to forgo travelling abroad in order to avoid capture by Nigerian agents seeking to bring him to Nigeria for trial. Other evidence -- *e.g.* a pending prosecution or the institution or threatened institution of extradition proceedings -- might also have supported Carpenter's assertion of the privilege.

The justifications that Carpenter advances in this case, however, amount to nothing more than speculation about Nigeria's intentions. First, the warnings by Benson Akindele, who does not appear to be a Nigerian official, do not, standing alone, provide a basis for Carpenter's fear of prosecution. And the somewhat ambiguous representation of Assistant United States Attorney Steven Levy with respect to Nigeria's "vital interest" in the American prosecution of Carpenter, *supra* note 5, falls short of suggesting that Nigeria was preparing to prosecute Carpenter.

Second, what Carpenter identifies as a warning from the United States is actually something more remote. The record suggests that the Nigerian government, if interested at all in Carpenter, sought only to question him about others rather than prosecute him. Moreover, Carpenter himself was not troubled enough by the warning to stay in the United States: he later travelled to the

[40]** As noted above, ETC further contends that the *Fifth Amendment* is only a domestic shield, which guards against self-incrimination in other American courts, whether state or federal, [16] but does not protect one from American court orders which would compel testimony that might threaten incrimination in the courts of a foreign sovereign. That issue, which the Supreme Court found unnecessary to resolve in *Zicarelli, supra*, has generated a contrariety of views in the lower courts. The Tenth Circuit, *In re Parker, 411 F.2d 1067, 1070 (10th Cir. 1969)*, *vacated as moot*, *397 U.S. 96, 90 S. Ct. 819, 25 L. Ed. 2d 81 (1970)*, and the Fourth Circuit, *United States v. (Under Seal), 794 F.2d 920 (4th Cir. 1986)*, have rejected the contention that the *Fifth Amendment* is extra-territorial in scope. The chief authority in support of an extra-territorial application is Judge Newman's opinion in *In re Cardassi, 351 F. Supp. 1080 (D.Conn. 1972)*. *Cardassi* has been subscribed to by Judge Hufstedler, concurring in *In re Federal Grand Jury Witness, 597 F.2d 1166, 1169 (9th Cir. 1979)*, and has been **[**41]** followed by two district courts in this circuit. *See* *United States v. Trucis, 89 F.R.D. 671 (E.D.Pa. 1981)*; *United States v. Kowalchuk*, No. 77-118 (E.D.Pa. 1978). [17]

[*1066] Because we have determined that the present record does not, in any event, present a substantial risk that Carpenter would be subject to prosecution in the courts of Nigeria, we find it unnecessary to resolve the important constitutional question as to the reach of the *Fifth Amendment* that would otherwise be presented.

C.

On cross-appeal, defendants raise two objections to rulings by the district court. The first contention, joined **[**42]** in by all of the defendants, is that the district court erred in concluding that ETC had standing to press its antitrust, RICO, and New Jersey Anti-Racketeering Act claims. This argument is premised on what the defendants perceive as factual deficiencies in ETC's amended complaint. In their view, ETC has not pleaded any facts which would establish, if true, that but for the defendants' illegal conduct it would have received the Air Force contract. The defendants also argue that ETC has pleaded no facts that would establish the payment of illegal commissions from the defendants to Nigerian government officials. The district court concluded that the amended complaint's allegations were sufficient to confer standing on ETC, and we agree with that assessment.

As far as ETC's antitrust standing is concerned, the allegations in the amended complaint as a whole make out an actionable violation of section 2(c) of the Robinson-Patman Act, *15 U.S.C. § 13(c)*. [18] Congress enacted section 2(c), the Act's brokerage provision, primarily to curb one particular abuse by large chain store buyers, namely the use of "dummy" brokerage fees as a means of securing price rebates. **[**43]** *See* *Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 371 (3rd Cir. 1985)*. The section has also been applied, however, in cases that involve commercial bribery. *See* *id. at 371*; *see also* *Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965)*, *cert. denied 383 U.S. 936, 15 L. Ed. 2d 853, 86 S. Ct. 1067 (1966)* (company which bribed state purchasing agent liable to competitor for state contract under 2(c)).

Bahamas. To justify his invocation of the privilege, Carpenter would have had to come forward with a good deal more than he presented to the magistrate.

[16] *See* *Murphy v. Waterfront Commission, 378 U.S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964)*.

[17] The question has been discussed, but not resolved, by the District of Columbia Circuit in *In re Sealed Case, 263 U.S. App. D.C. 357, 825 F.2d 494, 497 (D.C.Cir. 1987)*, and by the Second Circuit in *Flanagan, 691 F.2d at 124*.

[18] *15 U.S.C. § 13(c)* states:

> ***HN13***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative or intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid.

[44]** Although this court has concluded that ***HN14***[] as a general matter commercial bribery is actionable under 2(c), it has also held that a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice versa. *See* *Seaboard Supply, 770 F.2d at 372*. The amended complaint alleges that Kirkpatrick paid the illegal commissions to the Akindele-controlled corporations, from which they were distributed to unnamed Nigerian officials. Though the allegation is not a detailed one, it clearly charges that illegal payments were passed from a seller to a buyer -- a violation of 2(c).

HN15[] Not every plaintiff who alleges an actionable claim under the antitrust laws has standing, however, to bring a private antitrust action. In order to proceed with a claim, a plaintiff must be able to demonstrate that it is within the class of those injured in their business or property who, based on a variety of factors, are best suited to further the purposes of the statute by remedying the violation alleged. *See* *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont De Nemours & Co., 826 F.2d 1235, 1240 (3rd Cir. 1987)*. **[**45]** ***HN16***[] A private plaintiff does not have to prove price discrimination to recover for a violation of 2(c), *Seaboard Supply, 770 F.2d at 371 n.3*, but the plaintiff must still meet the standing requirements to proceed. *See* *Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 270-72 (5th Cir. 1979)*.

[*1067] Because of the standing doctrine's malleability, it would be difficult to define with precision the contours of the class of potential plaintiffs who have standing to assert 2(c) claims. Indeed, this court's case-by-case approach to the standing requirement argues against such an attempt. *See* *Alberta Gas Chemicals, 826 F.2d at 1239-41*. We need not do so in this case, moreover, because it is generally agreed that ***HN17***[] a direct competitor of a company that obtains a contract through commercial bribery has standing to press a 2(c) claim against the briber. *See* *Cool Attic, 587 F.2d at 271-72*; *Municipality of Anchorage v. Hitachi Cable, 547 F. Supp. 633, 640 (D. Alaska 1982)*; **[**46]** *Computer Statistics v. Blair, 418 F. Supp. 1339, 1348 (S.D. Tex. 1976)*; III E. Kintner and J. Bauer, *Federal* ***Antitrust Law*** § 26.12, at 529-30 (1982).

We agree with the district court that ETC's amended complaint alleged sufficient facts to establish the kind of injury that would confer standing to bring a claim against the defendants. Plaintiff alleged that it and the defendants are both in the business of supplying aeromedical facilities and equipment to foreign air forces, and that both plaintiff and defendants were in direct competition for the Nigerian Air Force bid. As the district court noted, short of alleging that it was next in line for the Nigerian contract, ETC could not have pleaded a more direct injury from defendants' alleged violation of section 2(c).

The question of ETC's standing to bring its RICO and Anti-Racketeering Act claims is somewhat easier to resolve. To have standing to assert a civil RICO claim, ETC need only allege an injury to its business or property resulting from some or all of the predicate acts that comprise the RICO violation. *See* *Town of Kearny, 829 F.2d at 1268* (quoting *Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806 (7th Cir. 1987))*. **[**47]** ETC's allegations in the amended complaint of injury from the bribery scheme -- a scheme that the amended complaint charges with sufficient factual specificity -- meet this standard. We also assume, as did the district court and the parties, that the New Jersey Anti-Racketeering Act's standing requirement is essentially the same as the federal standard.

D.

Finally, defendant DIC, one of Kirkpatrick's corporate parents, contends that it is entirely immune from liability. ETC claims that liability for the alleged wrongful acts of the Kirkpatrick group can be imputed to DIC on either of two theories: by piercing the defendant's corporate veil, *Melikian v. Corradetti, 791 F.2d 274 (3rd Cir. 1986)*, or by finding that Carpenter acted as DIC's agent in carrying out the bribery scheme, *Japan Petroleum Co. v. Ashland Oil, 456 F. Supp. 831 (D. Del. 1978)*. The district court found that the amended complaint minimally alleged "a relationship among [DIC], IDC, Carpenter, and Kirkpatrick sufficient to support the potential imposition of liability upon [DIC] or IDC for wrongful acts committed by Carpenter and/or Kirkpatrick." *ETC, 659 F. Supp. at 1388*. **[**48]** The court also concluded that ETC and the defendants should have the opportunity to proceed with discovery so that the facts defining the relationship of DIC, IDC, Carpenter and Kirkpatrick may be fully developed. *See* *id. at 1389*. We find no reason to question such a course, which should produce a record on the basis of which the question of DIC's liability can be properly determined. *See* *Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1988)*.

Conclusion

We therefore will reverse the district court on its act of state decision, its dismissal of plaintiff's RICO and Anti-Racketeering Act claims, and its affirmance of the magistrate's decision upholding Carpenter's assertion of the *Fifth Amendment* privilege. As to the other issues, we will affirm the district court. We will remand this case for proceedings consistent with this opinion.

APPENDIX

United States Department of State

The Legal Adviser

[*1068] Washington, D.C. 20520

December 10, 1986

The Honorable

Alfred J. Lechner, Jr.

United States District Court Judge

District of New Jersey

U.S. Post Office and Courthouse

Newark, N.J. 07101

Re: *Environmental* **[**49]** *Tectonics Corporation, International v. W.S. Kirkpatrick & Co. Inc., et al.*, Civil Action No. 86-796

Dear Judge Lechner:

I am writing on behalf of the Department of State in reply to the Court's invitation to the Department to express its views of the above-referenced civil action in light of defendant's motion to dismiss on the basis of the act of state doctrine. This court has indicated in particular that it might become necessary to examine the motivation of officials of the Republic of Nigeria in taking certain public actions. The Department appreciates the Court's consideration in offering this opportunity for comment.

In recent years, the United States Executive Branch has addressed the question of whether the act of state doctrine requires dismissal of proceedings that may call for judicial inquiry into the *motivations* (as opposed to the legal validity) of the public acts of foreign states. Specifically, as the United States stated in an *amicus curiae* brief before the United States Supreme Court:

> While judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial-questioning **[**50]** of the *validity* or *legality* of foreign government actions. . . .
> None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the

> bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied. (Emphasis added).

See United States Government **[**51]** briefs *amicus curiae* in support of petitions for a writ of *certiorari* in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd., 594 F.2d 48 (5th Cir. 1979)*, *cert. denied*, *445 U.S. 903, 100 S. Ct. 1078, 63 L. Ed. 2d 318 (1980)*; and in *Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977)*, *cert. denied*, *434 U.S. 984, 54 L. Ed. 2d 477, 98 S. Ct. 608 (1977)*, excerpts *reprinted in* 1979 *Digest of U.S. Practice in International Law* at 965 and 969, respectively.

These statements represent our views. As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

Moreover, the Department is of the view that the act of state doctrine may not apply to the award of the contract in question, to the extent that such award does not constitute **[**52]** a sufficiently formal expression of Nigeria's public policy or interests. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695, 48 L. Ed. 2d 301, 96 S. Ct. 1854 (1976)*; *compare Sage Int'l., Ltd. v. Cadillac Gage* ***[*1069]*** *Co., 534 F. Supp. 896, 908 (E.D. Mich. 1981)* *with General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3 (D.D.C. 1979)*.

Apart from the act of state question, however, inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

I hope this letter will be helpful in your disposition of the above-referenced action.

Sincerely,

Abraham D. Sofaer

cc: Alan A. Turner, Esq.

Thomas H. Sear, Esq.

Lawrence S. Horn, Esq.

Theodore V. Well, **[**53]** Esq.

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Jeanery, Inc. v. James Jeans, Inc.

United States Court of Appeals for the Ninth Circuit

May 5, 1986, Argued and Submitted ; May 2, 1988, Decided

No. 85-3751

Reporter
849 F.2d 1148 *; 1988 U.S. App. LEXIS 7786 **; 1988-1 Trade Cas. (CCH) P67,988

The Jeanery, Inc., an Oregon Corporation, and Rock Bottom Jean Co., Inc., an Oregon Corporation, Plaintiffs-Appellants, v. James Jeans, Inc., a Washington Corporation, Defendant-Appellee

Subsequent History: **[**1]** Amended June 2, 1988.

Prior History: Appeal from the United States District Court for the District of Oregon, William M. Dale, Jr., Magistrate, Presiding.

Core Terms

termination, manufacturer, dealer, distributor, resale price, conspiracy, complaints, retailer, antitrust, keystone, Sherman Act, discounting, anti trust law, acquiescence, customer, concerted action, concerted, price-cutting, competitors, circumstantial evidence, sales representative, take care, communicated, price-fixing, price-cutter, adherence, announced, prices, business justification, insufficient evidence

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN1[] **Reviewability of Lower Court Decisions, Adverse Determinations**

The appellate court reviews a district court's grant of judgment notwithstanding the verdict (JNOV) by applying the same standard used by the district court. JNOV is proper if without accounting for the credibility of the witnesses, the court finds that the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion--that the moving party is entitled to judgment notwithstanding the adverse verdict. Neither the trial judge nor the appellate court is permitted to weigh the evidence or substitute its judgment for that of the jury, provided the jury verdict is supported by substantial evidence.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[] **Judgment as Matter of Law, Directed Verdicts**

The decision to grant a directed verdict or a judgment notwithstanding the verdict, requires the trial court to engage in a careful reasoning process. In an antitrust case, if the evidence is entirely circumstantial, the court must decide whether a reasonable jury could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture. At the same time, the trial court must not encroach on the role of the jury in dispute resolution.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. Consequently, the court must closely scrutinize the evidence in a given case to avoid the danger of improper antitrust condemnations.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN4[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1* declares illegal every contract, combination, or conspiracy, in restraint of trade or commerce among the several States. The phrase "contract, combination, or conspiracy" has been interpreted to require concerted action of more than a single entity.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

Unilateral conduct by a single firm, even if it appears to restrain trade unreasonably, is not unlawful under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] Monopolies & Monopolization, Actual Monopolization

Unilateral conduct may be unlawful under § 2 of the Sherman Act, 15 U.S.C.S. § 2, if the conduct threatens monopolization.

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 > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN7[] Monopolies & Monopolization, Attempts to Monopolize

By making a conspiracy to monopolize unlawful, 15 U.S.C.S. § 2 does reach both concerted and unilateral behavior. But purely unilateral conduct is illegal only under § 2 and not under 15 U.S.C.S. § 1. Monopolization without conspiracy is unlawful under § 2, but restraint of trade without a conspiracy or combination is not unlawful under § 1.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

A parent corporation and its wholly owned subsidiary are not capable of conspiring with one another in violation of § 1 of the Sherman Act, 15 U.S.C.S. § 1.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN9[] Vertical Restraints, Nonprice Restraints

A manufacturer is free to announce resale prices and refuse to deal with dealers who sell below the announced price.

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 > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Concerted vertical price restraints are per se illegal. Concerted vertical non-price restraints are scrutinized for illegality under the antitrust rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN11[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Because a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination, proof of a vertical price fixing agreement must include more than a showing that the distributor conformed to the suggested price. An agreement to maintain prices may not be inferred from the fact alone that a manufacturer and its distributors are in constant communication about prices and marketing strategy. A jury may not infer a concerted price-fixing agreement from highly ambiguous evidence.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN12[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A plaintiff does not establish an illegal price-fixing agreement solely by proof of complaints by competitors of the terminated dealer, or that the dealer's termination followed or was in response to these complaints, or that the termination of a price-cutter was pursuant to an agreement with the complaining dealer.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN13[] **Price Fixing & Restraints of Trade, Vertical Restraints**

To show concerted action to fix prices, a plaintiff must introduce more than evidence of complaints and termination alone. The plaintiff must produce evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. Moreover, more must be shown than simply an agreement between the manufacturer and a complaining distributor to terminate a price-cutter. There must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. The common scheme or meeting of minds, prerequisite to *§ 1* of the Sherman Act, *15 U.S.C.S. § 1* liability is not shown merely by a distributor's conformity to the suggested resale price. Evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer and there must be evidence of an agreement on the price or price levels to be charged.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN14[] **Price Fixing & Restraints of Trade, Vertical Restraints**

If a manufacturer deliberately withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a per se violation of the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN15[] **Antitrust & Trade Law, Sherman Act**

When a manufacturer terminates a price-cutter in response to a competing distributor's complaint and with intent to restrain price competition, a *§ 1* Sherman Act, *15 U.S.C.S. § 1* violation is stated.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

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

HN16[] Price Fixing & Restraints of Trade, Vertical Restraints

A manufacturer does not commit a per se violation of the antitrust laws by entering into an agreement with a requesting distributor to terminate a price-cutter, unless the agreement includes some agreement on price or price levels.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN17[] Price Fixing & Restraints of Trade, Vertical Restraints

Complaints by competitors, standing alone, are not sufficient to show a conspiracy. Neither is it probative of a price-fixing conspiracy that a distributor is terminated after, or in response to, the complaints. Furthermore, the volume and frequency of competitor complaints does not affect this analysis; something more still must be shown by the terminated distributor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN18[] Price Fixing & Restraints of Trade, Vertical Restraints

The manufacturer has every right to set the price at which it wants its goods resold and to terminate a dealer who undercuts that price. A manufacturer may advise a dealer that its policy is to terminate a dealer who does not sell at keystone, or to favor filling orders placed by complying dealers. This is legitimate pressure to get a dealer to sell at keystone. No inference of antitrust conspiracy can be drawn from such evidence. It is ambiguous at best.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN19[] Price Fixing & Restraints of Trade, Vertical Restraints

A manufacturer may terminate a dealer who violates the manufacturer's retail price policy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

Contracts Law > Contract Formation > General Overview

HN20[] Price Fixing & Restraints of Trade, Vertical Restraints

A plaintiff does not establish concerted action merely by proving that the defendant sought agreement. More is required. The concept of "a meeting of the minds" means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN21[] Trials, Judgment as Matter of Law

Unsupported allegations in an antitrust case should not reach a jury.

Counsel: Justine Fischer, Stoll & Stoll, P.C., Portland, Oregon, for the Plaintiffs-Appellants.

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Judges: Arthur L. Alarcon, Stephen Reinhardt and David R. Thompson, Circuit Judges. Reinhardt, Circuit Judge, dissenting.

Opinion by: THOMPSON

Opinion

[*1150] AMENDED OPINION

THOMPSON, Circuit Judge:

The Jeanery, Inc., which is affiliated by common ownership with Rock Bottom Jean Co. (collectively referred to as "The Jeanery"), won a jury verdict in its antitrust suit against James Jeans, Inc., a clothing manufacturer. The Jeanery had alleged, and the jury found, that James Jeans conspired with other of its dealers to fix the resale price for James Jeans' products in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*, and that James Jeans terminated The Jeanery as one of its distributors because The Jeanery refused to sell its goods at the desired resale price. The jury awarded The Jeanery **[**2]** damages in the amount of $ 80,556.50, which the magistrate, sitting as a district court judge, *see 28 U.S.C. § 636(c) (1)*, automatically trebled under section 4 of the Clayton Act, *15 U.S.C. § 15*.

James Jeans then moved for a judgment notwithstanding the verdict ("JNOV") or in the alternative for a new trial. Upon reflection, the court concluded that there was insufficient evidence of a price-fixing conspiracy to submit to the jury and, accordingly, granted the motion for JNOV. The Jeanery appeals from this judgment, arguing that there was substantial evidence supporting the existence of a conspiracy to set resale prices in violation of the Sherman Act. The Jeanery also contends that it adequately proved it was injured by the alleged conspiracy, that the amount of damages it claimed was properly proven, and that the trial court erred by suggesting a dealer must show it made a firm offer to purchase goods, which the seller refused to accept, in order to establish termination.

We have jurisdiction of this appeal under *28 U.S.C. § 636(c)(3)*, and we affirm. Because we agree with the trial court's conclusion **[**3]** that there was insufficient evidence of conspiracy to submit the case to the jury, we do not reach The Jeanery's arguments regarding injury and damages. And for purposes of this appeal we accept The Jeanery's contention that James Jeans terminated it as a distributor.

I

FACTS

James Jeans manufactures, markets and distributes jeans and other casual pants under various trade names, including "James Jeans." From 1981 until early 1983, James Jeans' goods were a popular item in the Pacific Northwest, the region in which James Jeans conducted the majority of its business. Through employee sales representatives, James Jeans' merchandise was sold to retail outlets. Retail merchants purchased the goods through sales representatives who periodically visited their stores, or at semiannual trade shows where James Jeans displayed its wares. In the period relevant to this appeal, it was James Jeans' practice, which was consistent with industry practice as a whole, to suggest to retail merchants that the retail price should be an amount twice that paid by the retailer to buy the goods. This suggested resale price was known in the industry as the "keystone" markup. James Jeans made clear to **[**4]** retailers who purchased its goods that it wanted them to charge the full keystone price when the goods were resold to consumers, and that any retailer who sold below the suggested resale price would either be terminated as a distributor of James Jeans, or would not receive as favorable treatment from the manufacturer as would complying retailers. It is undisputed that James Jeans consistently explained this policy to all distributors who purchased its goods.

Tom and Chris Ballantyne own The Jeanery and Rock Bottom Jean Co. In September 1980, The Jeanery opened an account with James Jeans and began purchasing its merchandise. In May 1981, the Ballantynes began buying James Jeans' goods for sale at their Rock Bottom stores, which specialized in off-priced goods and factory seconds. The Ballantynes testified that the James Jeans' line was so popular during the 1981-1983 period that many of The Jeanery's customers would rather go to another store than purchase jeans other than James Jeans. Consequently, it was important to The Jeanery that it receive a **[*1151]** steady supply of James Jeans' merchandise.

The Ballantynes also testified that it was their practice to sell James Jeans **[**5]** at a price less than keystone markup. The Ballantynes were well aware that James Jeans discouraged distributors from discounting its goods in this manner. Indeed, on several occasions sales representatives of James Jeans either visited The Jeanery outlets or met with the Ballantynes at industry trade shows and told them that James Jeans was aware of The Jeanery's discounting practices and desired The Jeanery to price at keystone. The Jeanery, however, continued to price the goods it bought from James Jeans below the desired retail price.

Not surprisingly, other distributors of James Jeans who complied with the suggested retail price began to complain to James Jeans about The Jeanery's discounting. One of these complaints came from JJ's, one of James Jeans' best customers. Jim Lampus, the owner of JJ's, spoke with Hans Handwerk, a James Jeans representative, in April 1982, and expressed great dissatisfaction with The Jeanery's price cutting. Mr. Lampus threatened not to purchase any more goods from James Jeans unless James Jeans stopped selling to The Jeanery. Handwerk said that he would "take care of things." Several months later, in August 1982, Kris Nordstrom, another James Jeans **[**6]** representative, told the Ballantynes at the Seattle trade show that James Jeans would not accept any more orders from The Jeanery until Tom Ballantyne spoke with Handwerk about The Jeanery's pricing practices.

Rather than contact Handwerk, the Ballantynes contacted their attorney. When The Jeanery did not receive the jeans it had ordered from James Jeans for delivery in August 1982, the Ballantynes filed the present lawsuit against James Jeans alleging an illegal conspiracy among James Jeans and its other distributors to fix resale prices in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*. The Jeanery contended that James Jeans terminated it as a distributor because of its failure to adhere to the illegal price-fixing agreement, and that it suffered damages as a result. This appeal followed the trial court's judgment in favor of James Jeans notwithstanding the jury's verdict in favor of The Jeanery.

II

STANDARD OF REVIEW

HN1[] We review a district court's grant of judgment notwithstanding the verdict by applying the same standard used by the district court. **[**7]** *Wilcox v. First Interstate Bank, 815 F.2d 522, 524 (9th Cir. 1987)*. JNOV is proper if "'without accounting for the credibility of the witnesses, we find that the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion--that the moving party is entitled to judgment notwithstanding the adverse verdict.'" *Id. at 525* (citation omitted). Neither the trial judge nor this court is permitted to weigh the evidence or substitute its judgment for that of the jury, provided the jury verdict is supported by substantial evidence. *Id.*

HN2[] The decision to grant a directed verdict or JNOV, for the standard in either context is identical, *compare Peterson v. Kennedy, 771 F.2d 1244, 1252 (9th Cir. 1985)* (standard of review for JNOV), *cert. denied*, *475 U.S. 1122, 90 L. Ed. 2d 187, 106 S. Ct. 1642 (1986)*, *with id. at 1256* (standard of review for directed verdict), requires the trial court to engage in a careful reasoning **[**8]** process. In an antitrust case, if the evidence is entirely circumstantial, the court must decide whether a reasonable jury "could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture." *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 116 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)*; *cf. Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985)* (in antitrust case, when defendant moves for summary judgment, court must evaluate evidence in light most favorable to plaintiff and decide if jury could reach **[*1152]** guilty verdict without relying on "mere speculation, conjecture, or fantasy"). At the same time, the trial court must not encroach on the role of the jury in dispute resolution. *See Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1265* (9th Cir.), *cert. dismissed*, *464 U.S. 956, 104 S. Ct. 385, 78 L. Ed. 2d 331 (1983)*; *Sweeney, 637 F.2d at 115-16*.

In the antitrust context, determining what amount of evidence will support a jury verdict and assessing **[**9]** the quality of the evidence from which an inference of illegal action may be drawn takes on a special importance. For a number of HN3[] reasons, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Consequently, the court must closely scrutinize the evidence in a given case to avoid the danger of improper antitrust condemnations. *See, e.g., id. at 594* ("Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."); *see Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*.

III

ANALYSIS

HN4[] *Section 1* of the Sherman Act declares illegal "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. **[**10]** The phrase "contract, combination, or conspiracy" has been interpreted to require concerted action of more than a single entity. *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1261* (9th Cir.) (citing L. Sullivan, *Handbook of the Law of Antitrust* § 109 (1977)), *cert. dismissed*, *464 U.S. 956, 104 S. Ct. 385, 78 L. Ed. 2d 331 (1983)*. HN5[] Unilateral conduct by a single firm, even if it "appears to 'restrain trade' unreasonably," is not unlawful under *section 1* of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. [1] The

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[1] HN6[] Unilateral conduct may be unlawful under *section 2* of the Sherman Act, *15 U.S.C. § 2*, if the conduct threatens monopolization. *Copperweld, 467 U.S. at 767*.

> HN7[] By making a conspiracy to monopolize unlawful, *§ 2* does reach both concerted and unilateral behavior. The point remains, however, that purely unilateral conduct is illegal only under *§ 2* and not under *§ 1*. Monopolization without conspiracy is unlawful under *§ 2*, but restraint of trade without a conspiracy or combination is not unlawful under *§ 1*.

Id. at 767 n.13.

reason for distinguishing between concerted and independent action is primarily one of economics. A single, "efficient firm may capture unsatisfied customers from an inefficient rival . . . . This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Id.* (footnote omitted).

[11]** In two recent opinions, the Supreme Court has considered the distinction between concerted and unilateral action. In *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, the Court held that a ***HN8***[] parent corporation and its wholly owned subsidiary are not capable of conspiring with one another in violation of *section 1* of the Sherman Act. *Id. at 777*. In reaching this conclusion, the Court discussed the unilateral behavior and concerted action distinction and observed that the Sherman Act treats concerted action more harshly than unilateral behavior for two reasons. First, "it is sometimes difficult to distinguish robust competition [by a single company] from conduct with long-run anticompetitive effects." *Id. at 767-68*. Accordingly, a single firm's conduct, absent the danger of monopolization, is not the object of intense antitrust scrutiny because to treat it with such scrutiny would heighten "the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur. **[**12]** " *Id. at 768*.

Second, concerted action poses a substantially greater risk of anticompetitive harm than does independent behavior. *See id. at 768-69*. **[*1153]** "[Concerted action] deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id. at 769*. Notwithstanding the efficiencies and potential benefits to consumers that may result from joint activities, "their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Id.* The Court reasoned, however, that a parent and a wholly owned subsidiary cannot conspire together in violation of *section 1* because they have "a complete unity of interest." *Id. at 771*. Coordination of their activities is necessary to efficient competition and promotes consumer welfare. *Id. at 772*.

In *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, the Supreme Court considered the distinction between unilateral and concerted behavior in the context of a dealer termination case. Monsanto, a manufacturer **[**13]** of herbicides, terminated Spray-Rite as one of its dealers. Spray-Rite sued Monsanto alleging that Monsanto conspired with other of its dealers to fix resale prices and terminated Spray-Rite because it sold below the minimum resale price. *Id. at 757*. A jury found for Spray-Rite and awarded damages of $ 3.5 million, which was trebled to $ 10.5 million. Monsanto appealed, challenging the sufficiency of the evidence to support the verdict. The Seventh Circuit affirmed, holding that proof of termination following or in response to competitor complaints is sufficient to support an inference of concerted action. *Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1238-39 (7th Cir. 1982)*. The Supreme Court rejected the Seventh Circuit's view of the standard of proof, but affirmed the judgment under the Court's test for sufficiency of the evidence. *465 U.S. at 759*. The Supreme Court considered what amount of evidence will support a jury finding of a vertical price-fixing conspiracy in violation of *section 1* of the Sherman Act. *Id. at 755*. [2] To answer this question, the court reexamined its earlier decisions involving **[**14]** dealer terminations and vertical price-fixing conspiracies.

Two important distinctions emerge from these earlier cases. The first is that between concerted conduct and independent action, only the former is barred by *section 1* of the Sherman Act. *Id. at 761*. Thus, under the *Colgate* doctrine, ***HN9***[] a manufacturer is free to announce resale prices and refuse to deal with dealers who sell below the announced **[**15]** price. *Id.* (discussing *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919))*. The second important distinction is between concerted conduct to set prices and concerted conduct as to nonprice restraints. *Id.* ***HN10***[] Concerted vertical price restraints have been held per se illegal since the decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*. [3]

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[2] By "vertical," we refer to the situation in which a manufacturer imposes conditions on the sale of its goods by dealers or other parties in the distribution chain. *See* R. Bork, *The Antitrust Paradox: A Policy at War with Itself* 288 (1978). If a manufacturer also sells its own goods as a retailer, there is a horizontal element to the conduct. In our case, the manufacturer, James Jeans, sells its product solely to independent retailers who in turn resell the goods to the consuming public.

[*1154] In contrast, concerted vertical nonprice restraints are scrutinized for illegality under antitrust's rule of reason. *See* Monsanto, 465 U.S. at 761 (discussing Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)).

[16]** *Monsanto* and *Copperweld* set forth significant antitrust concepts. First, the rule of *Colgate* that a manufacturer can declare a resale price policy and refuse to deal with pricecutters is firmly entrenched in antitrust jurisprudence. *See* Monsanto, 465 U.S. at 761, 763. Second, ***HN11***[] because "a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination," *id. at 761*, proof of an agreement must "include[] more than a showing that the distributor conformed to the suggested price." *Id. at 764 n.9*. Third, an agreement to maintain prices may not be inferred from the fact alone that "a manufacturer and its distributors are in constant communication about prices and marketing strategy." *Id. at 762*. Finally, *Monsanto* cautions against permitting a jury to infer a concerted price-fixing agreement from highly ambiguous evidence. *Id. at 763*. Inferences drawn from weak evidence pose the danger of eroding the scope of conduct permitted by the *Colgate* doctrine or with **[**17]** respect to nonprice vertical restraints. *Id.; cf.* Copperweld, 467 U.S. at 768 (explaining that courts must carefully scrutinize allegations of concerted conduct to ensure that aggressive, procompetitive conduct of a single firm is not curtailed improperly).

HN12[] A plaintiff does not establish an illegal price-fixing agreement solely by proof of complaints by competitors of the terminated dealer, or that the dealer's termination followed or was "in response to" these complaints, Monsanto, 465 U.S. at 763, or that the termination of a price-cutter was pursuant to an agreement with the complaining dealer. Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 56 U.S.L.W. 4387, 4389, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). [4] Complaints about discounters "are natural--and from the manufacturer's

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[3] The per se rule of illegality is applied to those "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). Whether vertical price fixing should be per se illegal has been the subject of considerable judicial and scholarly debate. An abbreviated bibliography of this debate includes: Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 n.7 (1984) (collecting sources supporting proposition that "the economic effect of resale price maintenance is little different from agreements on nonprice restrictions"); Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 69, 53 L. Ed. 2d 568, 97 S. Ct. 2549 & n.10 (1977) (White, J., concurring); Albrecht v. Herald Co., 390 U.S. 145, 151, 19 L. Ed. 2d 998, 88 S. Ct. 869 n.7 (1968); Business Elec. Corp. v. Sharp Elec. Corp., 780 F.2d 1212, 1221-22 (5th Cir. 1986) (Jones, J., concurring), *aff'd*, 485 U.S. 717, 56 U.S.L.W. 4387, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988); R. Bork, *supra* note 2, at 280-98; Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135 (1984); Flynn, *The "Is" and "Ought" of Vertical Restraints after Monsanto Co. v. Spray-Rite Service Corp.*, 71 Cornell L. Rev. 1095 (1986); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977).

[4] *Monsanto* and *Business Electronics* call into doubt at least one of our earlier cases. In Filco v. Amana Refrigeration, Inc., 709 F.2d 1257 (9th Cir.), *cert. dismissed*, ***464 U.S. 956, 104 S. Ct. 385, 78 L. Ed. 2d 331 (1983)***, we considered the quantum of proof necessary to establish an illegal price-fixing conspiracy. *Id. at 1261*. Although Judge Wallace, who authored the opinion, presciently stated that "something more than complaints and termination must be shown [to prove an illegal conspiracy to set prices]," *id. at 1263*, we concluded that this "something more" could be supplied by the plaintiff showing "a *causal nexus* between complaints and termination." *Id.* (emphasis added). We criticized the Third Circuit for its statement in Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 110 (3d Cir. 1980), *cert. denied*, ***451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)***, that a supplier's termination of a discounting retailer in response to complaints by other retailers was insufficient, standing alone, to show concerted action. Filco, 709 F.2d at 1265 n.2. In *Monsanto*, however, the Supreme Court embraced the analysis in Sweeney. See Monsanto, 465 U.S. at 763-64. In *Business Electronics*, the Court held that an agreement between a manufacturer and a dealer to terminate another dealer for selling the manufacturer's goods at less than the manufacturer's suggested minimum resale price is not *per se* illegal without a showing of "a further agreement on the price or price levels to be charged by the remaining dealer." Business Elec., 56 U.S.L.W. at 4389. To the extent that *Filco* conflicts with *Monsanto* and *Business Electronics*, we are bound to follow the decisions of the Supreme Court.

perspective, unavoidable--reactions by distributors to the activities of their rivals." *Monsanto, 465 U.S. at 763*. Price complaints provide a manufacturer with important information necessary "to assure an efficient distribution **[**18]** **[*1155]** system." *Id.* Thus, to prohibit a manufacturer from acting on price complaints "would create an irrational dislocation in the market." *Id. at 764*. Furthermore, imposing liability on a manufacturer who terminates a price-cutter after receiving price complaints "'would both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute.'" *Id.* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 n.2 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981))*.

[19]** Complaints by competitors are not entirely without probative value, however, in showing concerted action. *Id. at 764 n.8*. But ***HN13***[] a plaintiff must introduce "something more" than evidence of complaints and termination alone. *Id. at 764* & n.8. The plaintiff must produce "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id. at 764*. [5] Moreover, more must be shown than simply an agreement between the manufacturer and a complaining distributor to terminate a price-cutter. *See* *Business Elec., 56 U.S.L.W. at 4389*. There must be "direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto, 465 U.S. at 764* (quoting *Sweeney, 637 F.2d at 111*). The "common scheme" or "meeting of minds," *id.* (quoting *American Tobacco Co. v. United States, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946))*, prerequisite **[**20]** to *section 1* liability is not shown merely by a distributor's conformity to the suggested resale price. *Id. at 764 n.9*. "It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id.* And, as the Supreme Court recently has emphasized, there must be evidence of an "agreement on the price or price levels to be charged . . . ." *Business Elec., 56 U.S.L.W. at 4389*.

In *Monsanto*, the Court discussed the direct evidence that established the two elements of (a) a manufacturer seeking a resale price **[**21]** agreement and (b) a dealer communicating its acquiescence to the proposed agreement. The Court observed that after Monsanto terminated Spray-Rite, Monsanto threatened not to supply its new herbicide to price-cutting distributors who did not adhere to the announced resale price. *Monsanto, 465 U.S. at 765*. When one discounter refused to follow the resale price policy, Monsanto complained to the distributor's parent company. The parent company in turn put pressure on the discounter to comply, and the discounter subsequently informed Monsanto that it would sell Monsanto's goods at the suggested price. *Id.* Through these events, the Court concluded a jury could find that Monsanto had sought a price-fixing agreement and had received the distributor's communicated acquiescence. *See id.* The *section 1* violation of the Sherman Act was complete. *See* *id. at 764* & n.9.

In the present case, although the plaintiff distributor, The Jeanery, does not explain who joined with James Jeans in the alleged illegal conspiracy, it seems reasonably clear that the claimed conspirators are James Jeans and some of its other distributors. [6] The content of the conspiracy **[**22]** is **[*1156]** alleged to be one to illegally fix resale

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Filco also concluded that a conspiracy can be shown by evidence of direct coercion by the manufacturer to ensure adherence to its resale price strategy. *709 F.2d at 1263*. Whether this portion of *Filco* survives *Monsanto* and *Business Electronics* is explored *infra*.

[5] As the Eleventh Circuit has put it, "this evidence need not be such that *only* an inference of conspiracy may be derived from it. It must, however, go beyond equivocal complaints and *tend* to exclude the inference of independent action." *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 n.4 (11th Cir. 1987)* (emphasis in original).

[6] There is evidence in the record that on several occasions, an employee of James Jeans met or sought to meet with the owners of The Jeanery to discuss The Jeanery's persistent price cutting. At one of these meetings, Kris Nordstrom, a James Jeans sales representative, offered to provide The Jeanery with off-priced goods and factory seconds for its discount outlets if The Jeanery would agree to sell a new line of James Jeans' goods at the desired retail price. There is evidence that The Jeanery accepted this offer. Although The Jeanery argued at trial that this evidence established an agreement to set prices, and requested a jury instruction to this effect, the requested instruction was refused by the trial court. The Jeanery does not argue on appeal that the trial court erred in refusing to give the requested instruction. Indeed, its position on appeal is one in support of

prices. There is evidence that in response to a price complaint by JJ's, one of James Jeans' best customers, James Jeans stopped supplying its product to The Jeanery. We have previously stated "that *HN14*[] if a manufacturer deliberately withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a per se violation of the antitrust laws." *Zidell Explorations, Inc. v. Conval Int'l, Ltd., 719 F.2d 1465, 1469 (9th Cir. 1983)* (discussing *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979))*; *see also* *O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986)* (following *Zidell* but finding insufficient evidence of conspiracy); *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., 698 F.2d 1011, 1015* (9th Cir.) (following *Cernuto* but finding insufficient evidence of conspiracy), *cert.* **[**23]** *denied*, *464 U.S. 829, 78 L. Ed. 2d 109, 104 S. Ct. 106 (1983)*. We have also explained that *HN15*[] when a manufacturer terminates a price-cutter "in response to a competing distributor's complaint and with intent to restrain price competition," a *section 1* Sherman Act violation has been stated. *Zidell, 719 F.2d at 1470*.

[24]** *Monsanto* and *Business Electronics* draw into question our decision in *Zidell*. In *Monsanto*, the Court clearly stated that dealer complaints and a responsive termination by a manufacturer are not sufficient, standing alone, to raise an inference of conspiracy. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763-64, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. The Third Circuit in *Cernuto*, which we applied in *Zidell*, condemned responsive dealer terminations because they reflect a "restraint . . . primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier." *Cernuto, 595 F.2d at 168*. Although this may be the motive behind the price complaint, *Monsanto* makes clear that so long as the manufacturer makes an independent business decision to terminate a price cutter, the fact that a complaint preceded or precipitated the termination is of no moment. *See* *Monsanto, 465 U.S. at 763-64*. [7] **[**26]** To hold otherwise and impose antitrust **[*1157]** liability on a manufacturer who acts after a price complaint would create the type of irrational **[**25]** dislocation in the market that *Monsanto* sought to prevent. *See* *id. at 764*. Moreover, the recent *Business Electronics* decision emphasizes that *HN16*[] a manufacturer does not commit a *per se* violation of the antitrust

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the jury's verdict. The jury returned a general verdict. Because the jury was not instructed that liability might be imposed if it found an agreement between James Jeans and The Jeanery to fix the resale price, we must assume that its general verdict does not include such a finding. *Cf.* *Husky Refining Co. v. Barnes, 119 F.2d 715, 717 (9th Cir. 1941)* (explaining that "it is to be assumed in the absence of a showing to the contrary that the direction of the court was followed").

The Jeanery did not argue, in opposition to the motion for JNOV, that the jury's verdict could have been based on finding the existence of an agreement between it and James Jeans. Nor does The Jeanery present this argument in any fashion in this appeal. Consequently, it is not necessary to decide whether the plaintiff has proved an Albrecht-type of conspiracy. *See* *Albrecht v. Herald Co., 390 U.S. 145, 150, 19 L. Ed. 2d 998, 88 S. Ct. 869 n.6 (1968)* (suggesting that retailer acquiescence in a manufacturer's demand makes it the second party to a conspiracy). Nor is it necessary to decide if this portion of *Albrecht* survives the teaching of *Monsanto* that "a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Monsanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. Like the Court in *Monsanto*, "we . . . decline to reach the[se] question[s], and we decide the case in the context in which it was decided below and argued here." *Id. at 762 n.7*.

[7] We have suggested in other cases that antitrust liability may depend on whether a manufacturer's primary motive in terminating a dealer was anticompetitive. *See, e.g.,* *O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986)* (citing with approval *Zidell Explorations, Inc. v. Conval Int'l, Ltd., 719 F.2d 1465, 1469 (9th Cir. 1983))*. The validity of this approach to antitrust liability is placed in doubt by the Supreme Court's *Monsanto, Copperweld, Matsushita* and *Business Electronics* decisions. These decisions reflect a more sophisticated use of economic analysis in antitrust cases than has previously been seen. Easterbrook, *supra* note 3, at 170-71. In line with this economic awareness, a court should be less concerned with subjective notions of motive and more concerned with the economic effect of challenged conduct. *Cf.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-95, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (analyzing the economic arguments against a predatory pricing conspiracy and concluding that "economic realities tend to make predatory pricing conspiracies self deterring"); *Monsanto, 465 U.S. at 762* (observing that "the economic effect of . . . unilateral and concerted vertical price setting, agreements on price and nonprice restrictions . . . is in many, but not all, cases similar or identical").

laws by entering into an agreement with a requesting distributor to terminate a price-cutter, "unless [the agreement] includes some agreement on price or price levels." *Business Elec., 56 U.S.L.W. at 4392*. [8]

In analyzing The Jeanery's evidence, we must be mindful of the Supreme Court's warning that the plaintiff must be given "the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*, *quoted in* *Wilcox v. First Interstate Bank, 815 F.2d 522, 526 (9th Cir. 1987)*. But in scrutinizing the evidence, we also must make certain that only reasonable inferences from sufficient evidence are drawn by the factfinder. Although a trial court should proceed cautiously in granting a motion for JNOV, *see* *Peterson v. Kennedy, 771 F.2d 1244, 1252 (9th Cir. 1985)*, *cert. denied*, *475 U.S. 1122, 90 L. Ed. 2d 187, 106 S. Ct. 1642 (1986)*, the **[**27]** court cannot forget that ***antitrust law*** places limits on the inferences that may be drawn from circumstantial evidence. *Wilcox, 815 F.2d at 525* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*.

The Jeanery's evidence consists of (1) competitor complaints about The Jeanery's persistent price cutting; (2) a strongly phrased complaint by JJ's, a major customer of James Jeans, coupled with James Jeans' statement that it would "take care of things"; (3) allegedly coercive tactics used by James Jeans to enforce adherence to its pricing policy; and (4) the alleged absence of a plausible business justification for James Jeans' decision to terminate The Jeanery. Taken as a whole, this evidence is insufficiently probative of a conspiracy to permit the case to go to a jury. [9]

[28]**

A. *Competitor Complaints*

There is evidence in the record that James Jeans received, at most, four complaints about the plaintiff's refusal to retail at "keystone." ***HN17***[] Complaints by competitors, standing alone, are not sufficient to show a conspiracy. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. Neither **[*1158]** is it probative of a price-fixing conspiracy that The Jeanery was terminated after, or in response to, the complaints. *Id.* Furthermore, the volume and frequency of competitor complaints does not affect this analysis; "something more" still must be shown by the plaintiff. *See* *id. at 764* & n.8.

B. *Major Customer's Complaint Coupled with James Jeans' Response*

Deposition testimony introduced at the trial reveals the following exchange between Jim Lampus, the owner of JJ's, and the witness, Hans Handwerk, a sales representative employed by James Jeans.

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[8] In *Business Electronics*, the Court noted that our decision in *Zidell* conflicted with the holding of the Fifth Circuit which it affirmed. *Business Elec., 56 U.S.L.W. at 4388, n.1*.

[9] The dissent argues that this conclusion is at odds with *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*. We do not agree. As the Court stated in *Business Electronics*:

> In *Parke, Davis*, a manufacturer combined first with wholesalers and then with retailers in order to gain "the retailers' adherence to its suggested minimum retail prices." *362 U.S., at 45-46*, and n. 6. The manufacturer also brokered an agreement among its retailers not to advertise prices below its suggested retail prices, which agreement was held to be part of the *per se* illegal combination. This holding also does not support a rule that an agreement on price or price level is not required for a vertical restraint to be *per se* illegal-first, because the agreement not to advertise prices was part and parcel of the combination that contained the price agreement, *id., at 35-36*, and second because the agreement among retailers that the manufacturer organized was a *horizontal* conspiracy among competitors. *Id., at 46-47*.

Business Elec., 56 U.S.L.W. at 4392 (emphasis in original).

Question to Hans Handwerk, the James Jeans representative: OK, And what did Mr. Lampus [JJ's owner] tell you **[**29]** about the Jeanery?

Answer: "Hans, we've got a guy right across from me that's selling your product for $ 5.00 off all the time."

Question: "Okay, and what was your response to Mr. Lampus?

Answer: "Okay, do I--who is it?"

Question: And what did he say?

Answer: I don't specifically recall saying who it was, I found out who it was at that time but I don't recall specific words that he said.

Question: Okay. Did Mr. Lampus ask you to do something about it?

Answer: Yes.

Question: And what did he ask you to do?

Answer: "Make a decision."

Question: What did you understand that to mean?

Answer: Well he then asked me, he said, "make a decision," and he said, "if you sell him, I'm not going to buy the product."

Question: And what did you tell him?

Answer: I said, "Jim, don't worry about it, I'll take care of things."

Further evidence revealed that Handwerk reported this conversation to Mr. Krause, the owner of James Jeans, who told Handwerk to "take care of it."

Taken in context with the other price complaints, Handwerk's statement to JJ's owner that he would "take care of things" reflects nothing more than an effort by a manufacturer to calm an angry customer. **[**30]** Moreover, the vague statement by Handwerk that he would "take care of things" falls far short of establishing an agreement to fix prices between the manufacturer and the complaining retailer. Neither does it tend to prove an agreement to terminate a retailer who has failed to follow the alleged resale price maintenance scheme. James Jeans' owner's instruction to Handwerk to "take care of" JJ's complaint also does not establish any agreement. James Jeans, in response to the complaint, could have simply terminated The Jeanery as a distributor. Instead, James Jeans tried to "take care of things" by resolving the problem with The Jeanery, and when that failed The Jeanery was terminated, almost five months after JJ's price complaint. Finally, even if this evidence were sufficient to support the finding of an agreement between James Jeans and JJ's to terminate The Jeanery, it is insufficient to establish "some agreement on price or price levels," without which "a vertical restraint is not illegal *per se." See* *Business Elec., 56 U.S.L.W. at 4392*.

C. *Coercive Tactics to Enforce Price Policy Adherence*

The Jeanery argues that it presented evidence of "coercive" conduct **[**31]** by James Jeans. This argument seems to be constructed on the statement in our *Filco* case that evidence of "overt coercion attempting to ensure compliance through threats or demands" is "something more" than merely complaints and termination and allows an inference of concerted action. *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1263* (9th Cir.), *cert. dismissed*, *464 U.S. 956, 104 S. Ct. 385, 78 L. Ed. 2d 331 (1983)*. But in *Filco*, we also explained that demands or threats are to "be distinguished from mere 'exposition, persuasion, argument, or pressure.'" *Id.* (quoting *Yentsch v. Texaco, Inc., 630 F.2d 46, 53 (2d Cir. 1980))*. In deciding how to categorize **[*1159]** statements made by James Jeans, we look to the context in which they were made. *Id.*

One retailer, Scott Wilson, testified that James Jeans told him that James Jeans would like to have its goods sold at keystone. At trial, Wilson testified:

Question: Was there any indication to you what would happen if you did not keystone?

Answer: They intimated the fact that they would be--we'd have difficulty getting them in the future.

Question: All **[**32]** right. Did you in fact sell at a discount price the James Jeans?

Answer: We have always done that, yes.

. . . .

Question: And did you have any difficulty getting merchandise from James Jeans?

Answer: Extreme.

Given that the ***HN18***[] manufacturer has every right to set the price at which it wants its goods resold and to terminate a dealer who undercuts that price, it is not surprising that a manufacturer would let a dealer know this policy. The greatest "difficulty" a dealer could experience in getting a product would be to suffer a termination. Certainly, then, a manufacturer may advise a dealer that its policy is to terminate a dealer who does not sell at keystone, or to favor filling orders placed by complying dealers. This is legitimate pressure to get a dealer to sell at keystone. No inference of antitrust conspiracy can be drawn from such evidence. It is ambiguous at best. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("***Antitrust law*** limits the range of permissible inferences from ambiguous **[**33]** evidence in a *§ 1* case. Thus, in *Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id., at 764*.").

Testimony by other retailers of James Jeans is equally equivocal. Judith Grant, the owner of Jeans & Things, testified to the following exchange with Kris Nordstrom, one of James Jeans' sales representatives.

> Question: And could you describe those conversations please?
>
> . . . .
>
> Answer: Well, when I asked them about the other stores in Yakima that did discount, they said that technically they could not refuse to sell to anybody they had already opened an account for. But they could--they did have ways of stopping anybody else from discounting them.
>
> . . . .
>
> Question: Did Mr. Nordstrom ever tell you, describe to you any of the ways that they had to deal with this problem of discounting?
>
> Answer: Well, what was said to me was, "Orders could be lost, could be shipped to the wrong destination, or just never processed."

This again **[**34]** reveals nothing more than James Jeans putting pressure on a retailer to adhere to its resale price policy. It is consistent with the privilege of independent action permitted a manufacturer under *Colgate*.

D. *Plausible Business Justification to Terminate The Jeanery*

The Jeanery argues there was no evidence of any business justification for James Jeans to terminate it as one of James Jeans' distributors. The Jeanery contends this lack of business justification, coupled with its termination in response to JJ's complaint, is sufficient circumstantial evidence of a price-fixing conspiracy to permit the case to go to the jury. We disagree. ***HN19***[] A manufacturer may terminate a dealer who violates the manufacturer's retail price policy. If any business justification is needed for such a termination, it is supplied by the manufacturer's business judgment that it is important to its marketing strategy and the maintenance of its dealer network not to have its goods sold at less than the suggested retail price. **[*1160]** "[A] manufacturer's strongly felt concern about resale prices does **[**35]** not necessarily mean that it has done more than the *Colgate* doctrine allows." *Monsanto, 465 U.S. at 763*. *Business Electronics* teaches that a manufacturer can agree to terminate a price-cutting distributor in response to a complaint from another dealer. It is uncontroverted in the present case that The Jeanery's price-cutting practices created problems between James Jeans and some of its other distributors. One of these distributors was JJ's, one of James Jeans' best customers. Faced with this situation, James Jeans exercised its business judgment and terminated The Jeanery. We see no absence of business justification in this course of action. Indeed, in *Business Electronics* there also was lacking any evidence of a plausible business justification for the termination, other than the manufacturer's desire to retain the business of an important customer. *See* *Business Elec., 56 U.S.L.W. at 4393* (Stevens, J., dissenting).

IV

LACK OF COMMUNICATED ACQUIESCENCE

If we were to treat James Jeans' statements to its retailers as requests for an agreement to sell at keystone; or if we were to treat as coercive threats its statements to its retailers **[**36]** that James Jeans products could be lost, delayed or mis-shipped if a retailer did not agree to sell at keystone, the record still does not support the finding of any agreement. Regardless of James Jeans' conduct, to establish an agreement it takes two to tango.

In *Monsanto*, the Court indicated that the threat to cut off supplies was "circumstantial evidence that Monsanto sought agreement from the distributor to conform to the resale price." *465 U.S. at 765 n.10*. From this circumstantial evidence of threats, "the jury could have concluded that Monsanto sought this agreement at a time when it was able to use supply as a lever to force compliance." *Id.* The Court further found an illegal agreement based upon "substantial *direct* evidence" of Monsanto's unsuccessful efforts to force distributor compliance by threats of short supplies during a peak shipping season followed by Monsanto's appeal to the distributor's parent company, which resulted in the distributor reluctantly "inform[ing] Monsanto that it would charge the suggested price." *Monsanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752, 765, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)* (emphasis **[**37]** in original).

HN20[] A plaintiff does not establish concerted action, however, merely by proving that the defendant sought agreement. More is required. "The concept of 'a meeting of the minds' . . . means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id. at 764 n.9*. In *Monsanto*, there was evidence of communicated acquiescence by the distributor. *See id. at 765*. Here, there isn't. There is no evidence that the retailers James Jeans requested, or pressured, to sell its product at keystone communicated acquiescence to such an agreement. Some dealers sold at keystone; some did not. The Jeanery did not, and it was terminated as a dealer. This termination was pursuant to James Jeans' announced policy as reiterated in its conversations with its dealers. But there is no evidence that this termination was pursuant to any agreement. [10] It was unilateral, independent action taken by James Jeans to maintain the resale price of its goods. And it did not violate **[**38]** *section 1* of the Sherman Act.

V

CONCLUSION

The Supreme Court has cautioned against letting ***HN21***[] unsupported allegations in **[*1161]** an antitrust case reach a jury. *See Matsushita, 475 U.S. at 593*; *Monsanto, 465 U.S. at 763*. The present case rests on circumstantial evidence that does not support a reasonable inference of concerted behavior. Evaluating the evidence in the light most favorable to The Jeanery, we conclude that a jury could find a violation of *section 1* of the Sherman Act only by relying on speculation or conjecture. *See Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985)*; **[**39]** *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 116 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 101 S. Ct. 1981, 68 L. Ed. 2d 300 (1981)*. Accordingly, we affirm the judgment of the trial court in favor of James Jeans on its motion for judgment notwithstanding the verdict.

AFFIRMED.

ORDER

The opinion and dissent filed May 2, 1988 are amended. Both are replaced by the amended opinion and amended dissent filed herewith.

Dissent by: REINHARDT

Dissent

REINHARDT, Circuit Judge, dissenting:

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[10] Even if the evidence were sufficient to establish an agreement between James Jeans and JJ's to terminate The Jeanery, there is no evidence this alleged agreement included "some agreement on price or prive levels." *Business Elec., 56 U.S.L.W. at 4392*.

A jury found that James Jeans, Inc., had violated the antitrust laws by unlawfully terminating one of its dealers, The Jeanery, Inc., and awarded damages. The trial court, relying primarily on *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, granted a judgment *non obstante veredicto* in favor of James Jeans. The majority issued an opinion affirming the district court, in which it concluded, on the basis of *Monsanto*, that The Jeanery did not offer sufficient evidence for a jury to find that an antitrust violation had occurred -- specifically, that there was insufficient evidence **[**40]** of an *agreement to terminate* its franchise. Because I disagreed with the majority's interpretation and application of *Monsanto*, and its failure to follow an earlier Supreme Court opinion, *United States v. Parke, Davis*, I filed a dissent. After the majority and dissenting opinions were issued, the Supreme Court decided *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 56 U.S.L.W. 4387, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. The majority then prepared an amended opinion, adding an additional ground for its conclusion -- namely, that there was insufficient evidence of a *price-specific agreement*. I still dissent, and will discuss the two bases for my disagreement separately.

MONSANTO AND THE AGREEMENT TO TERMINATE

Monsanto reaffirmed and elaborated the holding of *United States v. Colgate, 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. The point of *Colgate* was that manufacturers have a qualified privilege to choose the firms with which they will deal. A manufacturer may state in advance that it will not sell to a price-cutting dealer, and then follow through with that resolution. *Colgate, 250 U.S. at 307*. **[**41]** *Monsanto* stated that it followed from the holding in *Colgate* that a manufacturer's termination of a price-cutting firm after complaints from the firm's competitors *might* still be a legal unilateral action. *Monsanto, 465 U.S. at 763-64*. As *Monsanto* stated, the competing firms' complaints *might* simply have provided the manufacturer with information which formed a basis for its decision to enforce its earlier resolution regarding which firms it would deal with. *Monsanto, 465 U.S. at 763-64*. Under *Monsanto*, "something more" is needed beyond evidence of a complaint and a termination to show that the manufacturer's action was illegal (part of a combination) rather than legal (unilateral action). *Id. at 764*. *Monsanto* discussed this "something more" as including direct or circumstantial evidence that "tends to exclude the possibility" that the alleged conspirators acted independently, or, put alternatively, that reasonably tends to prove "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto, 465 U.S. at 764*. [1] In other words, **[*1162]** there must **[**42]** be additional evidence that tends either to prove concerted action or to disprove unilateral action.

While *Monsanto* gave some indication of what this "something more" could be, more guidance on this question can be found in other Supreme Court cases, in particular, from one leading case which the majority, remarkably, does not even mention except in a footnote. In *United States v. Parke, Davis & Co., 362 U.S. 29, 43-44, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*, **[**43]** the manufacturer had an announced policy of ceasing to do business with wholesalers who failed to comply with its specified retail price. [2] The Court, in finding an antitrust violation, explicitly reaffirmed *Colgate. Parke, Davis*, 362 U.S. at 44. However, the Court stated,

> When the manufacturer's actions . . . 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 [the qualified privilege to choose trading partners, protected by *Colgate*] is not present and therefore he has put together a combination in violation of the Sherman Act.

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[1] The Court in *Monsanto*, after reviewing the additional evidence present in that case, found "something more" and accordingly, affirmed the Court of Appeals, 465 U.S. at 764-768. The key evidence was a statement to Monsanto by a distributor that it would maintain the retail price. There was also a rather ambiguous newsletter from another distributor to his dealer-customers. In *Monsanto*, the "something more" was in actuality not very much. *See* Easterbrook, "Vertical Arrangements and the Rule of Reason", 53 *Antitrust L.J.* 131, 171-72 (1984).

[2] I note that *Monsanto* does not in any way signal a retreat from *Parke, Davis*. In fact, in its opinion, the *Monsanto* court cited *Parke, Davis* at two separate points. *See* *Monsanto, 465 U.S. at 761, 762*.

Id. It is in the majority's refusal to apply *Parke, Davis* that I most strongly part company with its legal analysis.

[44]** The Supreme Court has never given much guidance on how courts determine whether an unlawful combination exists for the purpose of *Section 1*. Possible theories that have received some support in the case law vary from the weaker requirements of an "implied acceptance theory" or a "coerced compliance theory" to the more rigid requirement of an express agreement. *See* 7 P. Areeda, ***Antitrust Law*** 8-180 (1986). The majority seriously overstates the extent to which the Court's decision in *Monsanto* has clarified -- or narrowed -- the criteria for determining whether there was an unlawful combination, by suggesting that an express agreement is necessary. [3] I think the more accurate reading of the relevant cases is that offered by Professor Areeda. He reads *Monsanto* as merely maintaining a distinction between simple and complex refusals to deal. A mere announcement and termination is a legal, unilateral action. However, when firms use individualized negotiations with dealers, meetings, repeated exhortations, and intermediate pressures, such actions indicate illegal, concerted action. [4] 7 P. Areeda, ***Antitrust Law*** 82-180 (1986). All of these factors were present in this **[**45]** case. It is important to note also that this case involves not merely a manufacturer's coercion of its dealers to control the dealers' prices. Here, a competing dealer (JJ's) had also threatened the manufacturer, trying (apparently successfully) to force the manufacturer to enforce the resale price levels. As Professor Areeda has argued, as a matter of antitrust policy, courts should be less tolerant of the efforts of dealers to control their competitors through the manufacturer than they are of manufacturer efforts to control dealer prices. 7 P. Areeda, ***Antitrust Law*** 175 (1986).

[46]** **[*1163]** Here, as in *Monsanto*, there was more than merely a customer complaint followed by a dealer termination. The record before us contains more than enough additional evidence for a jury to have concluded that (1) there was an unlawful combination to maintain the resale price of James Jeans' jeans and (2) The Jeanery was terminated as a result. There is ample evidence that in its dealings with retailers in general James Jeans went well beyond announcing a policy of refusing to deal with price-cutting merchants and terminating those who sold at discount. There is also ample evidence that in the particular act of terminating the Jeanery James Jeans did not, as permitted by *Monsanto*, simply enforce a preexisting policy in response to information it gained through a customer's complaint.

The record before us reveals direct evidence of an agreement in restraint of trade -- an express oral agreement between James Jeans and JJ's, one of its major accounts. According to the testimony of Handwerk, a James Jeans sales representative, the owner of JJ's told Handwerk that he must stop selling to The Jeanery or he would lose JJ's business; Handwerk immediately assured JJ's owner **[**47]** that he would "take care of things"; when Handwerk reported to the president of James Jeans, he was told to do just that; Handwerk filled in another sales representative, Nordstrom. It was Nordstrom who then cut off The Jeanery, as JJ's had demanded. Handwerk's testimony is direct and substantial evidence from which a jury could reasonably conclude that there was an agreement between JJ's and James Jeans to terminate a price-cutting dealer. Certainly a jury could find that

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[3] One commentator has stated: "*Monsanto* clearly does not adopt the implied acceptance or the coercion theory of agreement, but it may not entirely reject them either. Taking *Colgate* as given, the Court did not pursue agreement concepts." 7 P. Areeda, ***Antitrust Law*** 83 (1986).

[4] Professor Areeda stated:

> I do not mean to imply that suggestions or persuasion standing alone can be treated as agreements. Rather we are focusing on persuasion and exhortations (etc.) in the context of threatened termination. In this context, I would treat these additional steps as "complex." As *Parke Davis* pointed out, such a manufacturer is not merely choosing congenial dealers in the sense of those who prefer to comply in order to get the goods -- he is trying to get compliance without bearing the burden of termination. Such steps approach a seeking of dealer assent to a much greater degree than simple announcement of conditions and termination of non-conformists.

7 P. Areeda, ***Antitrust Law*** 116-17 (1986).

Handwerk's response constituted an assent, or at least a communicated acquiescence in JJ's demand. [5] *See* *Monsanto, 465 U.S. at 764 n.9*.

[48]** The majority reads *Monsanto* and *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, in such a way as to create, in effect, a "beyond all reasonable doubt" standard for finding a *Section 1* agreement. The majority's argument, reduced to its simplest form, is that there is a plausible reading of the evidence that would be consistent with legal, independent behavior, and therefore plaintiff's case must fail. [6] *See* maj. slip op. at 6399-6404. I think this approach to evaluating evidence reads the relevant Supreme Court cases far too narrowly. What the Supreme Court stated was that an antitrust plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could have harmed respondents." *Matsushita, 106 S. Ct. at 1357*. It is clear that The Jeanery has met this standard. Any stricter reading of the Supreme Court cases interferes with the jury's fact-finding function. That evidence may not entirely preclude an interpretation of independent action does not warrant taking the case from the jury.

[49]** The evidence here, unlike the type of evidence that *Monsanto* said would be insufficient, is *direct* in character. Handwerk's testimony relates to the agreement itself, not to other facts from which an **[*1164]** agreement might be inferred. While conceivably one could argue that Handwerk's response meant something different than acquiescence, the meaning of the statement was clearly a matter for the jury to decide. [7] In *Monsanto*, the plaintiffs sought to have the jury *infer* an agreement from the circumstantial fact that a dealer was terminated following another dealer's complaint. Here the plaintiff asked only that the jury find that the exchange of statements itself constituted an agreement or, at the least, resulted in a communicated acquiescence. This the majority refuses to permit the jury to do solely because it would read the verbal exchange differently.

[50]** Even were only circumstantial evidence involved, the concerns raised in *Monsanto*, that drawing "an inference . . . from highly ambiguous evidence" will erode the *Colgate* doctrine and eliminate distributors as an important source of information for manufacturers, *Monsanto, 465 U.S. at 763*, are not present in this case. The circumstances here do not suggest the likelihood that the manufacturer was simply responding to newly received information by implementing a preexisting policy. First, there was no evidence that James Jeans had a preexisting policy of terminating price-cutting dealers; in fact one of its own sales representatives testified that he believed it was illegal to terminate a price-cutter. There was also evidence that James Jeans normally dealt with price-cutters in other ways. Second, there was considerable evidence that at the time of Handwerk's discussion with JJ's owner James Jeans was already well aware of The Jeanery's price-cutting policies; thus the dealer's complaint was not particularly informative. Third, the message conveyed by the retailer here -- a threat to cease doing business unless a competitor is terminated -- cannot be classified **[**51]** as simply informational in nature. The existence of an agreement between James Jeans and JJ's to terminate The Jeanery is at least compelling circumstantial evidence of the existence of an underlying arrangement to maintain resale prices -- an arrangement of which James Jeans and JJ's were a part.

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[5] The majority characterizes this same exchange as "reflect[ing] nothing more than an effort by a manufacturer to calm an angry customer." Maj. op. at 1158. Though this may be a plausible interpretation of the exchange, interpreting the exchange as evidence of an agreement seems far more probable. In any event, the majority oversteps its role when it announces that the exchange falls [so] far short of establishing an agreement" that the question should not even go to the jury. Maj. op. at 1158. In effect, the district court, and the majority, simply arrogated unto themselves the fact-finding function of the jury.

[6] The majority's analysis seems to proceed from precisely the opposite premise set forth so persuasively by the Third Circuit when discussing antitrust conspiracies over forty years ago: "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age." *William Goldman Theatres v. Loew's, Inc., 150 F.2d 738, 743 n. 15 (3d Cir. 1945)*. Nowadays, because price-fixing agreements are *per se* illegal, antitrust conspirators tend to be perceptive enough to avoid express written agreements and to deny the existence of any combination or conspiracy; they also tend to avoid leaving incriminating evidence lying about.

[7] In *Monsanto*, the Court upheld the jury's finding of a conspiracy based on "*direct* evidence of agreements to maintain prices," even though that evidence was subject to lawful as well as unlawful interpretations. *Monsanto, 465 U.S. at 765*.

There was considerable further evidence of the "something more" referred to in *Monsanto*, or the "other means which effect adherence to [the manufacturer's] resale prices" referred to in *Parke, Davis, 362 U.S. at 49*. There was, for example, substantial evidence that James Jeans' tactics were far more sophisticated and disruptive than those permitted under *Monsanto*. James Jeans did not simply terminate dealers upon discovering that they did not sell at keystone. With respect to The Jeanery, James Jeans tried both rewards and punishments. Mr. Ballantyne testified that a James Jeans representative offered to supply The Jeanery with factory seconds and off-price merchandise in return for selling the popular new line of "Streets" jeans at full price. He also testified that the same representative repeatedly tried to "intimidate" him into selling at keystone.

In addition, **[**52]** other retail clothing dealers offered testimony as to the varying tactics that James Jeans used in trying to obtain their adherence to the keystone pricing policy. One dealer testified that he maintained James Jeans' resale prices because Nordstrom told him that his company had "ways of stopping anybody else from discounting," and that "orders could be lost, could be shipped to the wrong destination, or just never processed." [8] Another retailer testified that in "many different conversations" with James Jeans sales representatives, he was told that James Jeans had received complaints from other dealers about his discount prices, that it wanted him to sell at keystone, and that he would have difficulty getting his supplies in the future if he did not comply. When this **[*1165]** dealer refused to comply, James Jeans "lost" a $ 30,000 order from him.

[53]** The majority claims that James Jeans' various coercive tactics are "consistent with the privilege of independent action permitted a manufacturer under *Colgate*." Maj. op. at 1159. The majority gives no authority -- and certainly none can be found in *Colgate* or *Monsanto* -- for the position that a manufacturer may not only unilaterally terminate a dealer, but it may also use a variety of intermediate coercive tactics designed to disrupt the dealer's business operations, without fear of running afoul of the antitrust laws. The majority's view is contrary to the clear holding of *Parke, Davis*; the majority offers neither case law nor policy arguments for its extraordinary extension of the limited *Colgate* privilege.

James Jeans' conduct in attempting to conceal the fact that it had cut off future sales to The Jeanery also qualifies as "something more", as does its fabrication of a false reason for its failure to ship an order it had previously accepted. Attempting to conceal the fact of termination and contriving false reasons for not filling an order are probative of guilty knowledge and wrongful conduct. Here, these acts constitute further evidence that the termination **[**54]** of the Jeanery was undertaken as part of an unlawful resale price maintenance plan.

Finally, there was direct evidence of an agreement between James Jeans and The Jeanery to maintain the keystone price on the Street model. Mr. Ballantyne testified that he ultimately acquiesced in Nordstrom's demands regarding that line and advised him he would comply. The existence of this agreement may serve as some evidence of a general pattern of agreements between James Jeans and its dealers.

In sum, the above evidence constitutes substantial direct as well as circumstantial proof that James Jeans was a participant in a combination or conspiracy to maintain the retail price of its merchandise. *Cf.* *Monsanto, 465 U.S. at 765*. Thus, there was more than sufficient evidence before the jury to permit it to find a violation of Section One of the Sherman Act. Accordingly, in my opinion, the judgment notwithstanding the verdict cannot stand.

BUSINESS ELECTRONICS AND THE PRICE-RELATED AGREEMENT

As noted at the outset, the original majority opinion relied exclusively on the argument that the Jeanery had not shown sufficient evidence of an agreement between James Jeans and JJ's to **[**55]** terminate The Jeanery's franchise. After the Supreme Court handed down *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 56 U.S.L.W. 4387, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*, the majority revised its opinion to add a second ground for its conclusion: insufficient evidence of a price-specific agreement between James Jeans and JJ. This second issue is not properly before us: it was not considered by the district court in its JNOV, and it was not raised by either party either before the district court or on appeal. *Cf.* maj. op. at 1155-56 n.6. Moreover, even if the new

[8] This parallels precisely what happened to The Jeanery: Its last order was not filled allegedly because James Jeans was out of stock or not in production, but The Jeanery offered persuasive evidence that these reasons were fictitious.

ground could be raised for the first time now, on the theory that there has been a change in the law, the majority could not affirm on that basis. Rather, it would be required to remand in order to give the district court the initial opportunity to determine whether The Jeanery's evidence regarding a price-specific agreement was in fact insufficient. If upon remand, the district court were to decide that the evidence adduced at the original trial failed to meet the *Business Electronics* standard, JNOV would still not be proper; because the change in the law occurred after **[**56]** trial, The Jeanery would be entitled to a new trial at which it could present additional evidence. Thus, I do not believe *Business Electronics* can serve as a basis for affirming the district court's judgment. In my view, the majority's decision to uphold the JNOV must stand or fall on the basis of its original opinion.

I respectfully dissent.

Federal Paper Bd. Co. v. Commissioner

United States Tax Court

May 16, 1988. ; May 16, 1988, Filed

Docket No. 34291-83

Reporter
90 T.C. 1011 *; 1988 U.S. Tax Ct. LEXIS 67 **; 90 T.C. No. 67; 1988-2 Trade Cas. (CCH) P68,188

Federal Paper Board Co., Inc., Petitioner v. Commissioner of Internal Revenue, Respondent

Disposition: **[**1]** *Decision will be entered under Rule 155*.

Core Terms

milk carton, carton, folding, settling, signatories, sharing agreement, settlement, settlement payment, settlement agreement, antitrust, opt-out, class action, allocate, sales, conspiracy, purchases, complaints, Claimant, provisions, aggregate, sever, severally liable, jointly, percent, anti trust law, amount paid, purposes, amounts, conspirators, negotiations

Syllabus

In March 1976, P and other defendants were indicted for Federal ***antitrust law*** violations that involved folding cartons and not milk cartons. P pleaded nolo contendere to the charges set forth in the indictment. Subsequently, P paid amounts to settle antitrust litigation brought under sec. 4 of the Clayton Act. P paid a portion of those amounts to plaintiffs to settle a class action. P paid the remainder of those amounts to plaintiffs that chose not to participate in the settlement of the class action (opt-outs) -- the opt-outs chose, instead, to negotiate on their own behalves with P and other defendants in the antitrust litigation. Certain plaintiffs in the antitrust litigation asserted that P and other defendants conspired to affect the prices of both folding cartons (folding carton claims) and milk cartons (milk carton claims). *Held*: For purposes of amounts paid by P to settle class action, determined that allocation of P's payments between milk carton claims and folding carton claims is based upon aggregate sales of all the settling defendants in the class action to the settling plaintiffs in such action. *Sec. 162(g), I.R.C.* ***[**2]*** *1954*, applies to amounts allocated to folding carton claims, and disallows deduction for two-thirds of amounts so allocated. *Held, further*: For purposes of amounts paid by P to settle with opt-outs, determined that allocation of P's payments between milk carton claims and folding carton claims is based on agreements that established the manner in which the liability of the defendants that signed such agreements would be shared among such defendants. *Sec. 162(g), I.R.C. 1954*, applies to amounts allocated to folding carton claims, and disallows deduction for two-thirds of amounts so allocated.

Counsel: *David Sachs*, for the petitioner.

William S. Garofalo and *Barbara J. Fazekas*, for the respondent.

Judges: Wells, *Judge*.

Opinion by: WELLS

Opinion

[*1012] Respondent determined the following deficiencies in petitioner's Federal income taxes:

TYE --	Deficiency
12/27/75	[1] $ 595,009
12/30/78	595,009

[3]** After concessions, the issue for decision is whether *section 162(g)* [2] disallows a deduction for two-thirds of all amounts paid by petitioner to settle antitrust actions **[*1013]** brought under section 4 of the Clayton Act. [3]

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly. The stipulation of facts and attached exhibits are incorporated herein by this reference.

Petitioner's principal place of business or office was in Montvale, New Jersey, at the time the petition in this case was filed. For all years relevant to this case, petitioner manufactured and sold folding cartons (i.e., bending boxboard containers **[**4]** that are not suitable for liquids), and not milk cartons (i.e., bending boxboard containers that are suitable for liquids). [4]

Criminal Case and Companion Civil Suit

In February 1976, a criminal action was brought by the United States (hereinafter Government) in the U.S. District Court for the Northern District of Illinois against 23 corporations, including petitioner, and 50 individuals. The Government alleged that those defendants had violated Federal antitrust laws by engaging in a conspiracy to fix the prices of folding cartons. The Government did not allege for purposes of that criminal case, however, that **[**5]** the defendants therein conspired to fix the prices of milk cartons. [5]

In February 1976, the Government also filed a civil enforcement action against petitioner and other parties. Similar to its position in the criminal case, the Government alleged in the civil enforcement action that the defendants had engaged in a conspiracy to fix the prices of folding cartons, and did not allege that there had been a conspiracy to fix the prices of milk cartons.

[*1014] In March 1976, petitioner and other defendants in the criminal case were indicted for Federal ***antitrust law*** violations that involved folding cartons and not milk cartons. Petitioner pleaded nolo contendere to the charges set forth in the indictment.

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[1] The deficiency determined for petitioner's taxable year ended Dec. 27, 1975, resulted from a reduction of an investment credit carryback from petitioner's taxable year ended Dec. 30, 1978.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954 as amended and in effect during the taxable years in issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

[3] According to respondent, petitioner is one of several taxpayers that have taken conflicting positions with regard to the issue in this case.

[4] For purposes of stipulations, trial, and briefing, the parties stipulated to these definitions of the terms "folding cartons" and "milk cartons," unless it was clear from the context in which the terms appeared that some other definitions should apply. We adopt the same definitions of the terms, unless it is clear from the context in which the terms appear that some other definitions should apply.

[5] Subsequent to the filing of the criminal case, a separate grand jury convened to consider allegations involving milk cartons and did not return any indictments.

In the civil enforcement action, the Government obtained a consent order and injunction against petitioner and other defendants.

Class Action

During **[**6]** 1976, very soon after the indictment was issued in the criminal case, purchasers of milk cartons, folding cartons, or both types of cartons filed antitrust actions under section 4 of the Clayton Act against petitioner and other carton producers. These actions were consolidated in the U.S. District Court for the Northern District of Illinois (hereinafter District Court). The District Court subsequently determined that the civil antitrust litigation satisfied the statutory requirements for a class action, [6] and certified the litigation as such. The District Court defined the class on whose behalf the class action was maintained as "All persons in the United States (excluding Defendants, their subsidiaries, affiliates, or agents), who purchased folding cartons from any of the Defendants in these actions during the period from January 1, 1960 to December 31, 1974." [7]

[7]** Complaints that were filed by purchasers of cartons contained allegations that the defendants engaged in a conspiracy to fix, raise, maintain, or stabilize the prices of folding cartons. The complaints were, in essence, based upon the allegations contained in the indictment issued in the criminal case. Nevertheless, some of the complaints specifically mentioned milk cartons -- some of the complaints specifically alleged that the conspiracy included milk cartons, and at least one of the complaints specifically excluded milk cartons. Moreover, plaintiffs that did not specifically allege in their complaints that the conspiracy included milk cartons asserted in the course of the antitrust **[*1015]** litigation that the term "folding cartons," as used in their complaints, included milk cartons. Thus, the plaintiffs alleged that the defendants engaged in a single conspiracy to fix the prices of both folding cartons (folding carton claims) and milk cartons (milk carton claims). [8]

[8]** On June 24, 1977, the District Court denied a motion filed by certain defendants, not including petitioner, to sever milk carton claims. [9] On June 29, 1977, in response to a motion for reconsideration of its ruling denying the motion to sever milk carton claims, the District Court again refused to sever milk carton claims; this motion for reconsideration was filed by the same defendants that filed the motion to sever milk carton claims. The District Court made clear during the pendency of the litigation that, at least for the initial stages of the litigation, (1) the term "folding cartons" included milk cartons, and (2) the court would not consider the milk carton industry a separate industry from the folding carton industry.

[9]** The parties to the class action made various attempts to settle the antitrust litigation. In 1977, a group of defendants, which included petitioner, made a settlement proposal to the plaintiffs in the class action. The proposal provided that each defendant would settle the claims of its own plaintiff-customers and make settlement payments to those customers. The proposal also required the plaintiffs to exclude the sales of settling defendants from the plaintiffs' claims against those defendants that refused to settle. The proposal, however, was rejected by the plaintiffs.

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[6] See *Fed. R. Civ. P. 23*.

[7] The class initially included indirect purchasers of folding cartons, but was amended on July 15, 1977, to include only direct purchasers of folding cartons. See *In Re Folding Carton Antitrust Litigation, 75 F.R.D. 727, 737-738 (N.D. Ill. 1977)*.

[8] We use the terms "milk carton claims" and "folding carton claims" because the parties to this case and to the antitrust litigation used such terms. By using such terms, however, we are not suggesting that there were allegations of one conspiracy involving only milk cartons, and allegations of a second, separate conspiracy involving only folding cartons.

[9] The defendants filing the motion argued, inter alia, that (1) because the milk carton business was distinct from the folding carton business, the addition of the milk carton claims to the antitrust proceedings was improper; and (2) continued joint litigation of the claims involving folding cartons and the claims involving milk cartons would complicate the antitrust litigation and cause prejudice to those defendants required to defend against both types of claims.

On October 18, 1978, petitioner entered into a settlement agreement with certain plaintiffs (these plaintiffs hereinafter are referred to as settling plaintiffs). [10] The settlement agreement provided for the complete settlement of the **[*1016]** settling plaintiffs' claims against petitioner "with respect to all purchases of folding cartons including milk cartons." In return, petitioner agreed to deposit cash in the amount of $ 12 million in escrow for the benefit of the settling plaintiffs, and to issue to the settling plaintiffs subordinated promissory notes in the total principal amount of $ 5 million and **[**10]** warrants to purchase 181,818 shares of petitioner's common stock. The total fair market value of the consideration provided by petitioner under the settlement agreement was $ 15,405,487. [11] Of this amount, $ 1,060,000 represented a payment of legal fees. [12]

Other defendants also each entered into a settlement agreement with the settling plaintiffs. [13] Each settlement agreement, including the agreement between petitioner and the settling plaintiffs, specifically provided that the agreement would not be construed to affect in any manner **[**11]** any joint and several liability of the defendants that did not settle the claims against such defendants -- "any putative common law rule or practice, or State or local statute, to the contrary notwithstanding." Amounts paid by other defendants under their respective agreements were deposited in escrow.

Each defendant in the class action individually negotiated with the settling plaintiffs in order to settle the antitrust litigation. Moreover, the defendants did not enter into an agreement between themselves with respect to the manner in which they would share their liability to the settling plaintiffs. [14]

[12]** On July 9, 1979, the settling plaintiffs submitted a proposed plan of distribution to the District Court. That plan provided, in essence, that the amounts held in escrow and petitioner's notes and warrants would be distributed to the plaintiffs that filed claim forms. Distributions would be based upon each claimant's purchases of cartons from the **[*1017]** defendants in relation to all claimants' purchases of cartons from the defendants (these distributions hereinafter are referred to as pro rata distributions); no distinction was made between purchases of folding cartons and purchases of milk cartons for purposes of the distribution formula.

Later in July 1979, the District Court entered a pretrial order approving the form of a Notice of Hearing on Proposed Class Action Settlements and Proposed Plan of Distribution. The notice set forth the class that the District Court previously certified, [15] but specifically stated that "For purposes of these proposed settlements, folding cartons *include* milk cartons." (Emphasis in original.) The notice also contained a summary of the proposed settlement agreements and the proposed plan of distribution of the settlement fund (hereinafter **[**13]** plan of distribution).

On September 19, 1979, the District Court granted final approval of the settlement agreements entered into by the defendants with the settling plaintiffs, and also granted final approval of the plan of distribution.

Amounts held in escrow were distributed to the settling plaintiffs during the period between 1980 and 1983. In 1980, petitioner's notes and warrants were distributed to the settling plaintiffs pursuant to the plan of distribution; [16]

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[10] Certain plaintiffs excluded themselves from the certified class at some point in time, and therefore did not participate in this settlement agreement. Separate agreements were negotiated with those plaintiffs, and are discussed *infra*.

[11] There was no provision in the settlement agreement indicating that petitioner's payment was based upon petitioner's actual sales of folding cartons to its plaintiff-customers.

[12] The parties have stipulated to this allocation.

[13] Certain plaintiffs excluded themselves from the certified class at some point in time, and therefore did not participate in these settlement agreements. Separate agreements were negotiated with those plaintiffs, and are discussed *infra*.

[14] Defendants did, however, enter into an agreement among themselves with respect to the manner in which they would share their liability for various litigation costs incurred in the class action.

[15] See this opinion, *supra*, for the defined class in the class action.

[16] Thus, pro rata distributions were made to purchasers of folding cartons, milk cartons, or both types of cartons.

however, settling plaintiffs with claims below a certain dollar amount did not receive notes and warrants because notes and warrants were not issued in fractional amounts.

During the relevant period **[**14]** under the plan of distribution, the aggregate sales of milk cartons by all the settling defendants to the settling plaintiffs constituted 23.6 percent of the aggregate sales of folding and milk cartons by such defendants.

Opt-Out Cases

Approximately 16 plaintiffs chose not to participate in the settlement agreements between the defendants and the settling plaintiffs (these nonparticipating plaintiffs hereinafter are referred to as opt-out plaintiffs). The opt-out **[*1018]** plaintiffs chose, instead, to negotiate on their own behalves with the defendants.

On May 31, 1979, certain defendants, not including petitioner, renewed their motion to sever milk carton claims. [17] The District Court denied the motion, but made clear that it could "sever out the milk cartons any time in the course of the trial when it appeared * * * that it [was] prejudicial to keep them in." [18]

Prior to settling with **[**15]** the opt-out plaintiffs, most of the defendants signed two agreements that established the manner in which their liability to the opt-out plaintiffs would be allocated among such defendants (this type of agreement hereinafter is referred to as a sharing agreement). Petitioner and other defendants signed a sharing agreement that covered the claims of various opt-out plaintiffs, including the claims of opt-out plaintiff Dean Foods Co. (hereinafter Dean Foods), and signed a separate sharing agreement that covered only the claims of opt-out plaintiff Kraft, Inc. (hereinafter Kraft). (The sharing agreement that covered the claims of various opt-out plaintiffs, including Dean Foods, hereinafter is referred to as the general sharing agreement, and the sharing agreement that covered the claims of Kraft hereinafter is referred to as the Kraft sharing agreement.)

One portion of the general sharing agreement divided liability into two parts for a payment to opt-out plaintiffs pursuant to a settlement agreement that "[encompassed]" folding carton claims. First, general sharing agreement signatories that entered into any such settlement agreement with opt-out plaintiffs would share 95 percent **[**16]** of the payment under such settlement agreement in proportion to each such signatory's sales of folding cartons to the opt-out plaintiffs. Second, 5 percent of the payment would be shared on a per capita basis among sharing agreement signatories that entered into any such settlement agreement with opt-out plaintiffs. [19]

Another part of the general sharing agreement contained provisions that specifically applied to the milk carton claim **[*1019]** of Dean Foods. [20] One such provision applied to general sharing agreement signatories that had not sold milk cartons to Dean Foods (hereinafter Dean Foods folding carton signatories). Under that provision, Dean Foods folding carton signatories would be required to make a contribution to each general sharing agreement signatory that sold milk cartons to **[**17]** Dean Foods (hereinafter Dean Foods milk carton signatory) if such Dean Foods milk carton signatory (1) settled a milk carton claim against itself, and (2) in connection therewith, caused Dean Foods to agree not to assert that claim against any general sharing agreement signatory. For petitioner, this contribution would be that part of $ 10,000 equal to such settling Dean Foods milk carton signatory's percentage of milk carton sales to Dean Foods. [21] That provision only applied, however, if the Dean Foods folding carton

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[17] This renewed motion only related to the claims of the opt-out plaintiffs.

[18] See note 9 *supra*.

[19] Portions of any payment shared on a per capita basis also were subject to certain absolute dollar limitation provisions. Those provisions of the general sharing agreement, however, are not material to our decision.

[20] These provisions of the general sharing agreement referred specifically to the Dean Foods milk carton claim, and did not refer to any other milk carton claims of opt-out plaintiffs.

[21] Such sales percentages were set forth in an exhibit attached to the general sharing agreement. The total of the sales percentages for all Dean Foods milk carton signatories was 100 percent.

signatories had not settled Dean Foods' milk carton claim against them prior to the time the Dean Foods milk carton signatory entered into a settlement agreement meeting the foregoing requirements.

[18]** Another provision regarding the milk carton claim of Dean Foods provided, in essence, that if any Dean Foods folding carton signatory (1) entered into a "Settlement" with Dean Foods, and (2) satisfied requirements 2, 3, and 4 of article IV (B) of the general sharing agreement, [22] then that signatory would not be subject to the judgment sharing provisions of the sharing agreement with respect to the milk carton claim of Dean Foods.

Requirements 2, 3, and 4 of article IV (B) of the general sharing agreement were as follows:

ARTICLE IV

SETTLEMENT OF FOLDING CARTON CLAIMS

* * * *

B. * * *

2. The Signatory or group of Signatories entering into an agreement of Settlement with an Opt Out Claimant(s) refrains from requiring such Opt Out Claimant(s) to reduce or refund any Settlement payment by such **[*1020]** Signatory(ies) in the event such Opt Out Claimant(s) settle(s) with another Signatory on a basis different from the Settlement effected with such Signatory(ies); **[**19]** and

3. The Signatories seek to pursue a joint approach to negotiating settlement of each Opt Out Claim, which may include the selection of persons to negotiate with Opt Out Claimants; provided, however, that a Signatory(ies) need not join in or accept any Settlement or proposed Settlement which is the outcome of such joint approach; and provided that any Signatory may at any time after the commencement of such joint Settlement negotiations cease to participate in such joint Settlement negotiations with respect to an Opt Out Claimant(s), if such Signatory gives notice for such decision to all other Signatories which are then defendants to the Claimant's Claim, which notice must be prior to the commencement of any individual Settlement negotiations by such Signatory with such Opt Out Claimant(s); and

4. Upon reaching a Settlement with an Opt Out Claimant(s), a Signatory give notice of the terms thereof within ten days to all other Signatories which are then defendants to that Claimant's folding carton claim.

The term "Settlement," as used in the foregoing provision and in other parts of the general sharing agreement, was defined by the general sharing agreement as "any disposition of **[**20]** a Claim by agreement with any [opt-out Plaintiff]." The term "Claim," as used in the definition of the term "Settlement" and in other parts of the general sharing agreement, was defined as "any demand in any action listed in Exhibit A hereto, brought by an [opt-out plaintiff] for damages, * * * based upon any alleged violation of the antitrust laws with respect to the purchase or sale at any time of folding cartons and/or milk cartons." [23]

In 1980, Dean Foods accepted $ 500,000 from all the defendants in settlement of its folding carton claim against such defendants and in settlement of its milk carton claim against the defendants that did not sell milk cartons to Dean Foods. Petitioner's share of the Dean Foods settlement payment was determined under the general sharing agreement provisions that governed payments under settlement agreements **[**21]** that encompassed folding carton claims, and such determination took into account the percentage of folding cartons that Dean Foods purchased from petitioner -- Dean Foods purchased 11.85 percent of its folding **[*1021]** cartons from petitioner

[22] Art. IV governed the settlement of folding carton claims.

[23] Exhibit A to the general sharing agreement listed the various legal actions brought by the opt-out plaintiffs. Included in the list was the action brought by Dean Foods.

during the period in which the alleged antitrust activities occurred. The amount of petitioner's share was $ 57,374, [24] and petitioner paid that amount.

Dean Foods' aggregate purchases of milk cartons from settling defendants amounted to approximately $ 70 million for the relevant period, and its aggregate purchases **[**22]** of folding cartons from settling defendants amounted to approximately $ 7 million for the same period.

For tax purposes, petitioner based its allocation of its share of the settlement payment on the aggregate sales of the group of settling defendants to Dean Foods: petitioner allocated 90.9 percent of its $ 57,374 settlement payment, or $ 52,152.97, to the Dean Foods milk carton claim and the remainder of the settlement payment, or $ 5,221.03, to the Dean Foods folding carton claim.

The Kraft sharing agreement contained provisions similar to the provisions contained in the general sharing agreement. The Kraft sharing agreement provided that sharing agreement signatories that had not sold milk cartons to Kraft (hereinafter Kraft folding carton signatories) would make a contribution to each Kraft sharing agreement signatory that had sold milk cartons to Kraft (hereinafter Kraft milk carton signatory) if the Kraft milk carton signatory (1) settled Kraft's milk carton claim against that Kraft milk carton signatory, and (2) in connection therewith, caused Kraft to agree not to assert a claim against any Kraft sharing agreement signatory based on sales of milk cartons by the settling Kraft **[**23]** milk carton signatory to Kraft. For petitioner, this contribution would be that part of $ 10,000 equal to each such settling Kraft milk carton signatory's percentage of milk carton sales to Kraft. [25]

Several defendants that were Kraft milk carton signatories settled with Kraft. Each such defendant signed a separate settlement agreement that settled the milk carton **[*1022]** claim against such settling defendant, and in connection with each such agreement, Kraft agreed not to assert a claim against any Kraft sharing agreement signatory based on sales of milk cartons by the settling defendant to Kraft. Pursuant to the foregoing Kraft sharing agreement provision regarding Kraft's milk carton claim, petitioner contributed $ 4,778.90 to amounts paid by the settling Kraft milk carton signatories.

The total value of petitioner's settlement **[**24]** payments with respect to claims by all opt-out plaintiffs, including Dean Foods and Kraft, was $ 178,569.14. Of this amount, $ 17,822 represented a payment of legal fees. [26] Dean Foods and Kraft were the only opt-out plaintiffs that asserted milk carton claims.

OPINION

The issue for decision is whether *section 162(g)* disallows a deduction for two-thirds of all amounts paid by petitioner [27] to settle antitrust actions brought under section 4 of the Clayton Act. [28]

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[24] A. Petitioner's share of the settlement payment was calculated as follows pursuant to the general sharing agreement provision that focused on each defendant's actual sales: .1185 X .95 X $ 500,000 = $ 56,287.

B. Petitioner's share of the settlement payment was $ 1,087 under the sharing agreement provision that focused on each defendant's per capita share.C. Petitioner's total share of the settlement payment to Dean Foods therefore was $ 57,374 ($ 56,287 + $ 1,087).

[25] Such sales percentages were set forth in an exhibit attached to the Kraft sharing agreement. The total of the sales percentages for all Kraft milk carton signatories was 100 percent.

[26] The parties have stipulated to this allocation.

[27] As to the amounts paid by petitioner under the settlement agreements discussed herein, the parties to this case agree on the portion of such amounts that are allocable to various legal fees to which *sec. 162(g)* does not apply. See *sec. 1.162-22(a)(2), Income Tax Regs.* Thus,

[28] Sec. 4 of the Clayton Act, *15 U.S.C. sec. 15 (1976)*, provides, in pertinent part, that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * without respect to the amount in

[25]** *Section 162(a)* provides that a deduction shall be allowed for all "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Nevertheless, *section 162(g)* disallows a deduction under *section 162(a)* for two-thirds of certain amounts paid with respect to an action brought under section 4 of the Clayton Act. [29] *Section 162(g)*, provides, in pertinent part, as follows:

SEC. 162(g). Treble Damage Payments Under the Antitrust Laws. -- If in a criminal proceeding a taxpayer is convicted of a violation of the antitrust laws, or his plea of guilty or nolo contendere to an indictment or information charging such violation is entered or accepted **[*1023]** in such a proceeding, no deduction shall be allowed under subsection (a) for two-thirds of any amount paid or incurred --

* * * *

(2) in settlement of any action brought under * * * section 4 [of the Clayton Act] on account of such violation or related violation.

The statutory requirement that the antitrust violation involved in a civil proceeding be the same as, or related to, the violation involved in a criminal proceeding gives effect to the desire of Congress to deny a deduction **[**26]** "only in the case of 'hard-core violations' where intent has been clearly proved in a criminal proceeding." S. Rept. 91-552 (1969), 1969-3 C.B. 423, 597.

In the instant case, petitioner pleaded nolo contendere to charges in an indictment. That indictment charged petitioner and other defendants with a violation of the antitrust laws involving only folding cartons, not milk cartons. In the civil antitrust litigation instituted by purchasers of cartons, [30] however, there were allegations by plaintiffs that the prices of *both* milk cartons and folding cartons were affected by a single conspiracy, and that such conspiracy violated the antitrust laws. **[**27]** Thus, the violation giving rise to the criminal action is not the same in all material respects as the violation giving rise to the civil antitrust actions. We therefore must allocate settlement payments between the milk carton claims and the folding carton claims. [31]

Payments in settlement **[**28]** of litigation are characterized for tax purposes by reference to the origin and nature of the claim that was the actual basis for settlement (*United States v. Gilmore, 372 U.S. 39 (1963)*; *Bent v. Commissioner, 87 T.C. 236, 244 (1986)*, affd. *835 F.2d 67 (3d Cir. 1987))*, and not by reference to the validity of that claim **[*1024]** (*Bent v. Commissioner, supra at 244*). [32] **[**30]** A determination as to how to allocate settlement payments is factual (*Knuckles v. Commissioner, 349 F.2d 610, 612 (10th Cir. 1965)*, affg. a Memorandum Opinion of this Court; *Seay v. Commissioner, 58 T.C. 32, 37 (1972))*, and petitioner bears the burden of proving that respondent's allocation is erroneous (*Fisher Cos. v. Commissioner, 84 T.C. 1319, 1339 (1985)*, affd. without published opinion *806 F.2d 263 (9th Cir. 1986)*; *Bresler v. Commissioner, 65 T.C. 182, 188 (1975)*; Rule 142(a)). Such determination requires consideration of all the facts, including **[**29]** the issues stated, the defenses

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controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[29] For a more extensive discussion of *sec. 162(g)* and its genesis, see Wilberding, "New Tax Considerations Injected into Antitrust Damage Proceedings," 19 Kan. L. Rev. 441 (1971).

the amounts allocable to legal fees are not in issue, and references in our analysis to petitioner's payments do not include such amounts.

[30] References to any type of civil antitrust litigation hereinafter are to the litigation instituted by purchasers of cartons, and not to the civil enforcement action brought by the Government.

[31] Respondent does not allege that the milk carton claims in the civil litigation are "related" to the violation involved in the criminal case. We therefore do not address that issue. The statutory term "related violation" is defined in *sec. 1.162-22(c), Income Tax Regs.* See also *sec. 1.162-22(f)*, examples *(2)* and *(3), Income Tax Regs.*; *Fisher Cos., Inc. v. Commissioner, 84 T.C. 1319, 1338-1343 (1985)*, affd. without published opinion ***806 F.2d 263 (9th Cir. 1986)***.

[32] For purposes of this test, the "claim" in the instant case is the alleged conspiracy, not the milk carton claims and folding carton claims. See note 8 *supra* concerning our use of the terms "milk carton claims" and "folding carton claims."

asserted, the background of the litigation, and other facts pertinent to the controversy giving rise to the settlement. See *Morgan's Estate v. Commissioner, 332 F.2d 144, 151 (5th Cir. 1964)*; *Rafter v. Commissioner, 60 T.C. 1, 8 (1973)*, affd. without published opinion *489 F.2d 752 (2d Cir. 1974)*; *Boagni v. Commissioner, 59 T.C. 708, 713 (1973)*. When an allocation of settlement payments must be made and there is no express allocation contained in a settlement agreement, the most important fact for purposes of making the allocation is "the intent of the payor." [33] *Knuckles v. Commissioner, 349 F.2d at 613*; see also *Bent v. Commissioner, supra at 244*, and cases cited therein.

Respondent's principal argument is that all of petitioner's settlement payments are allocable to folding carton claims, and that because the folding carton claims were the subject of a criminal action in which petitioner pleaded nolo contendere, *section 162(g)* applies to all of petitioner's settlement payments. Respondent bases that argument on the following grounds: (1) Petitioner did not manufacture milk cartons; (2) there has been no showing that petitioner "was in fact jointly and severally liable for" milk carton claims; (3) *section 162(g)* was intended to apply "in the case of 'hard core' violations where intent has been clearly proved in a criminal proceeding"; and (4) certain defendants signed sharing agreements which, in large part, based each **[**31]** such defendant's liability on the defendant's actual sales. **[*1025]** Respondent alternatively argues that only a nominal portion of petitioner's settlement payments should be allocated to milk carton claims. Respondent bases his alternative argument on essentially the same grounds relied upon by respondent in support of his principal argument.

Petitioner argues that it is entitled to allocate to the milk carton claims more than a nominal portion of each of its payments that were made in settlement of the civil antitrust actions, and that amounts so allocated are fully deductible. Petitioner further argues that the allocation should be based on the aggregate sales of all settling defendants to the relevant plaintiffs. [34] Petitioner bases his arguments on the attempt by the plaintiffs in the civil antitrust litigation to hold petitioner jointly and severally liable for all damages allegedly caused by the carton manufacturers implicated in that antitrust litigation.

[32]** In light of the factual nature of the issue in this case, we separately analyze the various settlement arrangements pursuant to which petitioner made payments.

Settlement of Class Action

It is well established that the principle of joint and several liability applies to antitrust conspirators. *MacMillan Bloedel Ltd. v. Flintkote Co., 760 F.2d 580, 584-585 (5th Cir. 1985)*; *City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903)*, affd. *203 U.S. 390 (1906)*. Moreover, there is no right to contribution among antitrust conspirators. *Texas Industries v. Radcliffe Materials, Inc., 451 U.S. 630 (1981)*. [35]

[33]** Although many complaints were filed by purchasers of folding cartons, milk cartons, or both types of cartons, those complaints alleged that there was only a single antitrust conspiracy, and at least some of the complaints **[*1026]** alleged that the conspiracy involved both folding cartons and milk cartons. Moreover, Edward Wolfe, the attorney who represented petitioner for purposes of the antitrust litigation, testified that even the plaintiffs

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[33] It should also be noted, however, that this Court will not give effect to a settlement agreement or similar document written solely to enable a taxpayer to claim a deduction. See *Metzger v. Commissioner, 88 T.C. 834, 849-850 (1987)*; *Fisher Cos., Inc. v. Commissioner, supra at 1340*.

[34] For instance, since 23.6 percent of the aggregate sales of cartons by all settling defendants to the settling plaintiffs constituted sales of milk cartons, petitioner argues that it should be able to allocate 23.6 percent of its settlement payments to milk carton claims.

[35] Petitioner made payments in settlement of the class action and the opt-out plaintiffs' cases prior to the Supreme Court's decision in *Texas Industries v. Radcliffe Materials, Inc., 451 U.S. 630 (1981)*. Nevertheless, prior to *Texas Industries*, as well as prior to the time the settlement arrangements discussed herein were entered into by the parties, the legal authority that existed on the issue of contribution among antitrust conspirators indicated that there was no such right. See generally 47 A.L.R. Fed. 712 (1980).

that used only the term "folding cartons" in their complaints "asserted in the course of the proceedings that they were covering milk cartons as well." We found Mr. Wolfe to be a particularly credible witness, and respondent did not offer any evidence that caused us to doubt Mr. Wolfe's testimony.

During the course of the class action, the District Court judge that presided over the civil antitrust litigation certified the class of plaintiffs as "purchasers of folding cartons," but he made clear several times that he considered the term "folding carton" to include milk cartons for purposes of that litigation. The presiding judge made that point clear in response to motions filed by several defendants, not including petitioner, to sever claims **[**34]** involving milk cartons from the litigation. After reviewing the briefs and documents submitted by the parties, the judge stated, "There doesn't appear to be any such significant difference so that the milk carton industry could be called a separate industry from the folding carton industry." Subsequently, in response to a motion to reconsider his earlier denial of such defendants' motion, the judge once again refused to sever milk carton claims from the litigation.

Based upon the foregoing law and evidence, we find that the settling plaintiffs sought to hold petitioner jointly and severally liable for all damages alleged to have flowed from an antitrust conspiracy, regardless whether those damages were related to the conspiracy's alleged effects on prices of folding cartons or milk cartons.

Attempts to sever milk carton claims from the litigation, and thereby possibly defeat the attempt by the plaintiffs to hold all the defendants jointly and severally liable with respect to milk carton claims and folding carton claims, proved unsuccessful. Thus, petitioner was placed in a position where it naturally would be concerned about liability for both milk carton claims and folding carton **[**35]** claims, even though it did not manufacture milk cartons.

The parties to the class action made various attempts to settle such action. In 1977, a group of defendants, including **[*1027]** petitioner, made a settlement proposal to the plaintiffs in the class action. The proposal provided that each defendant would settle claims made by its own customers, and would make settlement payments to those customers. The proposal also required the plaintiffs to exclude the sales of settling defendants from legal actions maintained against any defendants that refused to settle. Thus, the settlement proposal indicates that the defendants had grouped together in an effort to protect each other from claims that attempted to hold nonsettling defendants jointly and severally liable for the acts of the settling defendants. The plaintiffs ultimately rejected such proposal. Nevertheless, the proposal provides further evidence of the defendants' concern about joint and several liability for both milk carton claims and folding carton claims.

Subsequently, petitioner settled with certain plaintiffs in the class action (i.e., the settling plaintiffs), and the settlement agreement covered both milk carton **[**36]** claims and folding carton claims. The settlement agreement did not contain an explicit allocation of amounts paid under the agreement. Nevertheless, all the evidence in the instant case suggests that petitioner, the payor, intended that its payments under the settlement agreement with the settling plaintiffs would settle *both* milk carton claims and folding carton claims, and we so find.

As noted, respondent's principal argument in this case is that all of petitioner's settlement payments are allocable to folding carton claims, and respondent's alternative argument is that only a nominal portion of petitioner's settlement payments is allocable to milk carton claims. As bases for both of those arguments, respondent relies upon essentially the same grounds.

Respondent first relies upon the nature of petitioner's business: petitioner did not manufacture or sell milk cartons. According to respondent, since petitioner did not manufacture milk cartons, and the milk carton and folding carton industries are separate, the origin of petitioner's liability was petitioner's antitrust activities with respect to folding cartons, not milk cartons. That argument, however, ignores the claims **[**37]** of the settling plaintiffs -- they attempted to hold petitioner, as well as the other defendants, jointly **[*1028]** and severally liable for *all* damages flowing from the alleged conspiracy. Thus, the settling plaintiffs were alleging that any activities in which petitioner engaged that were in violation of the Federal antitrust laws affected the prices of *both* milk cartons and folding cartons. The nature of petitioner's business therefore is not a valid predicate for respondent's arguments concerning the allocation of petitioner's settlement payments.

Respondent next relies upon petitioner's failure to prove that it "was in fact jointly and severally liable for" milk carton claims. That argument, however, ignores the well settled principle of law that courts must focus on the origin and nature of a claim, and not on the validity of the claim in characterizing the payments for tax purposes. See *Bent v. Commissioner, 87 T.C. at 244*. We therefore hold that petitioner is not required to prove joint and several liability, in fact, in order to prove that it is entitled to allocate a portion of its settlement payments to milk carton claims.

Respondent **[**38]** next points to the legislative purpose for *section 162(g)*, which, as already noted, was to deny a deduction only "in the case of 'hard core violations' where intent has been clearly proved in a criminal proceeding." S. Rept. 91-552 (1969), 1969-3 C.B. 423, 597. According to respondent, petitioner's proposed allocation method, which focuses on the aggregate sales of all the settling antitrust defendants to the settling plaintiffs, creates the potential for inequities with respect to any defendant in the class action that sold folding cartons and milk cartons, but had milk carton sales in excess of the aggregate milk carton sales of all the antitrust defendants. Respondent's argument, however, ignores the legal principles governing the liability of antitrust conspirators (i.e., those conspirators are jointly and severally liable for all damages, and have no right to contribution). If the District Court did not sever milk carton claims from the class action, and the class action were tried and decided against all defendants, application of those legal principles would not have resulted in a difference between the relative liability of the defendants in the **[**39]** antitrust case based upon whether the defendants **[*1029]** sold milk cartons or folding cartons. [36]

Last, respondent relies upon the sharing agreements to establish that all parties to the antitrust litigation "gave a low valuation to the risk of joint and several liability." Respondent apparently makes this point in connection with the legal principle that when there is no settlement payment allocation contained in a settlement agreement, the most important factor to be considered is the intent of the payor. See *Knuckles v. Commissioner, 349 F.2d at 613*; *Bent v. Commissioner, 87 T.C. at 244*. Nevertheless, the sharing agreements to which respondent refers were not applicable to the settlement agreement between petitioner and the settling plaintiffs. **[**40]** Moreover, the evidence in the instant case indicates that the defendants entered into the sharing agreements subsequent to petitioner's settlement with the settling plaintiffs. We therefore do not find the sharing agreements to be persuasive evidence that petitioner intended an allocation with respect to its settlement agreement with the settling plaintiffs based upon its actual sales to those plaintiffs.

Based upon the foregoing and the record as a whole, we find that it was the intent of petitioner to allocate settlement payments to milk carton claims and folding carton claims based upon the aggregate sales of all settling defendants in the class action to the settling plaintiffs. Moreover, we hold that petitioner's allocation of settlement payments with respect to its settlement agreement with the settling plaintiffs is proper because it reflects our finding with respect to petitioner's intent. Accordingly, *section 162(g)* does not apply to the portion of petitioner's settlement payments that is allocable to the milk carton claims of the settling plaintiffs (i.e., 23.6 percent of petitioner's payments).

Settlements With Opt-Out Plaintiffs

Thus far, we have determined how **[**41]** payments made by petitioner to settle the class action are to be allocated. Our allocation was based upon the aggregate sales of all settling **[*1030]** defendants in the class action to the settling plaintiffs. We made such allocation because of various legal principles governing liability in antitrust actions (i.e., defendants in such actions are jointly and severally liable and unable to seek contribution from other defendants or potential defendants) and other facts relating to the antitrust litigation.

The circumstances surrounding settlement payments made by petitioner to settle the claims of opt-out plaintiffs, however, are distinguishable from the circumstances surrounding settlement payments made by petitioner to settle

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[36] Respondent has not brought any evidence to our attention concerning any distinction that would have been made in the class action based upon the actual sales of each of the defendants in that action.

the class action; sharing agreements (i.e., agreements among the defendants as to how they would share liability) were entered into by most of the defendants with respect to the claims of the opt-out plaintiffs, but not with respect to the claims of the settling plaintiffs. Petitioner has provided us with relatively detailed evidence of the circumstances surrounding its share of settlement payments that were made to Dean Foods and Kraft pursuant to sharing **[**42]** agreements. We therefore first analyze petitioner's ability to deduct its share of those payments.

In 1980, Dean Foods accepted $ 500,000 from all the defendants in settlement of its folding carton claim against such defendants and in settlement of its milk carton claim against the defendants that did not sell milk cartons to Dean Foods. Petitioner's share of the Dean Foods settlement payment was $ 57,374, and was determined under the provisions of the general sharing agreement that governed liability for a payment made pursuant to a settlement agreement that encompassed folding carton claims. Under one of those folding carton claim provisions, general sharing agreement signatories that entered into the settlement agreement with Dean Foods shared 95 percent of the payment made pursuant to that settlement agreement in proportion to each such signatory's sales of folding cartons to Dean Foods (this provision hereinafter is referred to as the 95-percent provision). Under another such folding carton claim provision, general agreement signatories that entered into a settlement agreement with Dean Foods also shared on a per capita basis 5 percent of the payment under that settlement **[**43]** agreement, subject to certain limitations (this **[*1031]** provision hereinafter is referred to as the 5-percent provision).

As we have noted, the principle of joint and several liability applies to antitrust conspirators, and antitrust conspirators cannot seek contribution from their co-conspirators. Nevertheless, the general sharing agreement provided to those defendants that were parties to such agreement protection against the potentially far-reaching effects of the foregoing legal principles; this was done by basing the relative liability of each such defendant primarily on the actual sales of each such defendant. [37] The 95-percent provision is one provision in the general sharing agreement that had such an effect. Due to the effect of the 95-percent provision on petitioner's economic, or nontax, liability for amounts payable under the settlement agreement with Dean Foods, we find that such provision is the best evidence of petitioner's intent with regard to allocations of amounts paid pursuant to that provision. We therefore hold that petitioner must allocate solely to the Dean Foods folding carton claim petitioner's share of the defendants' settlement payment to Dean Foods **[**44]** that was determined under the 95-percent provision (i.e., petitioner's settlement payment that was based upon petitioner's actual sales of folding cartons).

We next address the amount paid by petitioner pursuant to the 5-percent provision of the general sharing agreement. Such amount was based upon petitioner's per capita share of 5 percent of the total amount paid under the settlement with Dean Foods, and not upon petitioner's actual sales to Dean Foods.

The 5-percent provision was one of the provisions of the general sharing agreement that governed liability for **[**45]** a payment made pursuant to a settlement agreement that encompassed *folding carton claims*. Petitioner has not argued why the 5-percent provision should be interpreted so as to indicate that petitioner intended to allocate to the Dean Foods milk carton claim petitioner's payment pursuant **[*1032]** to the 5-percent provision. [38] Therefore, bearing in mind petitioner's burden of proof in this case, we find that petitioner intended to allocate such amount to the Dean Foods folding carton claim. See Rule 142(a). We therefore hold that petitioner must allocate solely to the Dean Foods folding carton claim petitioner's share of the defendant's settlement payment to Dean Foods that was determined under the 5-percent provision of the general sharing agreement (i.e., petitioner's payment that was based upon petitioner's per capita share of the defendants' payment).

[46]** Based upon the foregoing, all of petitioner's payment with regard to the Dean Foods settlement is allocable to the Dean Foods folding carton claim, and section 162(g) applies to that amount.

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[37] Petitioner contends that the sharing agreements "could not affect in any way the legal liability of a defendant to the Opt-Out Plaintiffs on the underlying claims." Nevertheless, the sharing agreements did give the defendants the ability to affect the ultimate net liability of each defendant to the opt-out plaintiffs -- the effect of the general sharing agreement was to avoid the noncontribution principles that otherwise apply to antitrust conspirators.

[38] Petitioner did argue, however, that we should not base allocations upon the provisions of the sharing agreements, and we rejected such argument. See note 37 *supra*.

We next address petitioner's share of settlement payments made to Kraft. Several defendants that were Kraft Milk Carton Signatories settled with Kraft. Each such defendant signed a separate settlement agreement that settled the milk carton claim against such settling defendant, and in connection with each such agreement, Kraft agreed not to assert a claim against any Kraft sharing agreement signatory based on sales of milk cartons by the settling defendant to Kraft.

Pursuant to one of the Kraft sharing agreement provisions governing Kraft's milk carton claims against Kraft milk carton signatories, petitioner paid a total of $ 4,778.90 to the Kraft milk carton signatories. That provision provided that petitioner, as well as other Kraft folding carton signatories, was required to pay amounts to Kraft milk carton signatories that (1) settled the Kraft milk carton claim against such Kraft milk carton signatories, and (2) in connection therewith, caused Kraft to agree not to assert that same claim **[**47]** against any sharing agreement signatory. [39] Since petitioner's payments with respect to the Kraft settlement agreements were made pursuant to the foregoing milk carton claim provision, it is apparent that petitioner intended that such amounts be allocated specifically to the **[*1033]** Kraft milk carton claim, and we so find. We therefore hold that such amounts are allocable to the Kraft milk carton claim, and that *section 162(g)* does not apply to those amounts.

Finally, there remains in issue that portion of petitioner's $ 160,747.14 settlement payment with respect to the claims of opt-out plaintiffs other than Dean Foods or Kraft. [40] The terms of the general sharing agreement and the Kraft sharing agreement indicate that the general sharing **[**48]** agreement governed settlement payments made by the defendants to all opt-out plaintiffs other than Kraft. The provisions of the general sharing agreement that governed payments to settle a milk carton claim refer only to the Dean Foods milk carton claim. Therefore, with respect to the legal actions of the remaining opt-out plaintiffs, petitioner has not proved that there are any milk carton claims to which its settlement payment can be allocated. Moreover, even if there were such milk carton claims, there is no evidence in the record that persuades us that it would be proper to treat the payments to those opt-out plaintiffs differently than we treated petitioner's payment with regard to the Dean Foods settlement. Bearing in mind petitioner's burden of proof in this case, we allocate the remaining amount to folding carton claims, and *section 162(g)* applies to that amount. See Rule 142(a)

[49]** To reflect the foregoing,

Decision will be entered under Rule 155.

End of Document

[39] A milk carton claim against any Kraft milk carton signatory could be asserted against any defendant based upon the principle of joint and several liability, absent an agreement precluding Kraft from asserting such claim against other defendants in the antitrust litigation.

[40] The $ 160,747.14 settlement payment represents the total value of petitioner's settlement with the opt-out plaintiffs, which was $ 178,569.14, minus legal fees, which were $ 17,822.

Seven Gables Corp. v. Sterling Recreation Organization Co.

United States District Court for the Western District of Washington

May 16, 1988, Decided

No. C 84-1057R

Reporter

686 F. Supp. 1418 *; 1988 U.S. Dist. LEXIS 4951 **; 1988-1 Trade Cas. (CCH) P68,066

Seven Gables Corporation, Plaintiff, v. Sterling Recreation Organization Co., et al., Defendants

Core Terms

costs, settlement, prejudgment interest, attorney's fees, injunction, antitrust, declaration, lodestar, offset, juror, rates, Clayton Act, expenses, multiplier, damages, parties, argues, circumstances, compensated, defendants', prevailing, amounts, awards, award of attorney's fees, anti trust law, proceedings, expended, theater, trebled, film

Counsel: **[**1]** Perkins Coie, Seattle, Washington, William R. Bishin, Seattle, Washington, Attorneys for Plaintiff.

Thomas J. Greenan, James E. Hurt, Ferguson & Burdell, Seattle, Washington, Attorneys for Defendants.

Judges: Samuel Conti, United States District Judge.

Opinion by: CONTI

Opinion

[*1419] ORDER RE MOTIONS FOR: ATTORNEY'S FEES/COSTS/OFFSETS TO JURY AWARD/PREJUDGMENT INTEREST/AND INJUNCTION

SAMUEL CONTI, UNITED STATES DISTRICT JUDGE

On November 3, 1987, after a lengthy trial on the merits, the jury returned a verdict in this matter holding defendants Sterling Recreation Organization Co. ("SRO"), Frederic A. Danz ("Danz") and Robert M. Hazard ("Hazard")(collectively referred to as the "defendants") liable. The jury awarded plaintiff damages on plaintiff's claims under Sections 1 and 2 of the Sherman Act and Section.020 of the Washington Unfair Business Practices-Consumer Protection Act.

The matter is currently before the court on plaintiff's motions for an award of attorneys fees and costs, for an offset to the damages award, for prejudgment interest and for an injunction. On April 18, 1988, the court held a hearing on these motions. Plaintiff was represented by Thomas L. Boeder, Esq. and Richard L. Baum, Esq. of the law firm of Perkins Coie. Defendants were represented by Thomas J. Greenan, **[**2]** Esq. and James E. Hurt, Esq. of the law firm of Ferguson & Burdell. The court has reviewed the evidence submitted by the parties and the authorities cited in the memoranda, and has considered the oral arguments of counsel presented at the hearing. The court now issues its decision on the motions.

I. MOTION FOR AN AWARD OF ATTORNEY'S FEES

Plaintiff moves this court for an award of attorney's fees in this action pursuant to Section 4 of the Clayton Act, *15 U.S.C. § 15(a)*, and *RCW 19.86.090*. Plaintiff requests an award of $ 3,180,076.97 as attorney's fees, and also seeks a fee enhancement. Plaintiff argues that the number of hours claimed by its attorneys is reasonable, and that the hourly rates charged by its attorneys are reasonable. Plaintiff also argues that the court should enhance an award of attorney's fees with a multiplier.

[*1420] Defendants oppose plaintiff's motion. Defendants argue that portions of plaintiff's requested fees are not recoverable. Defendants also argue that plaintiff's claimed hours are excessive and the rates are too high.

Section 4 of the Clayton Act provides, in relevant part, that:

> any person who shall be injured in his business or property by reason of anything **[**3]** forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a). In order to determine what constitutes a reasonable attorney's fee, the court will engage in a two part inquiry. First, the court will determine the "lodestar" amount, that is, the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Second, the court will determine whether there should be an upward adjustment of the lodestar, known as a "multiplier." *See* *Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, - , 97 L. Ed. 2d 585, 590-592, 107 S. Ct. 3078 (1987)*; *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976)*; *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973)*.

The court's inquiry will be guided by the considerations enumerated in the Ninth Circuit's decision in *Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975)*. In *Kerr*, the Ninth Circuit held that the following twelve factors should be considered **[**4]** in awarding attorney's fees: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill necessary to perform the legal services properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relations with the client, and (12) awards in similar cases. *526 F.2d at 69-70*. The court will consider these factors in determining the lodestar and multiplier amounts.

The court first addresses one of defendants' preliminary objections to plaintiff's motion. Defendants argue that before the reasonableness of the plaintiff's fee request can be analyzed, the court should review the contingency fee contract between plaintiff and its attorneys. Defendants maintain this will prevent a windfall to a plaintiff who could keep a large fee award for itself if it is only contractually obligated to pay some **[**5]** lesser amount to its attorneys. Plaintiff has provided a copy of its fee contract for this court. The court has reviewed this contract and finds that there is no danger that plaintiff will receive a windfall in the event of a fee award.

A. *The Lodestar*

In its fee request, plaintiff seeks reimbursement for out-of-pocket expenses involved in the litigation and fees paid to expert witnesses. Defendants maintain that these requests are inappropriate. The court will first address the issue of whether these expenses and fees may properly be compensable as "attorney's fees." The court discusses plaintiff's request for statutory costs later in this order. At present the court is concerned with the amounts and expenses claimed by plaintiff that should not be covered under a request for statutory costs.

The court is persuaded by the reasoning expressed in *Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 663 F. Supp. 1360, 1457 (D. Kan. 1987)*, that "expenses not normally itemized and billed in addition to the hourly rate should be included in a fee allowance if reasonable in amount." Plaintiff has properly documented its out-of-pocket expenses, and has, at the court's request, **[**6]** separated those expenses it requested in the alternative as statutory costs from those that it seeks as attorney's fees. The court awards plaintiff $ 95,398.74 in out-of-pocket expenses as set forth in Exhibit A to the Declaration of Richard L. **[*1421]** Baum Re: Seven Gables Attorney Fee Request.

The court, however, does not accept the argument that expert witness fees are compensable as attorney's fees. This issue is controlled by the United States Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987)*. In *Crawford* the Supreme Court held that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in *28 U.S.C. § 1821* and *§ 1920*." *96 L.Ed 2d at 393*. The court does not interpret the provisions of the Clayton Act providing for recovery of attorney's fees as explicit statutory authorization for compensating plaintiff for fees paid to experts beyond that authorized by the cost statutes. The court therefore denies plaintiff's request for $ 121,024.35 in expert witness fees.

In order to establish the lodestar, the court must determine **[**7]** whether the hours claimed were reasonably expended. Plaintiff has submitted extensive documentation in support of its fee request. Plaintiff has submitted affidavits which establish the number of hours expended by its attorneys in this litigation. Defendants do not attack the veracity of the claimed hours. Rather, defendants argue that the number of attorney's hours expended, as well as the claimed rates, are unreasonable.

Plaintiff seeks compensation for a total of 26,966.68 hours of work performed by attorneys (both partners and associates of Perkins Coie, as well as associated counsel), legal assistants, clerks, computer staff and temporary staff. Plaintiff has provided adequate descriptions of the relevant time entries. The court has no reason to doubt the accuracy of plaintiff's time records. The court also finds these hours properly compensable as attorney's fees.

The court has evaluated the amount of time expended in this case in light of the *Kerr* factors. This case involved complex antitrust issues and required experienced antitrust counsel to prosecute the claims. For proof, plaintiff had to rely on complex economic analyses and computer generated statistics. Plaintiff **[**8]** had to support its case with the testimony of experts in the movie industry as well as experts in antitrust economics. Plaintiff was opposed by able and experienced antitrust counsel, who vigorously contested every claim at every step of the litigation. In light of all the circumstances in this case, the court finds that plaintiff achieved its primary litigation objectives in a reasonable manner.

Defendants have argued that plaintiff over staffed and over litigated this action. The court shares some of the defendants' concern. The number of attorneys and staff members that plaintiff dedicated to this action (16 attorneys, 6 legal assistants, 7 clerks, 4 computer staff members and various temporary clerks) as well as the number of claimed hours (26,966.68) is staggering. The court is mindful of its task to award fees in such a manner as "to reward the efficient litigator and to withold compensation for excessive, duplicative, and unnecessary hours." Ninth Circuit Committee on Court Awarded Attorney's Fees, Committee Finding No. 10. However, upon review of all of the relevant *Kerr* factors, and with particular attention to the results obtained, the court is of the opinion that the **[**9]** time and effort spent was reasonable.

Plaintiff's original attorney's fees request contained hourly rates based on the current value of the services. Defendants argue that the current rates represent a significant increase over plaintiff's attorney's historical rates, and are an unreasonable basis for any fee award. Defendants argue that the relevant hourly rates in this matter should be the prevailing rates among Seattle attorneys.

At the April 18, 1988 hearing, the court requested that plaintiff provide a breakdown of the attorney's hours claimed listing both the historical rates and the current rates. Plaintiff has provided this information to the court in exhibits attached to the Declaration of Sabra P. McIntosh Re: Seven Gables' Attorney's Fee Request.

While there is some authority for awarding attorney's fees based on their current value (*see* *Delaware Valley, supra,* ***[*1422]*** *97 L.Ed 2d at 592*), the court finds that the historical rates are the appropriate basis for determining the lodestar amount in the circumstances of this case. The court is not persuaded that the plaintiff should be compensated at the prevailing rates for Seattle attorneys. Nor does the court see, from the meager **[**10]** evidence placed before it, how those rates would differ significantly from those charged by plaintiff's attorneys. The court has reviewed the historical rates charged plaintiff's attorneys and finds they are reasonable in relation to the services performed. The court recognizes that plaintiff should be compensated for the delay in obtaining these fees, and therefore the court grants an award with simple interest.

The following table represents the court's determination of the proper lodestar in this case:

Seven Gables Fees Summary	Name	Total Hours	Historical Value	Historical Value With Simple Interest
Partners	Boeder	3366.70	$ 632,743.60	$ 699,376.40
	Holtan	907.75	166,597.50	187,719.50
	Burman	1811.60	321,543.70	354,087.88
	Reingold	22.25	3,916.00	4,332.23
	Chellis	891.25	104,683.50	127,197.69
Associates	Baum	2952.50	368,489.80	397,126.76
	Barley	1115.30	87,964.40	105,843.88
	Bowers	77.75	6,375.50	6,854.46
	Callahan	86.35	7,685.15	8,027.02
	Freedman	78.00	7,955.00	8,320.44
	Kramer	47.90	3,747.40	3,947.19
	Leiner	265.30	18,571.00	19,077.95
	Mohr	226.65	17,170.70	18,358.90
	Swanson	235.75	17,686.00	22,816.40
	Woodliff	135.80	10,895.35	12,328.63
Summer Clerk	Daspin	73.00	3,431.00	3,841.35
Legal Assistants	McIntosh	4487.53	305,065.52	343,453.67
	Cain	150.25	8,331.75	9,369.52
	Wiley	113.00	5,870.00	6,146.02
	Benson	126.70	5,701.50	6,171.61
	Ledford	308.25	13,071.75	13,914.70
	Tillson	3113.00	58,020.75	63,692.06
Clerks	Teller	2003.75	59,565.75	63,522.20
	Benske	1092.20	29,894.15	35,785.63
	Dickerson	371.25	10,820.25	11,486.95
	Lucey	1495.50	42,055.50	47,890.32
	Savage	182.25	4,920.75	6,202.83
	Phillips	257.85	4,641.30	4,891.65
Computer Staff	Bennett	2.50	212.50	256.65
	King	18.50	962.00	1,055.92
	Owen-Craft	225.75	11,851.50	12,751.35
	Wilson	82.25	4,112.50	4,466.79

Perkins Coie Fees Total		26324.38	2,344,553.07	2,610,314.54
Associated Counsel Fees Total	Bishin	642.30	90,258.50	106,875.94
Temporary Clerks			118,472.16	118,472.16
Other Out-of-Pocket Expenses			95,398.74	95,398.74
Total Hours and Fees:		26966.68	$ 2,648,682.47	$ 2,931,061.38

[11]** **[*1423]** The court therefore determines that the proper lodestar amount in this case is $ 2,931,061.38.

B. *Multiplier*

Plaintiff has requested that this court increase the fee award by adding a multiplier to the lodestar amount. The Supreme Court has explained, in the context of civil rights litigation, that

> where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

Hensley v. Eckerhart, 461 U.S. 424, 76 L. Ed. 2d 40, 52, 103 S. Ct. 1933 (1983). One often cited purpose for a fee enhancement is the compensation of counsel for the risk of not being paid. *See* Delaware Valley, supra, 97 L.Ed 2d at 591-600 (1987) [and cases cited therein]. The burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant. *Blum v. Stenson, 465 U.S. 886, 79 L. Ed. 2d 891, 901, 104 S. Ct. 1541 (1984)*.

In the present case the court is not persuaded **[**12]** that a multiplier is necessary to ensure plaintiff an award of reasonable attorney's fees. The court has endeavored to fully compensate plaintiff's attorneys. Plaintiff has been awarded, in the lodestar amount, the full amount of legally recoverable fees. Those fees are enormous, and are greater than the amount of the jury verdict (prior to trebling). The court has further compensated plaintiff for the delay in obtaining those fees. While plaintiff is the prevailing party in this action, it did not succeed to the full extent of its damage claims. The court has not reduced the lodestar because plaintiff was not fully successful. Nor does the court feel the results obtained were sufficiently "excellent" to justify an enhancement of an already enormous award. The court is not persuaded that plaintiff needs to be further compensated for the risks of taking the case, particularly in light of the fact that plaintiff received substantial pre-trial settlements from other defendants. The court finds that the lodestar amount fully compensates plaintiff and therefore denies the request for a multiplier.

In accordance with the foregoing, the court grants plaintiff an award of attorney's fees **[**13]** in the amount of $ 2,931,061.38.

II. MOTION FOR AN AWARD OF COSTS

Plaintiff has moved this court for an award of its costs in bringing this lawsuit, pursuant to Section 4 of the Clayton Act. Defendants oppose plaintiff's motion on two grounds: (1) they argue that plaintiff has waived its right to recover costs because of procedural errors, and (2) they argue some of the costs sought are excessive or otherwise inappropriate.

Section 4 of the Clayton Act provides that a prevailing plaintiff in a private antitrust action shall recover "the cost of suit, including a reasonable attorney's fee." **[*1424]** *15 U.S.C. § 15(a)*. Under this section, an award of costs to a successful antitrust plaintiff is mandatory. *Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 44 L. Ed. 2d 141, 155, 95 S. Ct. 1612 (1975)*.

The Ninth Circuit has held that the only costs recoverable by a successful plaintiff in a private antitrust suit are those which are normally allowable under *28 U.S.C. § 1920* and *Fed. R. Civ. P. 54(d)*. *Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224* (9th Cir.), *cert. denied*, *379 U.S. 880, 13 L. Ed. 2d 87, 85 S. Ct. 143 (1964)*. The Federal Rules of Civil Procedure provide, in relevant part

> (d) *Costs*. Except when **[**14]** express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Fed. R. Civ. P. 54(d). *See also* Local Rules for the United States District Court for the Western District of Washington, CR 54.

28 U.S.C. § 1920 provides

> A judge or clerk of any court of the United States may tax as costs the following:
> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation **[**15]** services under section 1828 of this title.
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

The time limits prescribed in *Fed. R. Civ. P. 54(d)* and the corresponding Local Rule do not govern this action. *Rule 54(d)* controls only when there is no express statutory provision for costs. In this case Section 4 of the Clayton Act provides the statutory authority for this motion. Furthermore the court itself established that it would determine the amount of costs at a later date, and accepted the parties stipulated briefing schedule. Therefore the court rejects defendants' argument that plaintiff's motion is procedurally improper.

Plaintiff originally presented a summary of costs to the court which included expenses claimed as part of plaintiff's request for attorney's fees. Plaintiff sought an award of these costs in the event the court did not award the costs as part of reasonable attorney's fees. At the court's request, plaintiff has now submitted a summary of costs which omits those fees sought as part of an attorney's fee award.

The court has thoroughly reviewed this new cost summary as well as the supporting documentation. The court **[**16]** finds that plaintiff's request for reporter fees is proper under *§ 1920(2)*. The court finds the request for witness fees proper under *§ 1920(3)* and *28 U.S.C. § 1821*. The court also finds that the request for exemplification costs, though large, is proper under *28 U.S.C. § 1920(4)* and the standards enunciated in *In Re Air Crash Disaster, 687 F.2d 626, 631 (2d Cir. 1982)*.

The court therefore grants plaintiff's motion to the following extent:

Clerk and Marshall Fees	$ 99.00
Court Reporter Fees	$ 45,015.30
Witness Fees	$ 4,924.18
Exemplification Fees	$ 18,476.38

Photocopying Fees	$ 50,453.19
Docket Fees	$ 20.00
TOTAL COSTS	$ 118,988.05

In accordance with the foregoing, the court awards plaintiff a total of $ 118,988.05 in costs.

III. OFFSETS TO JURY AWARD

Prior to the trial in this action, plaintiff received settlement amounts from other defendants **[**17]** in this action. It is undisputed **[*1425]** that some portion of the settlement amounts should be offset against the treble damages award in this case. Plaintiff argues that because each of the settlements it entered into compromised claims that went beyond the instant action's damage period, not all settlement amounts are proper offsets against the treble damage award. Plaintiff argues that the offset should be determined by applying to each settlement amount a percentage figure that is equivalent to the percentage that the damages period bears to the period of claims compromised by each settlement.

Defendants oppose any apportionment of the offset. Defendants argue that plaintiff's action includes state law claims and plaintiff has failed to comply with a state statute [*RCW 4.22.060*] designed to control the effect of settlements upon non-settling parties. Defendants argue that it is now impossible for this court to approve plaintiff's plan for apportioning an offset for settlements. Defendants further argue that as to plaintiff's federal claims, the doctrine of res judicata would prohibit plaintiff from engaging in new litigation with any of the defendants for any damage attributable to the **[**18]** period prior to trial. Defendants contend that plaintiff's federal judgment should be reduced by the full amount of the settlements.

Where collective antitrust liability is found, it is proper to deduct the sums plaintiff has received from settling defendants from the trebled damage award. *Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir. 1957)*. In a federal ***antitrust law*** action, a defendant, against whom civil damages, costs, and attorney's fees have been assessed, has no right of contribution, under federal statutory or common law, from other participants in the unlawful conspiracy on which recovery was based. *Texas Industries v. Radcliff Materials, 451 U.S. 630, 68 L. Ed. 2d 500, 512, 101 S. Ct. 2061 (1981)*.

The court rejects defendants claim that plaintiff settlements are improper under Washington state law. The court finds that the state statute dealing with settlement inapplicable to the instant case, there being no right of contribution under federal ***antitrust law***.

Plaintiff has not disclosed the settlement agreements to the defendants because they contain confidentiality provisions prohibiting disclosure without agreement of the settling parties. Plaintiff has, however, received approval to state **[**19]** that the entire amount of all settlements obtained in the case is $ 1,435,000.00. Out of this amount plaintiff argues $ 864,564.50 should be offset against the trebled damages amount.

Plaintiff has provided the court with the settlement agreements under seal, and the court has reviewed them *in camera*. Absent disputed facts, the construction of a contract is a matter of law for the court to decide. *Jones Associates v. Eastside Properties, Inc., 41 Wash. App. 462, 704 P.2d 681, 684 (1985)*. The court rejects plaintiff's argument that the settlement amounts should be apportioned. The agreements reference the compromise of claims asserted in this action; there is no reference to a specified damage period. The court therefore finds that the full amount of all settlements, $ 1,435,000.00, should be offset against the trebled award of $ 6,600,000.00. The court need not address the issue of whether a subsequent action by plaintiff would be barred under the principles of res judicata.

In accordance with the foregoing, the court orders that the court's judgment of November 4, 1987, as amended, be further amended to provide for judgment in favor of plaintiff and against defendants in the amount **[**20]** of $ 5,165,000.00, with interest to run on that amount from November 4, 1987, forward at a rate of 6.90% as provided by *28 U.S.C. § 1961(a)*.

IV. MOTION FOR AN AWARD OF PREJUDGMENT INTEREST

Plaintiff moves this court for an award of prejudgment interest on the actual damages found by the jury, for the period from August 10, 1984, the date of service of plaintiff's complaint, until November 4, 1987, the date of judgment. Plaintiff argues **[*1426]** such an award is just in this case because defendants engaged in conduct designed to delay the litigation and increase the cost thereof.

Defendants oppose plaintiff's motion. Defendants argue that plaintiff has not made an adequate showing that defendants' conduct falls within the authorized grounds for such an award. Defendants also argue that there is a presumption that the jury has already awarded prejudgment interest, and that plaintiff has introduced no evidence to rebut this presumption. Defendants also submit the declaration of the forewoman of the jury, wherein she asserts that the jury has already awarded plaintiff prejudgment interest. Plaintiff in turn moves to strike this declaration as inadmissible.

The court first addresses the issue of **[**21]** admissibility of the forewoman's declaration. The Federal Rules of Evidence provide, in relevant part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b). Defendants have submitted a declaration in this case entitled "Declaration of Nancy Ellen Garlock Re Prejudgment Interest." In this declaration, the forewoman of the jury in this action states that the jury included prejudgment interest in their computation of damages and that "if **[**22]** the court were to award any prejudgment interest separate and apart from the jury verdict, this would be a duplication of amounts already contained with the verdict for prejudgment interest." Declaration of Garlock, p. 2, attached as Exhibit A to SRO Defendant's Memorandum in Opposition to Plaintiff's Motion for Pre-Judgment Interest. This declaration does not concern extraneous prejudicial information or outside influence being brought to bear upon any juror. The declaration is therefore inadmissible under *Fed. R. Evid. 606(b)*, and the court grants plaintiff's motion to strike. *See Scogin v. Century Fitness, Inc., 780 F.2d 1316, 1318-1320 (8th Cir. 1985)*.

Section 4 of the Clayton Act, as amended by the Antitrust Improvements Act of 1980, provides, in relevant part:

> (a) Amount of recovery; prejudgment interest
>
> . . . The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest **[**23]** for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--
>
> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
>
> (3) whether such person or the opposing party, or either party's representative, **[*1427]** engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

15 U.S.C. § 15(a). Plaintiff maintains that defendants' refusal to acknowledge, throughout the pre-trial discovery proceedings, that they had special relationships with film distributors, evidences bad faith and an intent to delay the litigation. Plaintiff further argues that defendants' pre-trial **[**24]** conduct violated Fed. R. Civ. P. 11, 36 and 37. Defendants argue that all their responses during discovery were truthful and that they did not engage in dilatory conduct.

The court is not persuaded that defendants' conduct constituted bad faith. Defendants did vigorously defend this action at every step of the proceedings. Defendants were not sanctioned by the court at any time during the proceedings. The fact that the jury ultimately found against defendants does not alone establish that the defense was in bad faith. Nor is the court persuaded that defendants engaged in dilatory conduct. This case went from filing to trial on the merits within approximately 3 years. Given the complexity of this case this time period was reasonable. Both parties adhered to the stipulated discovery schedule and the case was ready for trial without delay. In light of all the circumstances present in this case, the court finds that plaintiff is not entitled to an award of prejudgment interest.

In accordance with the foregoing, the court denies plaintiff's motion for an award of prejudgment interest.

V. MOTION FOR AN INJUNCTION

Plaintiff moves this court for an injunction prohibiting defendants from negotiating **[**25]** for the exhibition of first-run films on other than film-by-film, theater by theater basis. Plaintiff advances three reasons for the injunction: (1) SRO still owns 7 drive-in theaters in Washington; (2) defendants are capable of entering the first-run film exhibition at any time and their refusal to admit past violations makes future violations likely; and (3) defendants would suffer no harm from the injunction and such relief would serve the public interest.

Defendants oppose the motion. Defendants argue that there is no factual foundation for a finding of any continuing antitrust violations. Defendants also argue that the court has already found that negotiation for films on something other than a theater by theater, film by film basis is not a *per se* antitrust violation, and therefore the court should not enjoin such future acts.

15 U.S.C. § 26 provides, in relevant 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, including sections 13, 14, 18, and 19 of this title, when **[**26]** 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 laws of the State of Washington provide for similar relief. RCW § 19.86.020. The relief in an antitrust case must be effective to redress the violations and to restore competition; a district court possesses large discretion to fit the decree to the special needs of the individual case. Ford Motor Co. v. United States, 405 U.S. 562, 31 L. Ed. 2d 492, 501, 92 S. Ct. 1142 (1971). 15 U.S.C. § 26 provides for "traditional principles of equity and authorizes injunctive relief upon the demonstration of 'threatened' injury." Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 23 L. Ed. 2d 129, 152, 89 S. Ct. 1562 (1969).

The court finds that plaintiff has failed to demonstrate the threat of future injury. The evidence demonstrates that defendants are no longer in the theater business that was at issue in this litigation. The court is not persuaded that there is a likelihood that defendants will re-enter the business, at least not a likelihood sufficient **[*1428]** to justify the exercise of injunctive relief. Nor does the court find that the **[**27]** prior legal proceedings against defendants sufficiently probative of future conduct.

Plaintiff is seeking an injunction that would not have geographical limitations. Such an injunction would be improper, since the jury found only an antitrust violation in the Seattle area. Furthermore, plaintiff prevailed on only part of their claims. It would be improper for the court to enjoin conduct that the jury found did not violate the antitrust laws. In sum, the court finds that plaintiff has failed to demonstrate a sufficient legal and factual basis for an injunction.

In accordance with the foregoing, the court denies plaintiff's motion for an injunction.

VI. FORM OF JUDGMENT

Both plaintiff and defendants disagree over what the proper form of judgment should be in this case. Plaintiff argues there should be two judgments, one indicating the damage award of the jury, and another judgment indicating an award of attorney's fees, costs and prejudgment interest. Defendants argue that one judgment is appropriate.

After reviewing the papers submitted by the parties and considering the oral arguments presented at the hearing, the court finds that the concerns of all the parties can be addressed by **[**28]** the court specifically delineating the effective dates of the awards for the purpose of the calculation of interest. The court will therefore enter one judgment stating the effective dates of any awards.

VII. ORDER

In accordance with the foregoing, the court orders that:

(1) plaintiff is granted attorney's fees, pursuant to Section 4 of the Clayton Act, *15 U.S.C. § 15*, in the amount of $ 2,931,061.38, with interest to run on that amount, from the date of the signing of this order, at a rate provided by *28 U.S.C. § 1961*;

(2) plaintiff is granted costs, pursuant to Section 4 of the Clayton Act, *15 U.S.C. § 15*, in the amount of $ 118,988.05, with interest to run on that amount, from the date of the signing of this order, at a rate provided by *28 U.S.C. § 1961*;

(3) the court's judgment of November 4, 1987, as amended, is further amended to provide for judgment in favor of plaintiff and against defendants in the amount of $ 5,165,000.00, with interest to run on that amount from November 4, 1987 forward at 6.90% pursuant to *28 U.S.C. § 1961(a)*;

(4) plaintiff's **[**29]** motion for prejudgment interest is denied; and

(5) plaintiff's motion for an injunction is denied.

Dated: May 16, 1988

Volvo North America Corp. v. Men's International Professional Tennis Council

United States District Court for the Southern District of New York

May 18, 1988, Decided

No. 85 Civ. 2959 (KTD)

Reporter

687 F. Supp. 800 *; 1988 U.S. Dist. LEXIS 4863 **

Volvo North America Corporation, International Merchandising Corporation, and Proserv, Inc., Plaintiffs, v. Men's International Professional Tennis Council, M. Marshall Happer III, and Philippe Chatrier, Defendants; Men's International Professional Tennis Council and M. Marshall Happer III, Counterclaimants, v. Volvo North America Corporation, International Merchandising Corporation, and Proserv, Inc., Counterclaim-Defendants, and Donald L. Dell, Raymond S. Benton, Dell, Benton & Falk, Mark H. McCormack, International Merchandising Group, International Management Inc., Transworld International Inc., and A.B. Volvo Additional Counterclaim-Defendants

Subsequent History: **[**1]** Vacated In Part, Reversed In Part and Remanded, August 30, 1988.

Core Terms

Counterclaims, alleges, tennis, sponsorship, sponsor, players, cause of action, tournaments, television, combined, conspiracy, breached, markets, unfair competition, defamation, trademark, secondary meaning, anticompetitive, damages, conspired, nowhere, breach of contract, Sherman Act, asserts, false statement, slip opinion, advertising, effects, replead, pages

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Attempts to Monopolize, Sherman Act**

Federal ***antitrust law*** prohibits contracts, combinations and conspiracies in restraint of interstate trade or commerce as well as attempts, combinations, or conspiracies to monopolize interstate trade or commerce. *15 U.S.C.S. §§ 1*, *2 (1982)*.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN2[] **Standing, Clayton Act**

Standing to sue for antitrust violations is conferred upon civil litigants by the Clayton Act. *15 U.S.C.S . §§ 15*, *26 (1982)*. In order to prevail in a private antitrust action, a plaintiff must show that a violation of the antitrust laws occurred, that the plaintiff was damaged as a result, and the amount of damages.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Actual Monopolization, Anticompetitive & Predatory Practices**

See *15 U.S.C.S. § 1*.

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

HN4[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN5[] **Conspiracy to Monopolize, Sherman Act**

A plaintiff must establish three essential elements in order to recover in a civil action under *15 U.S.C.S. § 1*. The first element is that the defendant entered into a contract, combination, or conspiracy. The second is that that contract, combination, or conspiracy restrained interstate trade or commerce. *15 U.S.C.S. § 1*. These first two elements do not require proof of defendants' specific intent to create a monopoly. Rather, the required showing is that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, and that the anticompetitive effects of the alleged conspiracy outweigh the procompetitive effects. The third element that a plaintiff must establish is that injury to the plaintiff's business or property was proximately caused by the defendant's antitrust violation. *15 U.S.C.S. § 15*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN6[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Antitrust conspiracies should not be inferred when such inferences are implausible, because the effect of such practices is often to deter procompetetive conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN7[] **Monopolies & Monopolization, Actual Monopolization**

The offense of monopolization under the Sherman Act *§ 2*, *15 U.S.C.S. § 2*, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

The monopoly power required by the first element in the offense of monopolization is the power to control prices or exclude competition. Such "exclusionary" conduct is conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power. The issue is whether the defendant's conduct is reasonable in light of its business needs, or whether it unreasonably excludes competition.

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

HN9[] **Monopolies & Monopolization, Actual Monopolization**

The second element in the offense of monopolization requires some showing that the monopoly at issue is an unlawful one; lawful monopolies are not prohibited by *15 U.S.C.S. § 2*. The lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors. A showing that the defendant intends to harm its competitive rivals is not sufficient to satisfy the second element of *15 U.S.C.S § 2*. "Intent to harm" rivals without more offers too vague a standard in a world where executives may think no further than "let's get more business," and long-term effects on consumers depend in large measure on competitors' responses. Neither is intent to do more business, which amounts to the same thing. Vigorous competitors intend to harm rivals, to do all the business if they can. To penalize this intent is to penalize competition.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

HN10[] **False Designation of Origin, Elements of False Designation of Origin**

See *15 U.S.C.S. § 1125(a) (1982)*.

Trademark Law > ... > Registration Procedures > Federal Registration > Degree of Protection

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Factors for Determining Confusion > Similarity of Marks > General Overview

Trademark Law > Trademark Cancellation & Establishment > Registration Procedures > General Overview

HN11[] **Federal Registration, Degree of Protection**

15 U.S.C.S. § 1125(a) protects both registered and unregistered trademarks against false designation of origin and false description or representation. Analysis of *15 U.S.C.S. § 1125(a)* protection requires two steps: a preliminary determination whether the mark at issue is entitled to protection and, if so, what level of protection; and a determination whether confusion is likely to occur between the marks at issue.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Terms Requiring Secondary Meaning > Descriptive & Laudatory Terms > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Trademark Law > ... > Names > Generic Names > General Overview

Trademark Law > Subject Matter of Trademarks > Eligibility for Trademark Protection > Strength of Trademark

Trademark Law > Subject Matter of Trademarks > Terms With Inherent Distinctiveness > Suggestive Terms

HN12[] **Eligibility for Trademark Protection, Evidence of Secondary Meaning**

There are four classes of protected trademarks. Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful. Generic terms -- the common descriptive name of an article or substance-- are ineligible for any trademark protection. Descriptive marks, those describing the qualities, ingredients, effects or other features of the product or service naturally and in ordinary language are protectible only where secondary meaning can be established. Suggestive terms require imagination, thought and perception to reach a conclusion as to the nature of goods, and are eligible for protection without proof of secondary meaning. Finally, arbitrary or fanciful marks enjoy all the rights accorded to suggestive terms as marks - without the need of debating whether the term is "merely descriptive" and with ease of establishing infringement.

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN13[] **Likelihood of Confusion, Consumer Confusion**

After a mark's eligibility for protection has been determined, a court must address the ultimate inquiry: whether there exists a likelihood that an appreciable number of ordinarily prudent purchasers will be misled, or indeed simply confused, as to the source of the goods or services in question.

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

Trademark Law > Likelihood of Confusion > General Overview

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN14[ ] **Similarity of Marks, Appearance, Meaning & Sound**

A court determines whether a likelihood of confusion exists in trademark cases by evaluating a number of factors: 1) The strength of the mark at issue; 2) The degree of similarity between the marks; 3) The proximity of the products or services at issue; 4) The likelihood that the senior user will bridge the gap; 5) Actual confusion; 6) The junior user's good or bad faith in adopting the mark; 7) The quality of the respective goods or services; 8) The sophistication of the relevant consumers; 9) Balancing the conflicting interests of the parties involved; 10) The nature of the senior user's priority; 11) Any delay by the senior user in asserting its claim; 12) The harm to the junior user compared to the benefit to the senior user that would result from the requested injunction.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Trademark Law > ... > Terms Requiring Secondary Meaning > Descriptive & Laudatory Terms > General Overview

HN15[ ] **Eligibility for Trademark Protection, Evidence of Secondary Meaning**

A descriptive mark is entitled to trademark protection only if secondary meaning of the mark can be established.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

HN16[ ] **Infringement Actions, Determinations**

A mark acquires secondary meaning when it is shown that the primary significance of the term in the minds of the consuming public is not the product but the producer. Thus, the crux of the doctrine of secondary meaning is that the mark comes to identify not only the goods but the source of those goods, even though the relevant consuming public might not know the name of the producer. Someone seeking to establish secondary meaning must show that the purchasing public associates goods designated by a particular mark with a single source. The focus of secondary meaning therefore is the consuming public. Hence, so must be the inquiry into whether the mark owner has a protectible interest. Although the mark owner strives to create a secondary meaning for its product, it is the consuming public which, in effect, determines whether that effort has succeeded.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Antitrust & Trade Law > Consumer Protection > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN17[] **Consumer Protection, Likelihood of Confusion**

A cause of action for unfair competition under the Lanham Act, *15 U.S.C.S. § 1125(a)*, is made out by showing the use of one's trademark by another in a way that is likely to confuse consumers as to the source of the product.

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Conveyances > Valid Transfers

Trademark Law > Conveyances > General Overview

Trademark Law > Causes of Action Involving Trademarks > Dilution of Famous Marks > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Trademark Law > Likelihood of Confusion > Confusion Among Noncompeting Products > General Overview

Trademark Law > Special Marks > Trade Names > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

HN18[] **Conveyances, Valid Transfers**

Dilution under the New York state antidilution, *N.Y. Gen. Bus. Law § 368-d* (McKinney 1984), is characterized as a "whittling down" of the identity or reputation of a tradename or mark. Dilution threatens two separable but related components of advertising value. Junior uses may blur a mark's product identification or they may tarnish the affirmative associations a mark has come to convey. The interest protected by *§ 368-d* is not simply commercial goodwill, but the selling power that a distinctive mark or name with favorable associations has engendered for a product in the mind of the consuming public. In order to state a claim under *§ 368-d*, a plaintiff must first have a trademark or name which is truly of distinctive quality or one which has acquired a secondary meaning in the mind of the public, and must prove a likelihood of dilution.

Trademark Law > ... > Remedies > Equitable Relief > General Overview

Trademark Law > Causes of Action Involving Trademarks > Dilution of Famous Marks > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Infringement Actions > Remedies > General Overview

Trademark Law > Likelihood of Confusion > Confusion Among Noncompeting Products > General Overview

Trademark Law > Special Marks > Trade Names > Infringement Actions

HN19[] **Remedies, Equitable Relief**

See *N.Y. Gen. Bus. Law § 368-d* (McKinney 1984).

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN20[] **Unfair Business Practices, Elements**

The tort of unfair competition is generally described as a misappropriation of the skill, expenditures, and labor of another. One cannot sell his product by misappropriating the good will of another through misleading the public into thinking that it is "sponsored" by or derived from something else. An element of bad faith is essential to this tort. In order to make out a cause of action for unfair competition, a complaint must set forth: (1) the acts or omissions by defendants that proximately caused the misappropriation and (2) the property or benefit misappropriated -- mere allegations that plaintiff has been harmed will not suffice.

Torts > Intentional Torts > Defamation > General Overview

HN21[] **Intentional Torts, Defamation**

In order to state a cause of action for defamation, a plaintiff must plead that defendant (1) negligently or willfully uttered a (2) defamatory statement (3) of or concerning the plaintiff (4) to a third person (5) which resulted in damage to plaintiff's reputation. In defamation actions, the false and defamatory matter should be pleaded in haec verba. Paraphrasing the allegedly defamatory statements would be insufficient to state a cause of action for defamation.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN22[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See *18 U.S.C.S. 1964(c) (1982)*.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN23[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See *18 U.S.C.S. § 1962 (1982)*.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN24[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

In order to state a cause of action under *18 U.S.C.S. § 1964(c)*, a plaintiff must allege: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. A pattern of racketeering activity consists of at least two specified criminal acts which have sufficient continuity and relationship to constitute a pattern.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN25[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) requires that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Challenges

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN26[] Amount in Controversy, Challenges

A matter in controversy must exceeds the sum or value of $ 10,000 under *28 U.S.C.S. § 1332(a) (1982)* for diversity jurisdiction.

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Williams & Connolly, Attorneys for Plaintiff ProServ, Inc. and Additional Counterclaim Defendants Donald L. Dell, Raymond S. Benton, and Dell, Benton & Falk, Washington, District of Columbia, of Counsel: Robert S. Litt, Esq., Jeffery R. Berry, Esq., Mark S. Levinstein, Esq., William R. Murray, Jr., Esq. and Lloyd I. Isler, P.C., Local Counsel for Plaintiff, New York, New York.

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Simpson Thacher & Bartlett, Attorneys for Defendants-Counterclaimants Men's International Professional Tennis Council and M. Marshall Happer III, New York, New York, of Counsel: Roy L. Reardon, Esq., Michael J. Chepiga, **[**2]** Esq., Julie R. Fenster, Esq.

Judges: Kevin Thomas Duffy, United States District Judge.

Opinion by: DUFFY

Opinion

[*803] MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, UNITED STATES DISTRICT JUDGE.

Plaintiffs/counterclaim-defendants Volvo North America Corporation, International Merchandising Corporation, and ProServ, Inc. and counterclaim-defendants Donald L. Dell, Raymond S. Benton, Dell, Benton & Falk, Mark H. McCormack, International Merchandising Group, International Management Inc., Transworld International Inc., and A.B. Volvo move, *inter alia*, to dismiss defendants/counterclaimants Men's International Professional Tennis Council's and M. Marshall Happer III's counterclaims against them. For the reasons that follow, counterclaims 1 through 4, 6, 13, and 14 are dismissed. Counterclaims 5 and 7 through 12 are dismissed with leave to replead granted.

FACTS

The background facts of this case are set forth in detail in my Memorandum and Order of August 10, 1987 in this case *678 F. Supp. 1035 (S.D.N.Y. 1987)*. For purposes of this Memorandum and Order, I will only mention those facts deemed pertinent to the motions at issue.

The Men's International Professional Tennis **[**3]** Council ("MIPTC") is an unincorporated body that organizes, schedules, and administers the Grand Prix Circuit series of men's professional tennis events ("Grand Prix"). Counterclaims and Answer at para. 6. M. Marshall Happer III ("Happer") is MIPTC's administrator, and has held that position since 1981. *Id*. at para. 7.

A.B. Volvo is a Swedish corporation primarily engaged in the production of automobiles, trucks, and buses. Volvo North America Corporation is a wholly-owned subsidiary of A.B. Volvo, primarily engaged in the distribution of cars, trucks, and buses in the United States. Both A.B. Volvo and Volvo North America Corporation will be collectively referred to as "Volvo". Volvo has sponsored Grand Prix tennis events since 1972, and was the overall sponsor of the Grand Prix from 1980 through 1984. *Id*. at para. 8.

ProServ, Inc. ("ProServ") is a Washington, D.C. firm that owns, produces, promotes, and televises men's professional tennis events, represents men's professional tennis players and other athletes, and provides marketing and sponsorship opportunities for companies wishing to sponsor men's professional tennis events. *Id*. at para. 9. Raymond S. Benton **[**4]** ("Benton") is president of ProServ, and a partner of Dell, Benton & Falk, the law firm that represents ProServ. *Id*. at paras. 12, 13; Memorandum of Plaintiff/Counterclaim Defendant Volvo North American Corporation in Support of a Motion to Dismiss Defendants' Counterclaims at 3. Donald L. Dell is the majority owner of ProServ, and is also a partner of Dell, Benton & Falk. *Id*. at paras. 11, 13. Dell and the firm of Dell, Benton & Falk will be collectively referred to **[*804]** as "Dell." Since 1972, ProServ has acted as Volvo's agent for its marketing endeavors in men's professional tennis. *Id*. at para. 58.

International Management Group is the corporate parent of the three corporations owned by Mark H. McCormack ("McCormack"): (1) International Merchandising Corporation, a corporation based in Cleveland, Ohio and engaged in essentially the same tennis-related activities as ProServ; (2) International Management Inc.; and (3) Transworld International Inc., a sports marketing and merchandising organization. *Id*. at para. 14. International Management Group, International Merchandising Corporation, International Management Inc., and Transworld International Inc. will **[**5]** be collectively referred to as "IMG".

MIPTC and Happer assert fourteen counterclaims against Volvo, ProServ, Benton, Dell, McCormack, and IMG:

(1) MIPTC alleges that all counterclaim defendants contracted, combined and conspired to restrain trade, in violation of the Sherman Act, *15 U.S.C. § 1 (1982)*, in the following markets: (a) the worldwide market for men's professional tennis players' services ("the players market"); (b) the world wide market for producing men's professional tennis events ("the events market"); (c) the worldwide, United States, and local markets for television broadcast rights of men's professional tennis events ("the television market"). [1] Counterclaims and Answer at paras. 118-22.

[6]** (2) MIPTC alleges that all counterclaim defendants combined and conspired to monopolize, in violation of the Sherman Act, *15 U.S.C. § 2 (1982)*, the players, events, and television markets. *Id*. at paras. 123-26.

(3) MIPTC alleges that Volvo, ProServ, Dell, and Benton made false and misleading written and broadcast statements regarding Volvo's Grand Prix sponsorship which constitute false descriptions and representations and created a false designation of origin in violation of the Lanham Act. *15 U.S.C. § 1125(a) (1982)*. *Id*. at paras. 127-29.

(4) MIPTC alleges that Volvo, ProServ, Dell, and Benton adopted a mark so similar to the Grand Prix mark as to create a likelihood of confusion and dilute the distinctive quality of the Grand Prix mark in violation of the New York state antidilution statute. *N.Y. Gen. Bus. Law § 368-d* (McKinney 1984). *Id*. at paras. 130-32.

(5) MIPTC alleges that Volvo, ProServ, Dell, and Benton made false and misleading written and broadcast statements regarding Volvo's Grand Prix sponsorship which create a likelihood of confusion, misappropriate rights belonging to MIPTC, and constitute common law **[**7]** unfair competition. *Id*. at paras. 133-35.

(6) MIPTC alleges that ProServ, Dell, and Benton participate in the affairs of men's pofessional tennis through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *18 U.S.C. § 1964(c) (1982)*. The pattern of racketeering activity alleged includes mail fraud, in violation of *18 U.S.C. § 1341 (1982)*, and wire and television fraud, in violation of *18 U.S.C. § 1343 (1982)*. *Id*. at paras. 136-38.

(7) MIPTC alleges that Volvo has breached the overall sponsorship agreement between them, dated September 25, 1979, by failing to pay amounts owed under that agreement. *Id*. at paras. 139-41.

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[1] Counterclaimants allege separate markets for the worldwide services of men's professional tennis players in general, and for the services of top-ranked men's professional tennis players. They likewise allege separate markets for worldwide production of men's professional tennis events in general, and for major men's professional tennis events. Therefore, counterclaimants assert restraint of trade in five, not just three relevant markets. I disagree. While the stakes, volume, and publicity of top-ranked men's professional tennis players' services and production of the major events that they play in might be exponentially larger than those of lesser known players and tennis events, they nevertheless do not constitute separate markets.

(8) MIPTC alleges that Volvo has breached its agreement to be a Grand Prix sanction-holder [2] by failing to abide by the **[*805]** Grand Prix promotional and sponsorship rules. The promotional breaches alleged include failing to identify Nabisco Brands, Inc. ("Nabisco") prominently, or in some instances at all, as the overall Grand Prix sponsor on all promotional, advertising, and other materials in connection with **[**8]** the event. The sponsorship breach alleged is that Volvo sponsored a "circuit within a circuit" of Grand Prix events. *Id*. at paras. 142-44.

(9) MIPTC alleges that Volvo has breached its overall Grand Prix sponsorship agreement by failing to abide by the Grand Prix promotional and sponsorship rules, and claims the same breaches as those made out in counterclaim 8. *Id*. at paras. 145-47.

(10) MIPTC **[**9]** alleges that Volvo, ProServ, Dell, and Benton breached their agreements to provide full financial disclosure concerning the Volvo Masters during those years that Volvo was the overall sponsor of the Grand Prix and of the Masters tournaments. *Id*. at paras. 148-50.

(11) MIPTC alleges that Volvo and ProServ breached their January 1985 agreement to cooperate with MIPTC's reasonable promotional activities. *Id*. at paras. 151-53.

(12) MIPTC alleges that ProServ has breached its agreement to be a Grand Prix sanction-holder by failing to abide by Grand Prix promotional and sponsorship rules. The promotional breaches alleged include failing to identify Nabisco prominently, or in some instances at all, as the overall Grand Prix sponsor on all promotional, advertising, and other materials in connection with the event. The sponsorship breach alleged is that Volvo sponsored a "circuit within a circuit" of Grand Prix events. *Id*. at paras. 154-56.

(13) Happer alleges that Dell, Benton, Volvo, ProServ, and McCormack have defamed him, have disparaged him in his profession, and have exposed him to public ridicule and contempt within the tennis and legal communities. The specific acts **[**10]** allegedly causing such harm include their false statements to the press that Happer dealt with Volvo dishonestly, unfairly, and in bad faith, and that Happer lied, breached confidences, and conducted a fraudulent bidding process for Grand Prix sponsorship rights. *Id*. at paras. 157-64.

(14) MIPTC alleges that Dell, Benton, Volvo, and ProServ have defamed it. The specific acts alleged include their false statements to the press and others accusing MIPTC of greed, dishonesty, bad faith, and fraud. *Id*. at paras. 165-74.

MIPTC and Happer essentially maintain that Volvo, ProServ, Dell, Benton, IMG, and McCormack "have achieved and maintain their power in men's professional tennis and have damaged the MIPTC and its constituents by means of numerous improper, illegal and anticompetitive acts and practices. Moreover, Dell, Benton and ProServ continue to run the affairs of men's professional tennis through a pattern of illegal acts and practices." Counterclaims and Answer at para. 116.

Volvo, ProServ, Dell, Benton, IMG, and McCormack each move to dismiss all of the counterclaims against them.

DISCUSSION

For purposes of the following analysis, I assume that MIPTC and Happer **[**11]** properly assert *in personam* jurisdiction over AB Volvo, the Swedish parent corporation of Volvo North America Corporation. Therefore, the motions of Volvo and AB Volvo will be deemed one motion for purposes of this Memorandum. I also assume the MIPTC has standing to properly assert antitrust claims on behalf of its constituents.

1. *Volvo's Motion to Dismiss the Counterclaims*

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[2] Men's professional tennis consists of two types of events: those organized by the MIPTC ("sanctioned events"), and those having no relationship to MIPTC ("special events"). The owner of any sanctioned event, who bears complete financial responsibility for all aspects of the tournament, is actually a licensee who has obtained a sanction from MIPTC. The owner can retain the sanction and, for some consideration, assign all rights and responsibilities for conducting the event to some other person. In such a case, the owner remains the sanction-holder, and the assignee becomes a *de facto* owner of the event.

Volvo moves, pursuant to *Fed. R. Civ. P. 12(b)(6)*, to dismiss all of the counterclaims alleged by MIPTC and Happer against Volvo for failure to state a claim upon which **[*806]** relief can be granted; and, pursuant to *Fed. R. Civ. P. 12(b) (1)*, to dismiss the first and second counterclaims for lack of subject matter jurisdiction; and, pursuant to *Fed. R. Civ. P. 12(f)*, to strike the allegations of fraud included in paragraphs 81 through 83, 86, 88, 89, and 102 from the Counterclaims and Answer as immaterial, impertinent, and scandalous.

This discussion will address the counterclaims in the order that they are alleged against Volvo. Counterclaims 1 and 2 allege that Volvo violated federal ***antitrust law***. Counterclaims and Answer at paras. 118-126. ***HN1***[] **[**12]** Federal ***antitrust law*** prohibits contracts, combinations and conspiracies in restraint of interstate trade or commerce as well as attempts, combinations, or conspiracies to monopolize interstate trade or commerce. *15 U.S.C. §§ 1*, *2 (1982)* (the Sherman Act). [3] **[**13]** ***HN2***[] Standing to sue for antitrust violations is conferred upon civil litigants by the Clayton Act. *15 U.S.C. §§ 15*, *26 (1982)*. [4] "In order to prevail in a private antitrust action, a plaintiff must show that a violation of the antitrust laws occurred, that the plaintiff was damaged as a result, and the amount of damages." *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc., 408 F. Supp. 1251, 1268 (S.D.N.Y. 1976)*.

[14]** Counterclaim 1 attempts to establish that Volvo and ProServ combined and conspired to restrain trade in the players, events, and television markets, in violation of *Section 1* of the Sherman Act. *15 U.S.C. § 1*. ***HN5***[] A plaintiff must establish three essential elements in order to recover in a civil action under *Section 1*. The first element is that the defendant entered into a contract, combination, or conspiracy. The second is that that contract, combination, or conspiracy restrained interstate trade or commerce. *15 U.S.C. § 1*; *International Distribution*

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[3] *Section 1* of the Sherman Act provides in pertinent part that:

> ***HN3***[] every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1 (1982).

Section 2 of the Sherman Act provides in pertinent part that:

> ***HN4***[] every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C. § 2 (1982).

[4] *Section 15* of the Clayton Act provides in pertinent part that:

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor 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.

15 U.S.C. § 15 (1982).

Section 26 of the Clayton Act provides in pertinent part that:

> any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

15 U.S.C. § 26 (1982).

Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786, 793 (2d Cir.), *cert. denied*, *482 U.S. 915, 107 S. Ct. 3188, 96 L. Ed. 2d 676 (1987)*. These first two elements do not require proof of defendants' specific intent to create a monopoly. Rather, the required showing is that "'the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement,' and that the anticompetitive effects of the alleged conspiracy **[**15]** outweigh the procompetitive effects." *International Distribution, 812 F.2d at 793* (quoting *Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976)* (quoting *American Tobacco Co. v. United States, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946))*). The third element that a plaintiff must establish is that injury to the plaintiff's business or property was proximately caused by the defendant's antitrust violation. *15 U.S.C. **[*807]** § 15*; *Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 41 (2d Cir. 1986)*, *cert. denied*, *479 U.S. 1088, 107 S. Ct. 1295, 94 L. Ed. 2d 151 (1987)*.

MIPTC's first basis for its claim that Volvo and ProServ violated *Section 1* consists of allegations that, during the period following MIPTC's rejection of Volvo's Grand Prix sponsorship offer, Volvo and ProServ participated in a scheme to dominate and control men's tennis. The scheme alleged consists of issuing false and misleading information to the press and to the Grand Prix tournament organizers in order to maintain control over the Grand Prix sponsorship. Two separate **[**16]** types of misinformation are alleged. The first type is press releases, issued in both the United States and Sweden, which overstated the value of the Volvo sponsorship offer rejected by MIPTC and stated that MIPTC, Happer and Chatrier (MIPTC's chairman) dealt with Volvo in bad faith. The second type is that disseminated to Grand Prix tournament organizers which overstated the value of the Volvo sponsorship offer and indicated that the offer was still outstanding. The alleged purpose for issuing the first type of information was to eliminate potential competitors for Grand Prix sponsorship and to secure Volvo's renewal of that sponsorship. The alleged purpose for issuing the second type of information was to circumvent the MIPTC and collect support for Volvo's sponsorship offer directly from Grand Prix tournament organizers. Counterclaims and Answer at paras. 81-83, 86.

The Supreme Court has stated that ***HN6***[] conspiracies should not be inferred "when such inferences are implausible, because the effect of such practices is often to deter procompetetive conduct." *Matsushita Elec. Indus Co. v. Zenith Radio Corp., 475 U.S. 574, 593, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. **[**17]**

Accepting MIPTC's allegations as true, and even assuming that a conspiracy between Volvo and ProServ to disseminate false information may be plausibly inferred from the fact that both of them allegedly did so, MIPTC does not assert sufficient facts to state a *Section 1* violation. Volvo and ProServ did not obtain the anticompetitive result allegedly sought; Nabisco, not Volvo, obtained the Grand Prix sponsorship, and MIPTC alleges no anticompetitive effect to the relevant markets inflicted by the allegedly false statements. Nowhere does MIPTC claim that it sustained damages to its business or property as a proximate result of such a conspiracy between Volvo and ProServ.

MIPTC next alleges that Volvo and ProServ violated *Section 1* by exploring the possibility of forming a men's professional tennis circuit outside the Grand Prix if Volvo did not obtain a renewed Grand Prix sponsorship. *Id*. at paras. 81, 87. Were Volvo and ProServ to establish an independent men's professional tennis circuit, it would compete directly with MIPTC and the Grand Prix. Clearly, this allegation is insufficient to state a *Section 1* violation.

MIPTC next alleges that Volvo violated *Section 1* by conducting **[**18]** a campaign "to discourage all other potential bidders, by means of false and fraudulent misstatements and threats and intimidation, from pursuing their interest in becoming the next sponsor of the Grand Prix." *Id*. at para. 88. ProServ, on behalf of Volvo, is alleged to have participated in and facilitated Volvo's campaign by (1) falsely suggesting to Seiko and Dentsu that Volvo was still involved in Grand Prix sponsorship; (2) misrepresenting Volvo's renewal bid; and (3) stating that Dentsu, by seeking other potential Grand Prix sponsors, might cause problems between itself and ProServ. MIPTC alleges that the latter statement was sufficient to prevent further action by Dentsu on behalf of Seiko, because ProServ was involved with both Seiko and Dentsu in providing players and endorsements at Seiko's Tokyo Grand Prix event, and with Dentsu at another professional tennis event. *Id*. at paras. 88-90. MIPTC also alleges that ProServ, in its efforts to discourage Nabisco from seeking the Grand Prix sponsorship and on behalf of Volvo, falsely stated to Nabisco that the cost of acquiring the sponsorship would exceed $ 25 million. Nabisco subsequently informed MIPTC that it was not **[**19]** interested in **[*808]** the sponsorship at that price. Nonetheless, Nabisco's interest was later revived. *Id*. at paras. 91-93.

Accepting MIPTC's allegations as true, and assuming that a conspiracy between Volvo and ProServ to disseminate false information to Seiko, Dentsu, and Nabisco may be plausibly inferred from the fact that both of them allegedly did so, MIPTC does not allege sufficient facts to state a *Section 1* violation. Once again, Volvo and ProServ did not obtain the anticompetitive result allegedly sought, and MIPTC asserts neither an alternative anticompetitive effect inflicted on the relevant markets by the allegedly false statements, nor its own proximate injury from such a conspiracy.

MIPTC next accuses Volvo and ProServ of violating *Section 1* by pressuring and coercing individual MIPTC Council members to support Volvo in its Grand Prix sponsorship bid. *Id*. at para. 81. MIPTC alleges that Volvo combined with Dell to threaten Happer's job if MIPTC did not accept Volvo's sponsorship offer, thereby intimidating MIPTC into not opposing Volvo's sponsorship plans and projects. *Id*. at para. 117(20). MIPTC also alleges that Volvo has combined with ProServ, Dell, **[**20]** and Benton to threaten to prohibit MIPTC from conducting the Masters tournament at its established time and place, thereby coercing MIPTC into renewing Volvo's sponsorship bid. *Id*. at para. 117(21).

Accepting MIPTC's allegations as true, and assuming that a conspiracy between Volvo and ProServ to pressure and coerce individual MIPTC members to support Volvo's sponsorship renewal may plausibly be inferred from the facts pled, MIPTC does not allege sufficient facts to state a *Section 1* violation. Again, Volvo and ProServ did not obtain the anticompetitive result allegedly sought, and MIPTC alleges neither an alternative anticompetitive effect inflicted on the relevant markets by the allegedly false statements, nor its own proximate injury from such a conspiracy.

MIPTC next asserts that Volvo and ProServ started an unfounded whispering campaign against MIPTC. *Id*. at para. 81. Because it is not clear exactly what is meant by this allegation, I can neither determine whether the anticompetitive effects of a "whispering campaign" outweigh its procompetitive effects, nor how MIPTC may have been proximately injured by it, and what, if any, damages MIPTC may have sustained. This allegation **[**21]** is insufficient to state a cause of action under *Section 1*.

MIPTC next accuses Volvo and ProServ of launching a misleading and deceptive program called "Volvo Tennis" after the Grand Prix sponsorship was awarded to Nabisco. Volvo Tennis was allegedly staffed by the same people and located at the same offices as the "Volvo Grand Prix" program in place when Volvo was the overall Grand Prix sponsor. *Id*. at para. 104. The alleged purpose of such staffing and location was to undermine Nabisco and unfairly promote the Volvo name. *Id*. at para. 81. To support this claim, MIPTC points to the "Volvo Tennis" logo which was jointly designed and publicized by Volvo, ProServ, Dell, and Benton. MIPTC claims that this logo is confusingly similar to the "Volvo Grand Prix" logo which Volvo used during its overall Grand Prix sponsorship. *Id*. at para. 105. MIPTC makes out four allegations in support of the asserted conspiracy to mislead. First, Volvo and ProServ allegedly issued numerous mailings and placed numerous advertisements in national periodicals bearing the "Volvo Tennis" logo in order to defraud MIPTC, the Grand Prix events, and Nabisco, and to mislead and confuse the public. **[**22]** *Id*. at paras. 107, 117(27). Second, Volvo, with ProServ, Dell, and Benton, allegedly placed prominent and misleading banners and graphic displays at Grand Prix tournaments for exposure during television broadcasts. *Id*. at para. 117(28). Third, Volvo combined with ProServ, Dell, and Benton to use economic coercion against Grand Prix events to persuade them to change the names of their events to reflect the "Volvo Tennis" name. *Id*. at para. 117(34). Fourth, Volvo and ProServ allegedly used television broadcasts to further promote the "Volvo Tennis" program and to create the false impression that Volvo was still the overall Grand Prix sponsor. *Id*. at para. 111.

[*809] Assuming that Volvo and ProServ did combine to create and promote the "Volvo Tennis" program, MIPTC does not describe the anticompetitive effects of the program, does not describe the damage caused to MIPTC by the program, and does not even suggest how its anticompetitive effects might outweigh its procompetitive effects. Surely Volvo was required to change the name of its professional tennis sponsorship program from "Volvo Grand

Prix" when it was no longer the overall Grand Prix sponsor, but it was **[**23]** not required to cease all involvement in professional tennis while not involved in the overall Grand Prix sponsorship. MIPTC simply states that Volvo and ProServ have combined to economically coerce Grand Prix events to change the names of their events to reflect the "Volvo Tennis" name, but does not allege that the Grand Prix events referred to actually changed their names to reflect the "Volvo Tennis" name, does not suggest any resultant anticompetitive effect, and does not state how "Volvo Tennis" might have harmed MIPTC. These allegations are not sufficient to make out a *Section 1* violation.

Finally, MIPTC asserts that Volvo violated *Section 1* by combining with ProServ, Dell, and Benton to coerce MIPTC into giving Volvo a sanction for a Grand Prix event in Chicago by threatening to, and taking steps to, prevent MIPTC from staging the Masters tournament in its established time and place in the years after 1985. *Id*. at para. 117(32). Accepting MIPTC's allegations as true, and assuming that a conspiracy between Volvo and ProServ to coerce MIPTC into entering a sanctioning agreement with Volvo may plausibly be inferred from the fact that the agreement was made, MIPTC again fails **[**24]** to allege how it may have been harmed or what, if any, damages may have been sustained by it due to the sanctioning agreement. The allegations are not sufficient to state a *Section 1* violation.

Counterclaim 2 alleges that Volvo and ProServ combined and conspired to monopolize the players, events, and television markets in violation of *Section 2* of the Sherman Act. Counterclaims and Answer at paras. 123-26; *15 U.S.C. § 2*.

> ***HN7***[] The offense of monopolization under *section 2* of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

Southern Pacific Communications Co. v. American Telephone & Telegraph Co., 238 U.S. App. D.C. 309, 740 F.2d 980, 1000 (D.C. Cir. 1984) (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966))*. ***HN8***[] **[**25]** The monopoly power required by the first element is 'the power to control prices or exclude competition.'" *Southern Pacific, 740 F.2d at 1000* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956))*. Such

> "'exclusionary' conduct is conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power."

Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983) (quoting 3 P. Areeda and D. Turner, ***Antitrust Law*** para. 626 at 83 (1978)); *Southern Pacific, 740 F.2d at 999 n. 19*. "The issue is whether the defendant's conduct is reasonable in light of its business needs, or whether it unreasonably excludes competition." *Southern Pacific, 740 F.2d at 999 n. 19*. ***HN9***[] The second element requires some showing that the monopoly **[**26]** at issue is an unlawful one; lawful monopolies are not prohibited by *Section 2*. "The lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors." *Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986)*. A showing that the defendant intends to harm its competitive rivals is not sufficient to satisfy the second element of *Section 2*.

> **[*810]** "'Intent to harm' [rivals] without more offers too vague a standard in a world where executives may think no further than 'Let's get more business,' and long-term effects on consumers depend in large measure on competitors' responses." Neither is "intent to do more business," which amounts to the same thing, [a useful standard in antitrust]. Vigorous competitors intend to harm rivals, to do all the business if they can. To penalize this intent is to penalize competition."

Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338-39 (7th Cir. 1986) (quoting Barry Wright, 724 F.2d at 232).

MIPTC alleges that the scheme, discussed **[**27]** above, between Volvo and ProServ to dominate and control men's tennis constitutes a combination and conspiracy to monopolize the players, events, and television markets in violation of Section 2. However, nowhere in the counterclaims does MIPTC allege that Volvo and ProServ possess monopoly power in the players, events, or television markets; neither can that allegation be inferred from the facts alleged in the counterclaims. While the facts alleged in the counterclaims may describe attempts by Volvo and ProServ to exclude competition for the Grand Prix sponsorship, the fact that Volvo did not obtain the Grand Prix sponsorship it sought demonstrates that Volvo and ProServ do not possess that power. It cannot be said that the conduct alleged in the counterclaims "reasonably appear[ed] capable of making a significant contribution to creating or maintaining monopoly power." Barry Wright, 724 F.2d at 230.

Even assuming that Volvo and ProServ possess monopoly power in the relevant markets, MIPTC nowhere distinguishes their acquisition of that power from the historic development of men's professional tennis and the history of Volvo's involvement in it. As alleged in **[**28]** the counterclaims, Volvo and ProServ established their positions in the players, events, and television markets largely as consequences of the recent historical development of the sport of men's professional tennis. As alleged in the counterclaims, the fact that Volvo and ProServ acted with the intent to harm their rivals -- to "bury Nabisco," Counterclaims and Answer at para. 99, and to make the public "think everything in tennis is Volvo," *id*. at para. 100 -- is not sufficient to make out a claim of an unlawful monopoly. Ball Memorial, 784 F.2d at 1338-39; Barry Wright, 724 F.2d at 232. The allegations in the counterclaims are insufficient to state a Section 2 violation against Volvo.

Counterclaim 3 alleges that Volvo made false and misleading written and broadcast statements which constitute false descriptions and representations and created a false designation of origin in violation of the Lanham Act. Counterclaims and Answer at paras. 127-29; 15 U.S.C. § 1125(a). [5]

[29]** Section 1125(a) protects both registered and unregistered trademarks against false designation of origin and false description or representation. Centaur Communications, Ltd. v. A/S/M Communications, Inc., 830 F.2d 1217, 1220 (2d Cir. 1987); Thompson Medical Co. v. Pfizer Inc., 753 F.2d 208, 212 (2d Cir. 1985). Analysis of Section 1125(a) protection requires two steps: a preliminary determination whether the mark at issue is entitled to protection and, if so, what level of protection; and a determination whether confusion is likely to occur between the marks at issue. Centaur, 830 F.2d at 1220; Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 871 (2d Cir (1986); Thompson, 753 F.2d at 212-13.

HN12[] There are four classes of protected trademarks. "Arrayed in an ascending order which roughly reflects their eligibility to **[*811]** trademark status and the degree of protection accorded, these classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful." **[**30]** Lois, 799 F.2d at 871 (quoting Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976)).

> Generic terms -- "the common descriptive name of an article or substance" [or service] -- are ineligible for any trademark protection. Descriptive marks, those "describ[ing] the qualities, ingredients, effects or other features of the product [or service] naturally and in ordinary language" are protectible only where secondary meaning

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[5] The Lanham Act provides in relevant part that:

> ***HN10***[] any person who shall . . . use in connection with any goods or services, . . . a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, 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.

15 U.S.C. § 1125(a) (1982).

HN11[] -

> can be established. Suggestive terms require "imagination, thought and perception to reach a conclusion as to the nature of goods", and are eligible for protection without proof of secondary meaning. Finally, arbitrary or fanciful marks "enjoy all the rights accorded to suggestive terms as marks - without the need of debating whether the term is 'merely descriptive' and with ease of establishing infringement."

Thompson, 753 F.2d at 212-13 (quoting 15 U.S.C. § 1064(c) (1982 & Supp. IV 1986), 3 R. Callmann, *The Law of Unfair Competition, Trademarks and Monopolies*, § 18.05 at 17 (4th ed. 1983), Stix Products, Inc. v. United Merchants & Manufacturers, Inc., 295 F. Supp. 479, 488 (S.D.N.Y. 1968), **[**31]** Abercrombie, 537 F.2d at 11, respectively) (footnotes and citations omitted).

HN13[] After a mark's eligibility for protection has been determined, a court must address the ultimate inquiry: "whether there exists a 'likelihood that an appreciable number of ordinarily prudent purchasers [will] be misled, or indeed simply confused, as to the source of the goods [or services] in question.'" Thompson, 753 F.2d at 213 (quoting Mushroom Makers, Inc. v. R.G. Barry Corp., 580 F.2d 44, 47 (2d Cir. 1978), *cert. denied*, *439 U.S. 1116, 59 L. Ed. 2d 75, 99 S. Ct. 1022, 200 U.S.P.Q. (BNA) 832 (1979))*. ***HN14***[] A court determines whether a likelihood of confusion exists by evaluating a number of factors:

1. The strength of the mark at issue;
2. The degree of similarity between the marks;
3. The proximity of the products or services at issue;
4. The likelihood that the senior user will bridge the gap;
5. Actual confusion; **[**32]**
6. The junior user's good or bad faith in adopting the mark;
7. The quality of the respective goods or services;
8. The sophistication of the relevant consumers;
9. Balancing the conflicting interests of the parties involved;
10. The nature of the senior user's priority;
11. Any delay by the senior user in asserting its claim;
12. The harm to the junior user compared to the benefit to the senior user that would result from the requested injunction.

Thompson, 753 F.2d at 213-24.

MIPTC alleges that Volvo's use of the phrase "Volvo Tennis," the "Volvo Tennis" logo, the phrase "linking the world's great tennis events through television, and numerous false and misleading written and broadcast statements about the Volvo Tennis program and the Grand Prix constitute violations of the Lanham Act. MIPTC asserts that these statements, because they incorrectly represented that Volvo continued to be the overall Grand Prix sponsor after January 1985, that Volvo sponsored a "circuit within a circuit," and that "Volvo Tennis" was somehow related to the Grand Prix, created a likelihood of consumer confusion. Counterclaims and Answer at **[**33]** para. 128.

MIPTC alleges that the "Volvo Tennis" logo is confusingly similar to the "Volvo Grand Prix" logo used by Volvo while it was the overall Grand Prix sponsor. MIPTC further asserts that Volvo's use of the "Volvo Tennis" logo at a time when Volvo was still the overall Grand Prix sponsor was wrongful, misleading, and intended to create the impression the "Volvo Tennis" was connected with the Grand Prix. **[*812]** Counterclaims and Answer at para. 105. Examples of the alleged improper use include advertisements in the January 8, 1985 issue of *New York Magazine*, in the 1985 Masters' Tournament program, *id*. at paras. 107, 117(26) and in the names of the individual Grand Prix events it sponsored. *Id*. at para. 110.

MIPTC further alleges that during the television broadcasts of the Memphis finals, a Grand Prix event sponsored by Volvo, promotional announcements stated that the "program [was] made possible by grants from Volvo, sponsors of Volvo Tennis, linking the world's great tennis events through television, ..." *Id*. at para. 111. MIPTC claims that this phrase was "consciously patterned after the phrase approved by the MIPTC to describe the Grand Prix: **[**34]** 'linking the world's official tennis tournaments,'" *id*., and that its use intentionally caused confusion regarding whether Volvo was still the overall Grand Prix sponsor and whether Volvo sponsored a "circuit within a circuit." *Id*. at paras. 111, 117(31). MIPTC cites the following to support its claim that these tactics created confusion:

1. The February 7, 1985 *Tennis Week* described confusion caused by the use of the "Volvo Tennis" logo used at the beginning of the telecast of a Philadelphia Grand Prix event, and by the fact that Dell was an announcer on the broadcast.

2. Both the April 3, 1985 New York *Daily News* and *The New York Times* of April 8, 1985 referred to the "Volvo Grand Prix," approximately three months after Nabisco became the overall Grand Prix sponsor. *Id*. at para. 112.

Because the "Volvo Tennis" mark involves the corporate name "Volvo," it is clearly not a generic mark. Rather, "Volvo" is arbitrary or fanciful because it is based on an unrelated corporate proper name. "Tennis" is a generic term describing in simple language the product represented by "Volvo Tennis." Therefore, "Volvo Tennis" appears to be a descriptive mark, falling somewhere **[**35]** between the generic and arbitrary ends of the trademark spectrum, and entitled to some middle level of protection. It describes the features of the product it represents in ordinary language: tennis events sponsored by a corporate entity named Volvo. ***HN15***[] The mark is therefore entitled to trademark protection only if secondary meaning of the mark can be established.

> ***HN16***[]
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> A mark acquires secondary meaning when "it [is] shown that the *primary* significance of the term in the minds of the consuming public is not the product but the producer." Thus, the crux of the doctrine of secondary meaning "is that the mark comes to identify not only the goods but the source of those goods," even though the relevant consuming public might not know the name of the producer. . . . Someone seeking to establish secondary meaning must show that the purchasing public associates goods designated by a particular mark with but a single . . . source.
>
> secondary meaning must show that the purchasing public associates **[**36]** goods designated by a particular mark with but a single . . . source.
> The focus of secondary meaning therefore is the consuming public. Hence, so must be the inquiry into whether the mark owner has a protectible interest. Although the mark owner strives to create a secondary meaning for its product, it is the consuming public which, in effect, determines whether that effort has succeeded.

Centaur, 830 F.2d at 1221 (quoting *20th* *Century Wear, Inc. v. Sanmark-Stardust Inc., 815 F.2d 8, 10 (2d Cir. 1987)* (quoting *Ralston Purina Co. v. Thomas J. Lipton, Inc., 341 F. Supp. 129, 133 (S.D.N.Y. 1972))*) (emphasis in original) (citations omitted). MIPTC makes absolutely no allegations concerning whether secondary meaning for the "Volvo Tennis" mark has been established in the mind of the consuming public.

However, assuming that secondary meaning for the "Volvo Tennis" mark has been alleged, ***HN17***[] a cause of action for unfair competition under the Lanham Act "is made out by showing the use of one's trademark by another in a way that is **[*813]** **[**37]** likely to confuse consumers as to the source of the product." *Lois Sportswear, 799 F.2d at 871*. The likelihood that an appreciable number of consumers will be confused as to the source of the goods or services at issue is determined by evaluating a number of factors, listed *supra at page 811*. However, other than conclusory allegations that confusion is likely to occur and three specific occasions of actual confusion, MIPTC makes absolutely no allegations regarding those factors. The examples of confusion alleged are irrelevant because they do not involve consumers of the goods and services at issue, but rather are articles published in a magazine and two newspapers. These allegations are insufficient to make out a claim of unfair competition under the Lanham Act.

The phrases "linking the world's official tennis tournaments" and "linking the world's great tennis events through television" are similar, but nowhere are they alleged to be marks of any specific product or service. The fact that

MIPTC approved the former phrase to introduce television broadcasts of its Grand Prix tennis events does not entitle it to trademark protection. It is not a trademark, and **[**38]** the Lanham Act does not protect it.

Counterclaim 4 alleges that the same facts asserted *supra* in support of counterclaim 3 state a claim that Volvo created a likelihood of confusion by diluting the distinctive quality of the Grand Prix mark in violation of the New York state antidilution statute. Counterclaims and Answer at paras. 130-32; *N.Y. Gen. Bus. Law § 368-d* (McKinney 1984). [6]

> ***HN18***[] Dilution is characterized as a "whittling down" of the identity or reputation of a tradename or mark. . . . "Dilution . . . 'threatens two separable but related components of advertising value. Junior uses may blur a mark's product identification or they may tarnish the affirmative associations a mark has come to convey.'"

Sally Gee, Inc. v. Myra Hogan, Inc., 699 F.2d 621, 625 (2d Cir. 1983) (quoting 3A R. Callman, Unfair Competition, Trademarks, and Monopolies § 21.11 (4th ed. 1983) (quoting Note, *Dilution: Trademark Infringement or Will-O'-The-Wisp*, 77 Harv. L. Rev. 520, 531 (1964))) (citations omitted). "The interest protected by *§ 368-d* is **[**39]** not simply commercial goodwill, but the selling power that a distinctive mark or name with favorable associations has engendered for a product in the mind of the consuming public." *Sally Gee, 699 F.2d at 624-25*.

In order to state a claim under *§ 368-d*, "a plaintiff must first have a trademark or name which is 'truly of *distinctive* quality' or one which has 'acquired a secondary meaning in the mind of the public, **[**40]** ' and must prove a likelihood of dilution." *Miss Universe, Ind. v. Patricelli, 753 F.2d 235, 238 (2d Cir. 1985)* (quoting *Allied Maintenance Corp. v. Allied Mechanical Trades, Inc., 42 N.Y.2d 538, 546, 399 N.Y.S.2d 628, 633, 369 N.E.2d 1162, 1166 (1977))* (citation omitted) (emphasis in original).

MIPTC does not state such a claim for any of the marks at issue. The phrase "linking the world's official tennis tournaments," as discussed above, is not a trademark and therefore is not protected. Neither distinctiveness, strength, or secondary meaning for the "Nabisco Grand Prix" mark [7] as opposed to "Volvo Grand Prix" mark, nor dilution, weakening, or tarnishing of the value or quality of that mark have been alleged by MIPTC. Moreover, these allegations cannot be deduced from the facts alleged in the counterclaims. **[*814]** Therefore, counterclaim 4 fails to state a cause of action under *§ 368-d*.

[41]** Counterclaim 5 alleges that the same facts asserted *supra* in support of counterclaim 3 state a claim that Volvo's false and misleading written and broadcast statements regarding Volvo's Grand Prix sponsorship created a likelihood of confusion and misappropriated rights belonging to MIPTC, and therefore constitute common law unfair competition. Counterclaims and Answer at paras. 133-35.

HN20[] The tort of unfair competition is "generally described as a misappropriation of the skill, expenditures, and labor of another. 'One cannot sell his product by misappropriating the good will of another through misleading the public into thinking that it is "sponsored" by or derived from something else.'" *American Footwear Corp. v. Gen. Footwear Co., Ltd., 609 F.2d 655, 662 (2d Cir. 1979)*, *cert. denied*, *445 U.S. 951, 63 L. Ed. 2d 787, 100 S. Ct. 1601, 205 U.S.P.Q. (BNA) 680 (1980)* (quoting *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Group, Inc., 443 F. Supp. 291, 305 (S.D.N.Y. 1977))* (citations omitted). An element of bad faith is essential **[**42]** to this tort. *Saratoga Vichy Spring Co. v. Lehman, 625 F.2d 1037, 1044 (2d Cir 1980)*. In order to make out a cause of action

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[6] The New York antidilution statute provides that:

> ***HN19***[] likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

N.Y. Gen. Bus. Law § 368-d (McKinney 1984).

[7] It would appear that MIPTC is not claiming any rights to the mark "Grand Prix" since clearly that would be unenforceable.

for unfair competition, a complaint must set forth: "(1) the acts or omissions by defendants that proximately caused the misappropriation and (2) the property or benefit misappropriated -- mere allegations that [plaintiff has been harmed] will not suffice." *Bunch v. Artec Int'l Corp., 559 F. Supp. 961, 972 (S.D.N.Y. 1983)*.

The facts alleged *supra* in support of counterclaim 3 sufficiently set forth the deliberate acts by Volvo that allegedly caused the misappropriation: written and broadcast statements, statements and advertisements in publications, and the naming of Grand Prix events. Those facts also sufficiently set forth the thing allegedly misappropriated, the overall Grand Prix sponsorship, and at least *allege* that MIPTC has been harmed. Therefore, counterclaim 5 may adequately set forth a cause of action under common law unfair competition. As such, however, it can be sustained in this court, absent pendent jurisdiction, only under diversity jurisdiction.

Counterclaim 7 alleges that Volvo breached its overall **[**43]** sponsorship agreement with MIPTC, dated September 25, 1979, by failing to pay amounts owed under that agreement. Counterclaims and Answer at paras. 139-41. Assuming that such an agreement exists, that it is enforceable, and that Volvo has failed to pay amounts owed under it, counterclaim 7 may sufficiently state a cause of action for breach of contract. Again, however, it can be sustained in this court, absent pendent jurisdiction, only under diversity jurisdiction,

Counterclaim 8 alleges that Volvo breached its sanctioning agreement with MIPTC by failing to identify Nabisco prominently, or in some instances at all, as the overall Grand Prix sponsor on promotional and advertising materials connected with a sanctioned event, and by sponsoring a "circuit within a circuit" of Grand Prix events. Counterclaims and Answer at paras. 142-44. Assuming that such an agreement exists, that it is enforceable, that prominent identification of the overall sponsor is required by the agreement, that sponsoring any sort of "circuit within a circuit" is prohibited by the agreement, and that Volvo violated those provisions, counterclaim 8 may sufficiently make out a cause of action for breach of contract.

[44]** Counterclaim 9 alleges that the same breaches alleged in counterclaim 8 constitute breach of the overall Grand Prix sponsorship agreement between Volvo and MIPTC. Counterclaims and Answer at paras. 145-47. Making the same assumptions as those required by counterclaim 8, counterclaim 9 may also adequately state a cause of action for breach of contract.

Counterclaim 10 alleges that Volvo breached an agreement with MIPTC that it would provide full financial disclosure concerning the Volvo Masters tournament during those years that Volvo was the overall Grand Prix sponsor and sponsor of the Masters tournaments. Counterclaims and Answer at paras. 148-50. Assuming that such an agreement existed, that it is enforceable, that it required such financial disclosure, **[*815]** and that Volvo has not provided such disclosure, Counterclaim 10 may make out a cause of action for breach of contract.

Counterclaim 11 alleges that Volvo breached its January 1985 agreement with MIPTC to cooperate with MIPTC's reasonable promotional activities. Counterclaims and Answer at paras. 151-53. Assuming that such an agreement exists, that it is enforceable, that it requires such cooperation, that Volvo **[**45]** has failed to so cooperate, and that MIPTC has been damaged thereby, counterclaim 11 may sufficiently state a cause of action for breach of contract.

MIPTC has not made a showing of diversity to support federal diversity jurisdiction over counterclaim 5, for common law unfair competition, and counterclaims 7 through 11 for breach of contract. Furthermore, MIPTC has neither pled that "the matter in controversy exceeds the sum or value of $ 10,000," as required by *28 U.S.C. § 1332(a) (1982)*, nor pled any specific amount of damages suffered. Therefore, counterclaims 5 and 7 through 11 are dismissed with leave to replead. While I will permit the parties to replead, I have serious doubts that sufficient damages can be alleged or proven by this collection of counterclaiming defendants. Any damages suffered under most of the counterclaims would have been incurred solely by Nabisco. It appears, however, that counterclaims 7 and 10 for money damages and for an accounting against Volvo, ProServ, Dell, and Benton may include the requisite damage to these counterclaiming defendants. However, I cannot rule on these matters until such time as the counterclaiming defendants **[**46]** have had the opportunity to replead.

Counterclaim 13 alleges that Volvo has made false statements to the press which have defamed Happer, have disparaged him in his profession, and have exposed him to public ridicule and contempt within the tennis and legal communities. Counterclaims and Answer at paras. 157-64.

HN21[] In order to state a cause of action for defamation, a plaintiff must plead that defendant "(1) negligently or wilfully uttered a (2) defamatory statement (3) of or concerning the plaintiff (4) to a third person (5) which resulted in damage to plaintiff's reputation." *Carto v. Buckley, 649 F. Supp. 502, 505 n.1 (S.D.N.Y. 1986)*. In defamation actions, "the false and defamatory matter should be pleaded in *haec verba." Foltz v. Moore McCormack Lines, Inc., 189 F.2d 537, 539* (2d Cir.), *cert. denied*, *342 U.S. 871, 96 L. Ed. 655, 72 S. Ct. 106 (1951)*; *Herbert v. Lando, 603 F. Supp. 983, 990 (S.D.N.Y. 1985)*, *aff'd in relevant part, rev'd in part*, *781 F.2d 298 (2d Cir. 1986)*. The Court in *Foltz* **[**47]** held that paraphrasing the allegedly defamatory statements would be insufficient to state a cause of action for defamation. *Foltz, 189 F.2d at 539*.

Nowhere in MIPTC's papers are the allegedly defamatory statements set forth. Like the plaintiff in *Foltz*, MIPTC paraphrased the allegedly false statements in its pleadings. Counterclaims and Answer at paras. 109, 117(38), 158-61. This counterclaim is insufficient on its face.

Counterclaim 14 alleges that Volvo has defamed MIPTC by making false statements to the press and others accusing it of greed, dishonesty, bad faith, and fraud. *Id*. at paras. 165-74. Again, the allegedly defamatory statements are not set forth in any of MIPTC's papers. MIPTC paraphrased the allegedly false statements in its pleadings. *Id*. at paras. 82, 83, 86, 89, 109, 166-71. Again, this counterclaim is insufficient to make out a cause of action for defamation.

Volvo's motion to dismiss the counterclaims against it is granted in part and denied in part. Counterclaims 1 through 4, 13, and 14 against it are dismissed. Counterclaims 5 and 7 through 11 against it are dismissed with leave to replead granted. Because MIPTC nowhere asserts **[**48]** a cause of action for fraud against Volvo, Volvo's motion to strike the references to fraud made in paragraphs 81 through 83, 86, 88, 89, and 102 of the Counterclaims and Answer is hereby granted. Because counterclaims 1 and 2 are dismissed for failure to state a cause of action, Volvo's motion to dismiss counterclaims 1 and 2 for lack of subject matter jurisdiction is denied as moot.

[*816] 2. *ProServ, Dell, and Benton's Motion to Dismiss the Counterclaims*

ProServ, Dell, and Benton move, pursuant to *Fed. R. Civ. P. 12(b)(6)*, to dismiss all the counterclaims alleged by MIPTC and Happer against them for failure to state a claim upon which relief can be granted. ProServ, Dell, and Benton also move, pursuant to Fed. R. Civ. P. l2(f), to strike the newspaper and magazine quotations recited in paragraph 57 of the Counterclaims and Answer as immaterial, impertinent, scandalous, and impossible to properly respond to.

Counterclaim 1 alleges that ProServ, including Dell and Benton as its agents, combined and conspired with Volvo to dominate and control men's professional tennis in violation of *Section 1* of the Sherman Act. Counterclaims and Answer at paras. 118-22; *15 U.S.C. § 1*. **[**49]** As discussed *supra*, slip op. at pages 9 through 19, and for the reasons stated there, these allegations are insufficient to state a *Section 1* violation.

Counterclaim 1 also accuses ProServ and IMG of unlawfully and improperly using their market power over the world's top-ranked tennis players in order to "dominate, control or exert significant influence over a majority of" all men's professional tennis events worldwide, in violation of *Section 1*. Counterclaims and Answer at para. 30. In support of this claim, MIPTC alleges that ProServ and IMG perform one or more of the key functions involved in producing a majority of the major Grand Prix events (owner, manager, merchandising agent, sponsorship agent, television agent, player representative) and that by doing so, ProServ and IMG exercise inordinate power over those events. *Id*. at paras. 31-35. MIPTC also alleges that for the special events which ProServ and IMG own or control outright, they exercise absolute power over the event, including the ability to exclude players whom they do not represent. *Id*. at para. 36. While MIPTC asserts that ProServ and IMG exercise power over men's tennis events, it nowhere asserts that **[**50]** ProServ and IMG combined or conspired to do so. Similarly, no allegation is made that, or how, this power (assuming it exists as alleged in the counterclaims) unreasonably restrains trade. Finally, MIPTC does not allege how it may have been harmed or what, if any, damages may have been sustained by it due to this power. Because none of the three required elements of a cause of action under *Section 1* are alleged, this counterclaim must be dismissed.

MIPTC accuses ProServ and IMG of leveraging their control over players into control over tournaments, and ultimately into restraint of trade in the players, events, and television markets. *Id*. at paras. 42-43. In support of this claim, MIPTC alleges that "ProServ and IMG exert extensive power over [professional tennis] players from 'the cradle to the grave.'" *Id*. at para. 44. Specifically, ProServ and IMG (1) offer financial guarantees and wild card spots in order to induce promising young players to sign agency contracts with them, and coerce young players by threatening that they will not get any wild card spots if they do not sign agency contracts with them, *id*. at paras. 45, 117 (1)-(3); (2) extend loans and financial **[**51]** benefits to tennis coaches to enlist their support in signing young players to agency contracts, without disclosing such arrangements, *id*. at paras. 45, 117(4); (3) own the only existing circuits of events exclusively for players aged 35 to 45 and over 45 years of age, *id*. at paras. 47-48, 117(7); (4) pressure and pay under-the-table guarantees to their players to have them participate in tournaments in which ProServ and IMG have a financial interest, *id*., at paras. 5, 6; (5) coerce tournament organizers to give them a role or a financial interest in tournaments by threatening that without such an agreement, their players will not appear in the tournaments, or by threatening to run a special event at the same time as their tournaments, *id*. at paras. 50, 117 (8)-(9); (6) combine to recognize and promote each of their spheres of influence by refraining from running events opposite one another and exchanging their players' services for one another's events, *id*. at paras. 50, 117(11); (7) control the schedules at their events to favor their players, and control the advertising of their events to favor their players, to the detriment of higher-ranked **[*817]** players **[**52]** whom they do not represent, *id*. at para. 117 (14)-(15); and (8) have leveraged their control of players into control over the television broadcast rights to a majority of Grand Prix events by threatening tournament owners that their players would not play in a specific tournament unless ProServ or IMG was granted the television broadcast rights to the tournament, *id*. at para. 54. Although these assertions indicate that ProServ and IMG exercise power over professional men's tennis players, and therefore exert some influence on men's professional tennis events, it is nowhere asserted that ProServ and IMG combined or conspired to do so. The only allegation of combined action between ProServ and IMG is that they cooperate with each other in scheduling certain events and in making some tennis players available to play in the other's events. Even assuming that this assertion sufficiently alleges a combination or conspiracy between ProServ and IMG, no allegation is made that or how this conspiracy unreasonably restrains trade, or how MIPTC may have been harmed and what damages it has sustained because of it. Again, these allegations are insufficient to make out a cause of action **[**53]** under *Section 1*.

Counterclaim 2 alleges that ProServ, including Dell and Benton as its agents, combined and conspired with Volvo to monopolize the players, events, and television markets in violation of *Section 2* of the Sherman Act. Counterclaims and Answer at paras. 123-26; *15 U.S.C. § 2*. As discussed *supra*, slip op. at pages 19 through 22, and for the reasons stated there, these allegations are insufficient to state a *Section 2* violation.

Counterclaim 2 also alleges that the same scheme between ProServ and IMG to dominate and control men's tennis discussed above constitutes a combination and conspiracy to monopolize the players, events, and television markets in violation of *Section 2*. However, nowhere in the counterclaims does MIPTC allege that ProServ and IMG possess monopoly power over the players, events, or television markets; neither can that allegation be inferred from the facts alleged in the counterclaims. While the facts in the counterclaims may allege that ProServ and IMG exert some influence on these markets, they do not possess the power to control prices or exclude competition: a new player representation firm was formed during the period **[**54]** when Volvo and ProServ were actively pursuing renewal of, and MIPTC was soliciting bids for, the overall Grand Prix sponsorship. Counterclaims and Answer at para. 76. Moreover, even assuming that ProServ and IMG possess monopoly power in the relevant markets, MIPTC nowhere distinguishes their acquisition of that power from the fact that, as alleged in the counterclaims, ProServ and IMG established their positions in the players, events, and television markets largely as consequences of the recent historical development of the sport of men's professional tennis. The allegations in the counterclaims are therefore insufficient to state a *Section 2* violation.

Counterclaim 3 alleges that the same facts alleged against Volvo also state a cause of action against ProServ, Dell, and Benton under the Lanham Act. Counterclaims and Answer at paras. 127-29; *15 U.S.C. § 1125(a) (1982)*. For the same reasons as those discussed *supra* slip op. at pages 22-29, the allegations asserted by MIPTC are insufficient to state a cause of action against ProServ, Dell, and Benton for unfair competition under the Lanham Act.

Counterclaim 4 alleges that the same facts alleged against **[**55]** Volvo also state a cause of action against ProServ, Dell, and Benton under the New York antidilution statute. Counterclaims and Answer at paras. 130-32; *N.Y. Gen. Bus. Law § 368-d*. For the same reasons as those discussed *supra* slip op. at pages 29-30, the allegations asserted by MIPTC are insufficient to state a cause of action against ProServ, Dell, and Benton under *§ 368-d*.

Counterclaim 5 alleges that the same facts asserted against Volvo also state a cause of action against ProServ, Dell, and Benton for common law unfair competition. Counterclaims and Answer at paras. 133-35. For the same reasons as those discussed **[*818]** *supra* slip op. at pages 31-32, the allegations asserted by MIPTC may adequately set forth a cause of action against ProServ, Dell, and Benton under common law unfair competition. Absent pendent jurisdiction, however, it may be sustained in this court only under diversity jurisdiction.

Counterclaim 6 alleges that ProServ, Dell, and Benton participate in the affairs of men's professional tennis through a pattern of racketeering activity, in violation of *18 U.S.C. § 1964(c) (1982)* ("RICO"), [8] including acts of mail fraud, **[**56]** in violation of *18 U.S.C. § 1341 (1982)*, and wire fraud and television fraud, in violation of *18 U.S.C. § 1343 (1982)*. Counterclaims and Answer at paras. 136-38.

[57]** In order to state a cause of action under *Section 1964(c)*, a plaintiff must allege: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. . . . In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the

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8 The civil RICO statute provides, in pertinent part, that:

> ***HN22***[] any person injured in his business or property by reason of a violation of *section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (1982).

Section 1962 provides as follows:

> ***HN23***[] (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity . . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962 (1982).

HN24[] -

violation." *Sedima, S.P.R.L. v. Imrex, Co., Inc., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)* (footnote omitted). A pattern of racketeering activity consists of at least two specified criminal acts which have sufficient continuity and relationship to constitute a pattern. *See* *Sedima, 473 U.S. at 496 n. 14*; *18 U.S.C. § 1961(1)*, *(5) (1982 & Supp. IV 1986)*.

In the case at bar, assuming that MIPTC has made out all the requisite elements of a civil RICO cause of action, the predicate racketeering acts alleged consist of "mail fraud (in violation of *18 U.S.C. § 1341*) and wire and television fraud (in violation of *18 U.S.C. § 1343*), some of which have been described above in paragraphs 1-117." Counterclaims and Answer at **[**58]** para. 137. ***HN25***[] *Fed. R. Civ. P. 9(b)* requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Nowhere in the pleadings does MIPTC particularize the averments of fraud against ProServ, Dell, and Benton. Moreover, according to the language of the sixth counterclaim, only some of the averments of fraud have been described in the allegations supporting the counterclaims. This is insufficient to state a civil RICO cause of action.

Counterclaim 10 alleges that ProServ, Dell, and Benton breached an agreement with MIPTC that they would provide full financial disclosure concerning the Volvo Masters tournament during those years that Volvo was the overall Grand Prix sponsor and sponsor of the Masters tournaments. Counterclaims and Answer at paras. 148-50. Assuming that such an agreement existed, that it is enforceable, that it required such financial disclosure, and that ProServ, Dell, and Benton have not provided such disclosure, counterclaim 10 may make out a cause of action for breach of contract. Again, absent pendent **[**59]** jurisdiction, **[*819]** it may be sustained in this court only under diversity jurisdiction.

Counterclaim 11 alleges that ProServ breached its January 1985 agreement with MIPTC to cooperate with MIPTC's reasonable promotional activities. Counterclaims and Answer at paras. 151-53. Assuming that such an agreement exists, that it is enforceable, that it requires such cooperation, and that ProServ has failed to so cooperate, counterclaim 11 may sufficiently state a cause of action for breach of contract.

Counterclaim 12 alleges that ProServ breached its sanctioning agreement with MIPTC by failing to identify Nabisco prominently, or in some instances at all, as the overall Grand Prix sponsor on promotional and advertising materials connected with the sanctioned event, and by sponsoring a "circuit within a circuit" of Grand Prix events. Counterclaims and Answer at paras. 154-56. Assuming that such an agreement exists, that it is enforceable, that prominent identification of the overall sponsor is required by the agreement, that sponsoring any sort of "circuit within a circuit" is prohibited by the agreement, and that ProServ violated those provisions, counterclaim 12 may sufficiently **[**60]** make out a cause of action for breach of contract.

MIPTC has not made a showing of diversity to support federal diversity jurisdiction over counterclaim 5, for common law unfair competition, and counterclaims 10 through 12 for breach of contract. Furthermore, MIPTC has neither pled that ***HN26***[] "the matter in controversy exceeds the sum or value of $ 10,000," as required by *28 U.S.C. § 1332(a) (1982)*, nor pled any specific amount of damages suffered. Therefore, counterclaims 5 and 10 through 12 are dismissed with leave to replead. As I stated previously, I will permit the parties to replead despite serious doubts that sufficient damages can be alleged or proven by this collection of counterclaiming defendants against the other parties to this lawsuit.

Counterclaim 13 alleges that the same facts as those alleged against Volvo state a cause of action against ProServ, Dell, and Benton for defamation of Happer. Counterclaims and Answer at paras. 157-64. For the reasons discussed *supra* slip op. at pages 35-36, those allegations are also insufficient to make out a cause **[**61]** of action for defamation against ProServ, Dell, and Benton.

Counterclaim 14 alleges that the same facts as those alleged against Volvo state a cause of action against ProServ, Dell, and Benton for defamation of MIPTC. Counterclaims and Answer at paras. 165-74. For the reasons discussed *supra at page 814*, those allegations are also insufficient to make out a case of defamation against ProServ, Dell, and Benton.

ProServ, Dell, and Benton's motion to dismiss the counterclaims against them is granted in part and denied in part. Counterclaims 1 through 4, 6, 13, and 14 against them are dismissed. Counterclaims 5 and 10 through 12 are dismissed with leave to replead granted. The motion, pursuant to *Fed. R. Civ. P. 12(f)*, to strike all of the press quotations from the Counterclaims and Answer is denied.

3. *IMG and McCormack's Motion to Dismiss the Counterclaims*

IMG and McCormack move, pursuant to *Fed. R. Civ. P. 12(b)(6)*, to dismiss all of the counterclaims alleged by MIPTC and Happer against them for failure to state a claim upon which relief can be granted.

Counterclaim 1 alleges that IMG, including McCormack as its agent, combined and conspired with ProServ to dominate **[**62]** and control men's professional tennis in violation of *Section 1* of the Sherman Act. Counterclaims and Answer at paras. 118-22; *15 U.S.C. § 1*. As discussed *supra*, slip op. at pages 37-40, and for the reasons stated there, these allegations are insufficient to state a *Section 1* violation.

Counterclaim 2 alleges that IMG, including McCormack as its agent, combined and conspired with ProServ to monopolize the players, events, and television markets in violation of *Section 2* of the Sherman Act. Counterclaims and Answer at paras. 123-26; *15 U.S.C. § 2*. As discussed *supra*, slip op. at pages 40-41, and for the reasons stated there, **[*820]** these allegations are insufficient to state a *Section 2* violation.

Counterclaim 13 alleges that the same facts as those alleged against Volvo also state a cause of action against McCormack for defamation of Happer. Counterclaims and Answer at paras. 157-64. For the reasons discussed *supra* slip op. at pages 35-36, these allegations are insufficient to make out a case of defamation against McCormack.

Accordingly, IMG and McCormack's motion to dismiss counterclaims 1, 2, and 13 against them is **[**63]** granted.

CONCLUSION

In sum, counterclaims 1 through 4, 6, 13, and 14 are dismissed. Counterclaims 5 and 7 through 12 are dismissed with leave to replead granted.

SO ORDERED.

Telectronics Proprietary, Ltd. v. Medtronic, Inc.

United States District Court for the Southern District of New York

May 19, 1988, Decided ; May 20, 1988, Filed

No. 83 CIV. 8568 (PKL)

Reporter

687 F. Supp. 832 *; 1988 U.S. Dist. LEXIS 4836 **; 7 U.S.P.Q.2D (BNA) 1777 ***; 1988-1 Trade Cas. (CCH) P68,082

Telectronics Proprietary, Ltd., Plaintiff, v. Medtronic, Inc., Defendant, v. Telectronics, Inc., Telectronics U.S.A., Inc. and Telectronics Pty. Ltd., Additional Defendants on Counterclaim

Core Terms

patent, counterclaim, affirmative defense, monopolize, summary judgment, antitrust claim, Sherman Act, summary judgment motion, conspiracy, estoppel, license, pleadings, anti trust law, conspired, courts, laches, motion to dismiss, concerted action, district court, monopoly power, unclean hands, res judicata, indispensable, acquisition, allegations, antitrust, sanctions, parties, statute of limitations, restraint of trade

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

The function of a motion to dismiss under *Fed. R. Civ. P. 12(b) (6)* is to test the adequacy of the statement of a claim for relief made in any pleading. In considering a *Rule 12(b) (6)* motion, the court should confine its inquiry to the pleadings. A claim for relief may not be amended by the briefs in opposition to a motion to dismiss.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Pleadings, Counterclaims**

A *Fed. R. Civ. P. 12(b) (6)* motion is available to any party wishing to challenge the formal sufficiency of a claim whether it is made in a complaint, counterclaim, cross-claim, or third party claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN3[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 8(a) supplements *Fed. R. Civ. P. 12(b) (6)* by setting forth the requirements of a claim for relief: (1) a brief statement of the basis of the court's jurisdiction; (2) "a short and plain statement of the claim showing that the pleader is entitled to relief;" and (3) a demand for judgment. Under the Federal Rules, 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. Nonetheless, the pleading must set forth enough information to suggest that relief would be based on some recognized legal theory. The District Court has no obligation to create, unaided by the plaintiff, new legal theories to support a complaint.

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN4[] **Pleadings, Complaints**

In practice a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.

Antitrust & Trade Law > Sherman Act > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > Forfeitures & Penalties > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1 (1982)*, makes every contract or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations illegal. The gravamen of a charge under *§ 1* is conduct in restraint of trade; no fundamental alteration of market structure is necessary. There are several elements to a *section 1* claim. There must be (1) concerted action, (2) by two or more persons, and (3) the concerted action must unreasonably restrain interstate or foreign trade or commerce.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

To state a claim under the Sherman Act, *15 U.S.C.S. § 1*, a claimant must allege injury to competition in general.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN7[] **Regulated Practices, Market Definition**

The antitrust laws were enacted for the protection of competition, not competitors.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

Section 2 of the Sherman Act is aimed at the acquisition or retention of effective market control. It is designed to prevent a pernicious market structure in which the concentration of power saps the salubrious influence of competition.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN9[] Antitrust & Trade Law, Sherman Act

The essential elements of attempted monopolization under Sherman Act § 2, 15 U.S.C.S. § 2, are (1) a dangerous probability of success in monopolizing a given product market and (2) a specific intent to destroy competition or control prices in the market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN10[] Monopolies & Monopolization, Attempts to Monopolize

To state a claim for conspiracy to monopolize, a claimant must allege (1) concerted action; (2) specific intent to achieve the unlawful result of monopoly; and (3) the commission of at least one act in furtherance of the conspiracy. It need not be shown that monopoly power has been attained, nor that if the conspirators continued in their course unmolested they would have attained it, but only that obtaining such power is the purpose which motivates the conspiracy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN11[] Monopolies & Monopolization, Conspiracy to Monopolize

Although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN12[] Antitrust & Trade Law, Sherman Act

The joint activities of a parent company and its wholly owned subsidiary cannot constitute a combination or conspiracy in violation of the Sherman Act.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN13[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See 18 U.S.C.S. § 1964(c).

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN14[] Racketeer Influenced & Corrupt Organizations, Claims

Only the directly injured party has standing to sue in a civil RICO case. Concentrating the entire right to recover in the hands of the directly injured party promotes deterrence. RICO was designed to make life hard for repeat violators of the criminal law. Increased deterrence is produced by granting the full recovery to a single person. The person with the best opportunity to uncover a violation is the one directly injured.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

HN15[] Motions to Strike, Immaterial Matters

Fed. R. Civ. P. 12(f) authorizes courts to order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN16[] Motions to Strike, Redundant Matters

In deciding a motion to strike, a court will not consider matters outside the pleadings, and well-pleaded facts will be accepted as true. If the defense appears valid on the basis of the pleading, then the motion will be denied even though some defenses may not be supported by the facts. Generally, redundant, immaterial, impertinent or scandalous pleadings do not prejudice any of the parties. Motions to strike these non-prejudicial pleadings do not serve the interests of judicial efficiency and economy since they only postpone the date of trial on the merits.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN17[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. In evaluating a motion for summary judgment, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN18[] **Summary Judgment, Entitlement as Matter of Law**

In evaluating a motion for summary judgment, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN19[] **Supporting Materials, Affidavits**

The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate an absence of a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN20[] Summary Judgment, Burdens of Proof

Once a motion for summary judgment is properly made, the burden then shifts to the nonmoving party, who must set forth specific facts showing that there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN21[] Entitlement as Matter of Law, Appropriateness

Because the District Court must determine whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party -- the nonmoving party must produce, at the summary judgment stage, sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative summary judgment may be granted.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Copyright Law > ... > Civil Infringement Actions > Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN22[] Affirmative Defenses, Laches

Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that right to be free of stale claims comes to prevail over the right to prosecute them.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN23[] Private Actions, Standing

While the statute of limitations for antitrust claims is uniform, the event which gives rise to a claim under those laws is not. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. In the antitrust context, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him and the statute of limitations runs from the commission of the act. Because antitrust injuries vary, there is no simple rule for determining when an antitrust cause of action arises.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN24[] **Private Actions, Remedies**

In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. The cause of action for future damages, if they ever occur, will accrue only on the date they are suffered. 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 congressional purposes.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN25[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is only appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The accrual date for this cause of action is a factual dispute; thus summary judgment would be inappropriate at this juncture, and this issue is best reserved for resolution at trial.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN26[] **Estoppel, Collateral Estoppel**

The doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Generally, claim preclusion prevents the litigation of any ground that could have been advanced in the earlier suit in support of the claim made there. Issue preclusion, however, operates only to preclude relitigation of issues actually litigated in a previous action.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN27[] **Estoppel, Collateral Estoppel**

Collateral estoppel is appropriate only if: (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) plaintiff had a full and fair opportunity to litigate the issue in the first action. Collateral estoppel precludes a party from asserting a claim that the party had previously litigated and lost.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Patent Law > Preclusion > Collateral Estoppel

Administrative Law > Agency Adjudication > Decisions > Res Judicata

Administrative Law > Agency Adjudication > Review of Initial Decisions

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN28[] **Decisions, Collateral Estoppel**

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.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Administrative Law > Agency Adjudication > Review of Initial Decisions

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN29[] **Conveyances, Licenses**

Summary determination is virtually identical to summary judgment in the federal courts. Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation. *19 C.F.R. § 210.50(a)*. When a motion for summary determination is made and supported as provided in this rule, a party opposing the motion may not rest upon mere allegations or denials in his pleading; his response must set forth specific facts showing that there is a genuine issue of fact for hearing. *19 C.F.R. § 210.50(c)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN30[] **Summary Judgment, Entitlement as Matter of Law**

An order of summary determination constitutes an initial determination of the administrative law judge. *19 C.F.R. § 210.50(f)*.

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Judges: Peter K. Leisure, United States District Judge.

Opinion by: LEISURE

Opinion

[*1778]** **[*835]** OPINION AND ORDER

PETER K. LEISURE, UNITED STATES DISTRICT JUDGE.

This case has its origins in a patent-infringement suit brought before the International Trade Commission ("ITC") by Medtronic against Telectronics in July 1983. Telectronics Proprietary Ltd. initiated this **[***1779]** action, seeking declaratory judgment of noninfringement and invalidity, in November 1983. Medtronic responded with its answer and a counterclaim for infringement of four patents; Telectronics replied by asserting the defense of a license.

After discovery in the ITC case, [1] Telectronics amended its complaint in this Court to assert antitrust claims. Medtronic first answered the amended complaint in November 1984, and included in its answer antitrust-based counterclaims. Later, in February 1986, **[**2]** Medtronic filed an amended pleading which included, *inter alia*, counterclaims based on ***antitrust law***, patent law, and RICO, and affirmative defenses based on fraud, laches, unclean hands, and estoppel.

The following motions are now before this Court:

(1) Telectronics' motion under *Fed. R. Civ. P. 12(b) (6)* to dismiss Medtronic's first (Sherman Act *§§ 1*, *2*) and third (RICO) counterclaims;

(2) Telectronics' motion under *Fed. R. Civ. P. 12(f)* to strike Medtronic's ninth (unclean hands), twelfth (laches, fraud, estoppel, and unclean hands), and fourteenth (failure to join an indispensable party) affirmative defenses;
(3) Medtronic's motion for judgment on the pleadings or summary judgment on Telectronics' Clayton Act § 7 claim;

[*836] (4) Telectronics' motion for sanctions pursuant to *Fed. R. Civ. P. 11* along with Medtronic's motion for summary judgment on this motion.
(5) Telectronics' motion for partial summary judgment that the defense of a license under the '242 patent is res judicata or issue precluded.

This opinion will address this motions seriatim.

I. THE PARTIES

All of the parties in **[**3]** this action make and sell medical products including cardiac pacemakers.

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[1] The parties have now conducted extensive discovery in this case as well.

Plaintiff Telectronics Proprietary Ltd., and counterclaim defendant Telectronics, Inc. are subsidiaries of counterclaim defendant Telectronics U.S.A., Inc. (hereinafter collectively "Telectronics"). Telectronics Pty., Ltd., an Australian company currently not a party to this suit, owns a majority interest in Telectronics U.S.A.

Defendant Medtronic owns several patents, four of which are involved in this suit: U.S. Patent Nos. 3,595,242, 3,648,707, 4,059,116, and 4,312,355. All four of these patents involve pacemaker technology; their validity is in dispute.

II. TELECTRONICS' MOTIONS TO DISMISS

HN1[] The function of a motion to dismiss under *Rule 12(b) (6)* is to test the adequacy of the statement of a claim for relief made in any pleading. In considering a *Rule 12(b) (6)* motion, the court should confine its inquiry to the pleadings. [2] A claim for relief "may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)* (citing *Jacobson v. Peat, Marwick, Mitchell & Co., 445 F. Supp. 518, 526 (S.D.N.Y. 1977)*; *see* *Sansom Comm. **[**4]** v. Lynn, 366 F. Supp. 1271, 1278 (E.D. Pa. 1973)*; *Chambliss v. Coca-Cola Bottling Co., 274 F. Supp. 401, 409 (E.D. Tenn. 1967)*, *aff'd on other grounds*, *414 F.2d 256 (6th Cir. 1969)*, *cert. denied*, *397 U.S. 916, 25 L. Ed. 2d 97, 90 S. Ct. 921 (1970))*, *cert. denied*, *470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)*. **HN2**[] A *Rule 12(b) (6)* motion is available to any party wishing to challenge the formal sufficiency of a claim whether it is made in a complaint, counterclaim, cross-claim, or third party claim. [3]

HN3[] *Rule 8(a)* supplements *Rule 12(b) (6)* by setting forth the requirements of a claim for relief: (1) a brief statement of the basis of the court's jurisdiction; (2) "a short and plain statement of the claim showing that the pleader is entitled to relief;" and (3) a demand for judgment. Under the Federal Rules, "a complaint **[**5]** should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. Nonetheless, the pleading must set forth enough information to suggest that relief would be based on some recognized legal theory. "The District Court has no obligation to create, unaided by the plaintiff, new legal theories to support a complaint." *District of Columbia **[***1780]** v. Air Florida, Inc., 243 U.S. App. D.C. 1, 750 F.2d 1077, 1081-82 (D.C. Cir. 1984)*. [4] **HN4**[] "In practice 'a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory.'" *Car Carriers, 745 F.2d at 1106* (quoting *Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)* (Posner, J.) (quoting *French Quarter Apartments Ltd. v. Georgia-Pacific Corp. (In re Plywood Antitrust Litigation), 655 F.2d 627, 641 (5th Cir. 1981)*, *cert. dismissed*, *462 U.S. 1125, 77 L. Ed. 2d 1358, 103 S. Ct. 3100 (1983)))*.

[*837] Having set forth the standards **[**6]** for evaluating motions under *Rule 12(b) (6)*, the Court now addresses the sufficiency of Medtronic's counterclaims.

A. *Medtronic's Antitrust Claim*

Medtronic's first counterclaim is based on alleged violations of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1, 2 (1982)*. Medtronic seems to be alleging that Telectronics engaged in a conspiracy to restrain trade, attempted to monopolize, conspired to monopolize, and did monopolize the market for certain kinds of pacemakers. Defendant's First Amended and Supplemental Answer to Plaintiff's First Amended and Supplemental Complaint paras. 83, 88 (hereinafter "Answer"). Each of these allegations suggests a distinct claim under the Sherman Act.

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[2] Furthermore, all material facts alleged in a claim for relief are taken as admitted for the purposes of this motion. *See* *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977)*; *Bankers Trust Co. v. Feldesman, 676 F. Supp. 496, 498-99 (S.D.N.Y. 1987)*.

[3] *See* 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1356, at 590 (1969).

[4] *See* *Furlong v. Long Island College Hosp., 710 F.2d 922, 927 (2d Cir. 1983)*.

Section One

Restraint of Trade

HN5[] *Section 1* of the Sherman Act, *15 U.S.C. § 1 (1982)*, makes "every contract . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, . . . illegal." "The gravamen of a charge under *[section 1]* is conduct in restraint of trade; no fundamental alteration of market structure is necessary." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. **[**7]** There are several elements to a *section 1* claim. There must be (1) concerted action, (2) by two or more persons, and (3) the concerted action must unreasonably restrain interstate or foreign trade or commerce. [5] Although Medtronic has alleged that "Telectronics, Inc. and Telectronics U.S.A., Inc. have conspired and contracted with ELA SA and ELA U.S.A. and Nucleus Ltd., Synthelabo S.A. and Nestle Alimenta and Siemens-Elema, Inc. to restrain trade," Answer para. 83, it has not specified in this counterclaim what concerted actions these parties took to further their goal. [6] "Although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." *Heart Disease Research Found. v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)*. [7] A generous reading of Medtronic's pleading indicates that the "anticompetitive" concerted action Telectronics allegedly engaged in was a conspiracy to violate the Medicare laws. Answer paras. 63, 89. This allegation by itself is insufficient to state a claim under *section 1* of the Sherman Act. "The cornerstone of [***antitrust] law*** is competition. **[**8]** Congress'[s] intent in passing the Sherman Act was not to subject all business and commercial torts to the scrutiny of federal [***antitrust] law***." *Falstaff Brewing Co. v. Stroh Brewery Co., 628 F. Supp. 822, 826 (N.D. Cal. 1986)*. Moreover, Medtronic has failed to plead antitrust injury, another necessary element of an antitrust claim. [8] Thus this claim must be dismissed under *Rule 12(b) (6)*.

Section Two

There are three types of civil actions which may be brought **[**9]** under *section 2* of the Sherman Act, *15 U.S.C. § 2 (1982)*: (1) monopolization; (2) attempted monopolization; and (3) conspiring to monopolize. Medtronic appears to be trying to assert each of these claims.

Monopolization

To state properly a monopolization claim under *section 2*, the claimant must allege (1) that defendant has monopoly **[*838]** power -- the ability to control prices or exclude competition; and (2) that defendant acquired its monopoly power through conduct intended to obtain such power. [9]

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[5] *See* *Oreck Corp. v. Whirlpool Corp., 639 F.2d 75, 78 (2d Cir. 1980)*, *cert. denied*, ***454 U.S. 1083, 70 L. Ed. 2d 618, 102 S. Ct. 639 (1981)***; *Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1132 (S.D.N.Y. 1986)*; 2 E. Kintner, Federal ***Antitrust Law*** § 9.1, at 5 (1980); L. Sullivan, Antitrust §§ 108-09, at 311-12 (1977).

[6] This Court also assumes that the last five parties named by Medtronic are not owned by Telectronics.

[7] *See* *Speed Auto Sales, Inc. v. American Motors Corp., 477 F. Supp. 1193, 1196-97 (E.D.N.Y. 1979)*; *Troyer v. Karcagi, 476 F. Supp. 1142, 1153 (S.D.N.Y. 1979)*.

[8] *See infra* note 9. *See also* P. Areeda & H. Hovenkamp, ***Antitrust Law*** § 335.1a, at 256-61 (Supp. 1987) (discussing antitrust injury).

[9] *See* *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; L. Sullivan, *supra*, § 7, at 29-30.

[*1781]** **[**10]** ***HN8***[] *Section 2* of the Sherman Act is "aimed . . . at the acquisition or retention of effective market control." *United States v. Griffith, 334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*. It is designed to prevent "a pernicious market structure in which the concentration of power saps the salubrious influence of competition." *Berkey Photo, 603 F.2d at 272*. Ordinarily, the court may infer the existence of monopoly power from a predominant share of the relevant market. *Grinnell, 384 U.S. at 571*. Here, although it did offer definitions of the relevant product and geographic markets and submarkets, Medtronic has alleged neither monopoly power, nor even significant market share on Telectronics' part. Instead, it simply avers that: "the Telectronics[] entities have monopolized and continue to monopolize" the relevant markets. Answer para. 88. Such a statement is not a sufficient allegation of monopoly power to withstand a motion to dismiss. "A complaint cannot escape the charge that it is entirely conclusory in nature merely by quoting . . . words from the statutes." *Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972)*.

Attempted Monopolization

HN9[] "The essential elements of attempted monopolization **[**11]** under *[section 2]* are (1) a dangerous probability of success in monopolizing a given product market and (2) a specific intent to destroy competition or control prices in the market." *Levitch v. Columbia Broadcasting Sys., 495 F. Supp. 649, 668 (S.D.N.Y. 1980)*, *aff'd*, *697 F.2d 495 (2d Cir. 1983)*. [10] Medtronic seems to have alleged specific intent when it said: "Telectronics, Inc. and Telectronics U.S.A., Inc. have had, as their sole purpose, the suppression and elimination of competition." Answer para. 86. However, the counterclaim does not contain any allegations of a dangerous probability of success, and thus has failed to state a necessary element of the claim.

Conspiracy to Monopolize

HN10[] To state a claim for conspiracy to monopolize, a claimant must allege (1) concerted action; (2) specific intent to achieve the unlawful result of monopoly; and (3) the commission of at least one act in furtherance of the **[**12]** conspiracy. [11] "It need not be shown that monopoly power has been attained, nor that if the conspirators continued in their course unmolested they would have attained it, but only that obtaining such power is the purpose which motivates the conspiracy." L. Sullivan, *supra*, § 49, at 132-33. Medtronic's only allegations of concerted action state that Telectronics **[*839]** "and others have combined and conspired and acted individually to bribe physicians to use Telectronics' products and to exclude competition in the relevant markets and submarkets." Answer paras. 88-89. [12] "Although ***HN11***[] the Federal Rules permit statement of ultimate facts, a bare bones

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In addition, the claimant must allege antitrust injury -- that is an injury of the type the antitrust laws were designed to protect against -- as part of any claim under the antitrust laws. *See* *Car Carriers, 745 F.2d at 1107*; *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1980)*, *cert. denied*, ***450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981)***. Medtronic has vaguely stated that it has suffered "loss of profits and business opportunities, the amount of which is not yet ascertained, but which is substantial." Answer para. 92. By making this averment, Medtronic has stated an injury to itself, but not to competition in the relevant market. "Injury to one competitor is not a 'restraint of trade.' ***HN6***[] To state a claim under . . . the Sherman Act, a claimant must allege injury to competition in general." *Frito-Lay, 659 F. Supp. at 1133* (citing *BusTop Shelters, Inc. v. Convenience & Safety Corp., 521 F. Supp. 989 (S.D.N.Y. 1981))*. *See also* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* ***HN7***[] ("The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'") (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* (emphasis in original); *Kelco Disposal, Inc. v. Browning-Ferris Indus., 845 F.2d 404*, slip op. at 1871 (2d Cir. 1988) ("a plaintiff must prove behavior that injures competition, as distinct from a competitor").

[10] *See* *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 841 (2d Cir. 1980)*; *Frito-Lay, 659 F. Supp. at 1129 (S.D.N.Y. 1986)*; L. Sullivan, *supra*, § 50, at 134.

[11] *See* L. Sullivan, *supra*, § 49 at 132-33.

statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." Heart Disease Research, 463 F.2d at 100. Medtronic has not named the "others" who allegedly conspired with Telectronics U.S.A. and Telectronics, Inc. and these two entities cannot conspire with **[***1782]** each other. ***HN12***[] "The joint activities of a parent company and its wholly owned subsidiary cannot constitute a combination or conspiracy in violation of . . . the Sherman Act." *Shaw v. Rolex Watch, U.S.A., Inc., 673 F. Supp. 674, 1987-2 Trade Cas. (CCH)* ***[**13]*** *P67,787, at 59,238, 59,240 (S.D.N.Y. 1987)* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 776, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984))*.

Because Medtronic has failed to state adequately any claim under sections one and two of the Sherman Act, Telectronics' motion to dismiss defendant's first counterclaim pursuant to *Rule 12(b) (6)* is granted. Despite the fact that Medtronic was aware of a defect in **[**14]** its pleading, and did nothing to correct it for over one year, defendant may file an amended pleading within 20 days as this Court is disinclined to preclude a party's opportunity to prosecute a potentially legitimate claim merely because of its counsel's neglect or omission. [13]

B. *Medtronic's RICO Claim*

As its third counterclaim, Medtronic has attempted to state a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. No. 91-452, 84 Stat. 941 (codified as amended at *18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986)*). Medtronic's statement of this claim mainly consists of reiteration of the statute and incorporation by reference of an Information and Prosecutor's Statement prepared by the U.S. Attorney for the District **[**15]** of Colorado concerning Telectronics' violation of the Medicare laws, particularly *42 U.S.C. § 1395nn (1982 & Supp. III 1985)*. [14] Answer para. 111. Medtronic has made additional allegations in its brief in opposition to the 12(b) (6) motion, "but a party is not entitled to amend [its] pleading through statements in [its] brief." *Jacobson, 445 F. Supp. at 526* (citing *Chambliss, 274 F. Supp. at 409*).

Like the antitrust laws, RICO is enforced through both criminal and civil proceedings; *section 1964* contains the provisions creating the civil remedies.

> (c) ***HN13***[] Any person *injured in his business or property by reason of a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (emphasis added). To state a civil RICO claim, a claimant must allege both a violation **[**16]** of *section 1962* and injury to its business or property within the **[*840]** meaning of *section 1964*. [15] The injury requirement of *section 1964* is comprised of (1) injury to the plaintiff, (2) causation of that injury, and (3) the conduct

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[12] Apparently Medtronic may have intended to make allegations of additional conspiratorial or monopolistic conduct, but failed to do so because of a clerical error. Although Medtronic stated that there was an "obvious clerical omission of the specific acts of monopolization in paragraph 88 [and] Medtronic will seek leave . . . to correct its Complaint," Medtronic's Brief in Response and in Opposition to Telectronics' Motion Under *Fed. R. Civ. P. 12(b) (6)* and *12(f)* to Dismiss Medtronic's First and Third Counterclaims and to Strike Medtronic's Ninth, Twelfth, and Fourteenth Affirmative Defenses (hereinafter "Medtronic's *Rule 12* Brief"), it has not taken any action to correct its pleading in the year since it made that statement.

[13] This is particularly so when the plaintiff is acting as a "private attorney general," and enforcing an important public policy as is the case in private antitrust suits. *See generally* Klingsberg, Balancing the Benefits and Detriments of Private Antitrust Enforcement: Detrebling, Antitrust Injury, Standing, and Other Proposed Solutions, 9 Cardozo L. Rev. 1215, 1220 (1988) (discussing the merits of private antitrust enforcement).

[14] Medtronic also incorporated by reference a Statement by the Defendant in Advance of a Plea of Guilty and a Plea Agreement concerning these charges, but these items do not contain information which would clarify Medtronic's claim.

[15] Because Medtronic has failed to allege an injury, this Court need not reach the issue of whether it has properly pled a violation of *§ 1962*. This does not mean to imply that in its current state the part of Medtronic's pleading that pertains to *§ 1962* would withstand a motion to dismiss; in fact it seems unlikely that it would.

that caused the injury. The prohibited conduct and the plaintiff's proprietary injury must be causally linked. It is insufficient for a plaintiff to prove only a violation by the defendants and a proprietary injury; a plaintiff must prove that the defendant's violation caused his injury. [16]

[17]** Even when Medtronic's claim is examined under the generous standards of *Rule 12* and *Rule 8*, rather than the more stringent requirements of Rule 9(b), [17] **[**18]** it is stated **[***1783]** inadequately. Medtronic has done no more than paraphrase the statute in its pleading; its entire statement of injury is: "Medtronic has been, and continues to be, injured in its business or property by reason of each of the foregoing violations of *18 U.S.C. § 1962* and is entitled to appropriate relief pursuant to *18 U.S.C § 1964*." Answer para. 116. Medtronic's prayer for relief, which requests $ 1,000,000 (trebled), attorney's fees, interest and costs, provides no additional clues as to how Medtronic was injured. Even if this Court could divine how Medtronic was injured, the claim would still be inadequate because it fails to address causation. The prohibited conduct must cause the plaintiff's proprietary injury. It is insufficient for a plaintiff to plead simply a violation by the defendants and an injury to its property; it must plead that it was injured by the violation. [18]

Because Medtronic has failed to state adequately a claim under *18 U.S.C. § 1964*, Telectronics' motion to dismiss defendant's third counterclaim pursuant to *Rule 12(b) (6)* is granted. Medtronic may file an amended pleading within 20 days.

III. TELECTRONICS' MOTIONS TO STRIKE

HN15[] *Rule 12(f)* authorizes courts to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." In the instant case Telectronics has made a motion to strike Medtronic's ninth, twelfth, and fourteenth affirmative defenses. Motions to strike an affirmative defense are not favored, and will not be granted routinely. [19] **[**19]** *Rule 12(f)* motions will, however, **[*841]** be granted when warranted. [20]

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[16] *See* *Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983)* (to state a civil RICO claim plaintiff must allege violation of substantive RICO, damage, and causation), *cert. denied*, ***465 U.S. 1025, 79 L. Ed. 2d 684, 104 S. Ct. 1280 (1984)***; *Cahill v. Arthur Andersen & Co., 659 F. Supp. 1115, 1124-25 (S.D.N.Y. 1986)* (same), *aff'd*, *822 F.2d 14 (2d Cir. 1987)*.

HN14[] Only the directly injured party has standing to sue in a civil RICO case. *Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir. 1986)*, *cert. denied*, ***479 U.S. 987, 107 S. Ct. 579, 93 L. Ed. 2d 582 (1986)***; *Carter v. Berger, 777 F.2d 1173, 1174-76 (7th Cir. 1985)* (Easterbrook, J.).

> Concentrating the entire right to recover in the hands of the directly injured party promotes deterrence. RICO was designed to make life hard for repeat violators of the criminal law . . . .
>
> Increased deterrence . . . is produced by granting the full recovery to a single person. The person with the best opportunity to uncover a violation is the one directly injured. . . .

Id. at 1176.

[17] Rule 9(b) applies to at least the predicate act elements of a civil RICO claim if they are fraud-based. *See* *Cruse v. Equitable Securities, 678 F. Supp. 1023, 1033 (S.D.N.Y. 1987)*; *Greenfield v. Professional Care, Inc., 677 F. Supp. 110, 115-16 (E.D.N.Y. 1987)*; *Connors v. Lexington Ins. Co., 666 F. Supp. 434, 450 (E.D.N.Y. 1987)*; *Beck v. Manufacturers Hanover Trust Co., 645 F. Supp. 675, 680-82 (S.D.N.Y. 1986)*, *aff'd*, *820 F.2d 46 (2d Cir. 1987)*, *cert. denied*, ***484 U.S. 1005, 108 S. Ct. 698, 98 L. Ed. 2d 650 (1988)***; *Gregoris Motors v. Nissan Motor Corp., 630 F. Supp. 902, 912 (E.D.N.Y. 1986)*.

[18] *See* *Moss, 719 F.2d at 17*.

[19] *See* *Index Fund, Inc. v. Hagopian, 107 F.R.D. 95, 100 (S.D.N.Y. 1985)*. ***HN16***[] "In deciding a motion to strike, a court will not consider matters outside the pleadings, and well-pleaded facts will be accepted as true. If the defense appears . . . valid on the basis of the pleading, then the motion . . . will be denied even though some defenses . . . may not be supported by the facts." *Id*. (citations omitted). *See also* Note, *The Motion to Strike An Insufficient Defense -- Rule 12(f) of the Federal Rules of Civil*

Medtronic's ninth affirmative defense, Answer para. 63, asserts that Telectronics' claims are barred by the unclean hands doctrine. Medtronic has not indicated in this paragraph which of Telectronics' claims it believes are barred by this defense. In its twelfth affirmative defense, however, it repeats its assertion of the unclean hands defense with regard to the antitrust claims in particular. While the unclean hands defense is available in patent cases, [21] **[**20]** it is not applicable in the antitrust context; "a plaintiff's own anticompetitive conduct generally cannot be raised as a defense to liability in an antitrust action." *United States Football League v. National Football League, 842 F.2d 1335*, slip op. at 6610 (2d Cir. 1988). [22] Hence, to the extent that the unclean hands defense refers to Telectronics' antitrust claims, it must be stricken from the answer. Insofar as the ninth affirmative defense refers to Telectronics' patent claim, it may stand.

The entire text of Medtronic's twelfth affirmative defense is: "Telectronics' antitrust claims are barred by the judicial doctrines of laches, fraud, estoppel, and unclean hands." Answer para. 66. Medtronic has given absolutely no indication as to how these defenses apply to Telectronics' antitrust claims.

The doctrine of laches does not normally apply to antitrust claims, although it can be applied to equitable claims made under section 16 of the Clayton Act. [23] **[**21]** In this case, Telectronics has only requested money damages (which are provided for by statute) as a remedy under the antitrust laws, [24] therefore this Court sees no reason why the doctrine of **[***1784]** laches should apply in this case, and this affirmative defense must be stricken.

Pleading fraud without more as an affirmative defense does not meet the particularity requirements of Rule 9(b). [25] By itself, the word "fraud" provides neither the Court nor the opposing party with sufficient notice of the claim raised by this defense. Likewise, the word "estoppel" without more is not a sufficient statement of a defense. Moreover, even if Medtronic had adequately stated the estoppel defense, "it is highly unlikely that estoppel can be readily allowed to defeat antitrust claims." *Bernstein v. Universal Pictures, Inc., 517 F.2d 976, 981 (2d Cir. 1975)*. Because Medtronic has totally failed to state these defenses in a proper manner, they too should be stricken.

In its fourteenth affirmative defense, Answer paras. 68-80, Medtronic seems to be attempting to make a claim of failure to join an indispensable party. Medtronic's elaboration indicates that, if Telectronics **[**22]** Pty. Ltd. is indispensable to any claim in this action, it is indispensable to Medtronic's counterclaims, not Telectronics' **[*842]** claims. [26] "The infringement by [Telectronics] and Telectronics Pty. Ltd. of [Medtronic's] patents-in-suit have deprived [Medtronic] of sales of its cardiac pacers, which it would otherwise have made, and have in other respects injured [Medtronic] and will cause [Medtronic] added injury and damage . . . unless [Telectronics] and Telectronics Pty. Ltd. are enjoined from infringing [Medtronic's patents]." Answer para. 76. *Rule 8* requires that courts read

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Procedure, 11 Rut.-Cam. L.J. 441, 441 (1980) ("Generally, . . . redundant, immaterial, impertinent or scandalous pleadings do not prejudice any of the parties. Motions to strike these nonprejudicial pleadings do not serve the interests of judicial efficiency and economy since they only postpone the date of trial on the merits.").

[20] *See, e.g., Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1057 (5th Cir. 1982)*, *cert. denied*, ***459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983)***.

[21] *See e.g., Timely Products Corp. v. Arron, 523 F.2d 288, 298 (2d Cir. 1975)*; *A.H. Emery Co. v. Marcan Products Corp., 389 F.2d 11, 17-18* (2d Cir.), *cert. denied*, ***393 U.S. 835, 21 L. Ed. 2d 106, 89 S. Ct. 109, 159 U.S.P.Q. (BNA) 799 (1968)***.

[22] *See also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214, 95 L. Ed. 219, 71 S. Ct. 259 (1951)* (plaintiff's infractions of the antitrust laws could not legalize defendants' unlawful combination nor immunize them from liability).

[23] *See Argus Inc. v. Eastman Kodak Co., 552 F. Supp. 589, 599-600 (S.D.N.Y. 1982)*; *Russell v. Todd, 309 U.S. 280, 289, 84 L. Ed. 754, 60 S. Ct. 527 (1940)*; cf. *Kaiser, 677 F.2d at 1057*; C. Hills, *Antitrust Advisor* § 11.43, at 717-18 (rev. 2d ed. 1985).

[24] Telectronics is, however, seeking equitable relief -- i.e. declaratory judgment of non-infringement -- for its patent claim.

[25] Even if Rule 9(b) did not apply to assertions of fraud, a mere statement that a claim is barred by fraud is not a sufficient statement of an affirmative defense.

[26] Thus its designation as an affirmative defense is erroneous.

pleadings quite generously. Because it is plausible that Medtronic's claim is a compulsory counterclaim [27] and that Telectronics Pty. Ltd. is an indispensable party to that counterclaim, [28] the motion to strike the fourteenth affirmative defense must be denied.

[23]** IV. MEDTRONIC'S MOTION FOR SUMMARY JUDGMENT ON TELECTRONICS' CLAYTON ACT § 7 CLAIM

Medtronic has moved for judgment on the pleadings or summary judgment with respect to Telectronics' claim under section 7 of the Clayton Act, ch. 323, § 7, 38 Stat. 731 (1914) (current version at *15 U.S.C. § 18 (1982 & Supp. IV 1986)*). *Rule 12(c)* allows the court to treat a motion for judgment on the pleadings as a motion for summary judgment when it considers materials extrinsic to the pleadings. Because both parties have presented materials outside the pleadings and were on notice, this Court will treat this motion as a motion for summary judgment under *Rule 56*.

HN17[] Summary judgment is appropriate when "'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)* (quoting *Fed. R. Civ. P. 56(c)*). [29] "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citing *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968))*. ***HN18***[] In evaluating **[**24]** a motion for summary judgment, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986)* (citing *Liberty Lobby*, 477 U.S. at 247-49; *Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985))*, *cert. denied*, *480 U.S. 932, 107 S. Ct. 1570, 94 L. Ed. 2d 762 (1987)*. [30]

HN19[] The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its **[***1785]** motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on **[**25]** file, together with the affidavits, if any,' which it believes demonstrate an absence of a genuine issue of material fact." *Celotex, 477 **[*843]** U.S. at 323*. *Rule 56* does not require that the moving party support its motion with affidavits or other similar materials which negate the opponent's claim; rather, it can meet its burden by showing the district court "that there is an absence of evidence to support the nonmoving party's case." *Id. at 325*.

HN20[] Once a motion for summary judgment is properly made, the burden then shifts to the nonmoving party, who "must set forth specific facts showing that there is a genuine issue for trial." *Liberty Lobby, 477 U.S. at 256* (citing *Fed. R. Civ. P. 56(e)*). ***HN21***[] Because the District Court must determine "whether there is the need for a

[27] Medtronic's counterclaim would only be compulsory under Rule 13(a) if it "require[s] for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

[28] *Rule 19* only mandates joinder of parties who are "subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action." *Fed. R. Civ. P. 19(a)*. Since Telectronics Pty. Ltd. is an Australian corporation, it is quite possible that it falls outside the definition of an indispensable party under *Rule 19*. (Medtronic has unsuccessfully attempted to serve process on Telectronics Pty. Ltd. Answer para. 69.) For a discussion of the ability of American courts to exercise subject matter jurisdiction in antitrust cases involving foreign parties, *see* Note, *Economic Rationality and the Extraterritorial Application of United States Law in Private Antitrust Litigation*, 9 Cardozo L. Rev. 1401, 1404-10 (1988).

[29] *See also* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Law Firm of Daniel P. Foster, P.C. v. Turner Broadcasting System, 844 F.2d 955*, slip op. at 6662-63 (2d Cir. 1988).

[30] *See also* *Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975)*; *Cali v. Eastern Airlines, Inc., 442 F.2d 65, 71 (2d Cir. 1971)*.

trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," *Id. at 250*, -- the nonmoving party must produce, at the summary judgment stage, "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id. at 249* "If the evidence is merely colorable . . . **[**26]** or is not significantly probative . . . summary judgment may be granted." *Id. at 249-50* (citations omitted).

Medtronic's motion for summary judgment is mainly founded on the claim that Telectronics' Clayton Act section 7 claim is barred by the statute of limitations contained in *15 U.S.C. § 15b*. Relying heavily on a case decided in 1969 in the District of Minnesota which held that a private litigant does not have standing to bring an action under section 7 of the Clayton Act, *Dairy Foods, Inc. v. Farmers Co-operative Creamery, 298 F. Supp. 774 (D. Minn. 1969)*, Medtronic argues that Telectronics' cause of action arose at the time the patents in question were acquired. [31] **[**27]** Since the last patent in dispute was acquired on December 27, 1979, and the acquisition was made public on January 7, 1980, Medtronic contends that the limitations period ended on January 7, 1984 at the latest. This Court finds this argument unconvincing. [32]

Statutes of limitation are not designed to trigger a game which, if won by the defendant, allows a party to circumvent the law by arguing that a cause of action arose earlier than it actually did. Rather,

> ***HN22***[] statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that right to be free of stale claims comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49, 88 L. Ed. 788, 64 S. Ct. 582 (1944). ***HN23***[] While the statute of limitations for antitrust claims is **[**28]** uniform, the event which gives rise to a claim under those laws is not. "Generally, 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, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*. [33] In the antitrust context, "each **[*844]** time a plaintiff is injured by an act of the defendants a cause of action accrues to him [and] the statute of limitations runs from the commission of the act." *Id*. "Because antitrust injuries vary, there is no simple rule for determining when an antitrust cause of action arises." *C. Hills, supra* note 23, § 11.43, at 715.

In this case it is far from clear which act triggered Telectronics' claim under section 7; the acquisition of the disputed patents is but one possibility. It is equally possible that it was not until **[**29]** Medtronic asserted the patents against Telectronics in the ITC case that Telectronics was adversely impacted by Medtronic's conduct. Because Telectronics **[***1786]** would not be affected by Medtronic's acquisition of the patents until Medtronic attempted to assert them against Telectronics, its injury would probably be too speculative to confer standing until that time. [34]

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[31] Medtronic's reliance is based on dicta in the opinion stating that if the court had reached the opposite conclusion (i.e. that a private action could be brought under § 7), "it would seem that the cause of action would arise at the time of the merger or acquisition." *Dairy Foods, 298 F. Supp. at 777*. *Dairy Foods* was not decided on statute of limitations grounds, and even if it had been, the point in time at which a cause of action arises under the antitrust laws varies greatly from case to case.

[32] Similarly, Honorable Kenneth L. Ryskamp, District Judge of the Southern District of Florida, found this argument unconvincing when Medtronic made an almost identical motion in a case quite similar to the one before this Court. *Cordis Corp. v. Medtronic, Inc*., No. 84-1239-CIV (S.D. Fla. Nov. 20, 1986).

[33] *Cf. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1270 (9th Cir. 1975)*, *cert. denied*, ***459 U.S. 1009, 74 L. Ed. 2d 400, 103 S. Ct. 364 (1982)***; *Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 233* (6th Cir.), *cert. denied*, ***419 U.S. 997, 42 L. Ed. 2d 270, 95 S. Ct. 310 (1974)***; *C. Hills, supra* note 23, § 11.43, at 715; L. Sullivan, *supra*, at 775-76.

[34] The discussion in *Zenith* lends support to the argument that the cause of action did not arise until commencement of the ITC suit:

[30]** ***HN25***[] Summary judgment is only appropriate when "'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Celotex, 477 U.S. 317, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)* (quoting *Fed. R. Civ. P. 56(c)*). The accrual date for this cause of action is a factual dispute; thus summary judgment would be inappropriate at this juncture, and this issue is best reserved for resolution at trial.

Medtronic's second justification for its motion for summary judgment is based on its contention that the Greatbatch ('707), Funke ('355), and Adams ('116) patents were acquired from individual inventors and therefore their acquisition is not subject to section 7. [35] **[**31]** Until its amendment in 1980, section 7 of the Clayton Act did not apply to assets [36] acquired from "individuals, partnerships, unincorporated associations or other unincorporated business entities." H.R. Rep. No. 871, 96th Cong., 2d Sess. 2, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2732, 2732. Section 7 applies to acquisitions from noncorporate entities (including individuals) made after September 12, 1980. *15 U.S.C. § 18 (1982)*.

The Greatbatch and Adams patents were both acquired prior to September 12, 1980. While it appears undisputed that the Adams patent was acquired from its individual inventor, there is a dispute as to the prior ownership of the Greatbatch patent. It seems that Greatbatch was employed by Wilson Greatbatch Ltd. at the time of invention, thus the patent may have been owned by the company. The Funke patent may have been partially owned by, and thus acquired from, a corporation -- Biotronik, Inc; furthermore it was acquired after the 1980 amendment became effective. Hence, summary judgment in favor of Medtronic is appropriate in regard to the Adams patent, but inappropriate as to the Greatbatch, Funke, and Berkovits patents.

V. TELECTRONICS' MOTION FOR *RULE 11* SANCTIONS

Telectronics has brought a motion for *Rule 11* sanctions in response to Medtronic's motion for summary judgment on **[*845]** the Clayton Act section 7 claim. Shortly before Medtronic filed this motion in this Court, it received an unfavorable decision on a virtually identical motion in the **[**32]** *Cordis* case in the Southern District of Florida. Medtronic should have brought this decision to the attention of this Court and did not do so. [37] Decisions in the district court in Florida are not controlling in this Court, so Medtronic's behavior was not a violation of the letter of the Code of Professional Responsibility, but it is a clear violation of its spirit. Repetition of such dubious behavior is likely to result in the imposition of sanctions by this Court. Nevertheless, because it is not "'*patently clear* that

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> If a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. . . . Even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.
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> ***HN24***[] In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. . . . The cause of action for future damages, if they ever occur, will accrue only on the date they are suffered . . . .
>
> 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 . . . congressional purpose[s].

Zenith, 401 U.S. at 339-40 (citations omitted).

[35] There is no doubt that Medtronic acquired the '242 patent from a corporation.

[36] Patent acquisitions are within the scope of the antitrust laws. *SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1205 (2d Cir. 1981)*.

[37] *Cf*. Model Code of Professional Responsibility DR 7-106(B) (1970) ("In presenting a matter to a tribunal, a lawyer shall disclose: Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client . . . ."); Model Code of Professional Responsibility EC-7-23 (1970). *See generally*, Hochberger, *Ethics Opinion Sets Guideline for Disclosing Adverse Rulings*, N.Y.L.J., Dec. 18, 1980, at 1, col. 2.

[Medtronic's motion] had *absolutely no chance* of success,'" *Stern v. Leucadia Nat'l Corp., 844 F.2d 997, 1006 (2d Cir. 1988)* (quoting *Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985))* (emphasis added), this Court will refrain from imposing *Rule 11* sanctions at this time. **[***1787]**

[33]** VI. TELECTRONICS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE '242 LICENSE ISSUE

The final motion before this Court is Telectronics' motion for partial summary judgment that the defense of a license with respect to U.S. Patent No. 3,595,242 (the " '242" patent) is res judicata. The existence of a license was considered and decided by the International Trade Commission in *In re Certain Cardiac Pacemakers & Components Thereof*, No. 337-TA-162, Order No. 52, (U.S.I.T.C. 1984). The issue currently before the Court is whether that ITC decision should be accorded preclusive effect.

HN26[] "The doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" *MGA, Inc. v. General Motors Corp., 827 F.2d 729, 732 (Fed. Cir. 1987)* (quoting *Allen v. McCurry, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980))*, *cert. denied*, *484 U.S. 1009, 108 S. Ct. 705, 98 L. Ed. 2d 656 (1988)*. Generally, claim preclusion "prevents the litigation of any ground that *could have* been advanced in the earlier suit in support of the claim . . . made there . . . ." **[**34]** *USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 508 (7th Cir. 1982)* (emphasis added), *cert. denied*, *462 U.S. 1107, 77 L. Ed. 2d 1334, 103 S. Ct. 2455 (1983)*. Issue preclusion, however, operates only to preclude relitigation of issues actually litigated in a previous action. [38]

> ***HN27***[] Collateral estoppel is appropriate only if: (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) plaintiff had a full and fair opportunity to litigate the issue in the first action.
> Collateral estoppel . . . precludes a [party] 'from asserting a claim that the [party] had previously litigated and lost . . . .'

A.B. Dick Co. v. Burroughs Corp., 713 F.2d 700, 702, 218 U.S.P.Q. (BNA) 965 (Fed. Cir. 1983) (quoting *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979))* (footnote omitted), *cert. denied*, *464 U.S. 1042, 79 L. Ed. 2d 171, 104 S. Ct. 707 (1984)*.

The ITC action was initiated by Medtronic in August 1983. There Medtronic sought relief under section 337 of the Tariff **[**35]** Act of 1930, ch. 497, tit. III, § 337, 46 Stat. 703 (1930) (current version at *19 U.S.C. § 1337 (1982 & Supp. IV 1986)*). The ITC, an administrative agency, has jurisdiction to determine whether the defendant in an action before it has engaged in "unfair methods of competition and unfair acts in **[*846]** the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect . . . of which is to destroy or substantially injure an industry . . . in the United States." *19 U.S.C. § 1337(a)*. [39]

Patent infringement and importation of products manufactured by unauthorized use of a patented process or component parts are unfair acts or methods of competition under section 337. Thus defenses to such charges include noninfringement, [40] invalidity, and unenforceability of the patent. [41] Because the federal courts have exclusive jurisdiction over patent claims, *28 U.S.C. § 1338(a) (1982)*, the ITC may consider **[**36]** issues of patent

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[38] *See generally* *Young Engineers, Inc. v. USITC, 721 F.2d 1305, 1314-15, 2* Fed. Cir. (T) 9, *219 U.S.P.Q. (BNA) 1142 (Fed. Cir. 1983)* (contrasting issue preclusion and claim preclusion).

[39] For further discussion of the ITC's jurisdiction see Kaye, Lupo, & Lipnian, The Jurisdictional Paradigm Between the United States International Trade Commission and the Federal District Courts, 42 J. Pat. Off. Soc'y 118 (1982).

[40] Unlike invalidity and unenforceability, noninfringement is not a defense based on the validity of a patent. Rather, it is a defense based on a contractual right to use the patent, or on defendant's lack of use of the patent.

[41] *See* *Massachusetts Inst. of Technology v. AB Fortia, 774 F.2d 1104, 1108, 227 U.S.P.Q. (BNA) 428 (Fed. Cir. 1985)*.

validity only insofar as they impact its decision on unfair competition claims. [42] **[**37]** This does not mean, however, that the federal courts have exclusive jurisdiction over all questions which in some way concern a patent. [43] Of concern in this motion is the effect of the ITC's determination as regards **[***1788]** the existence of a license under a patent; this determination was not one of the validity of a patent, but of the existence of a contract. Tribunals other than the federal courts have the authority to decide matters involving contracts relating to patents. [44]

Because the ITC decision was on a matter within its jurisdiction (the existence of a license is a defense to a claim of unfair competition), there is no jurisdiction-based reason why the ITC determination should not be accorded issue-preclusive effect. [45] "The jurisdictional bar to *res judicata* treatment of ITC patent validity determinations simply does not apply to other decisions by the ITC." *Union Mfg., 763 F.2d at 45*. Moreover, there is no reason why **[*847]** the ITC's determination should **[**38]** not be accorded issue-preclusive effect simply because it was made by an administrative agency. ***HN28***[] "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." *United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422, 16 L. Ed. 2d 642, 86 S. Ct. 1545 (1966)*.

[39]** Medtronic also contends, again without offering any evidence to controvert what seems quite apparent, that there was no final judgment in this matter. The issue of a license under the '242 patent was decided by the ITC on a motion for summary determination. The ITC's adjudicative procedures are set forth in *19 C.F.R. §§ 210.1-210.71 (1987)*; generally, they bear a striking resemblance to the Federal Rules of Civil Procedure. ***HN29***[] Summary determination is virtually identical to summary judgment in the federal courts. "Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation." *19 C.F.R. § 210.50(a)*. "When a motion for summary determination is made and

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[42] *See* S. Rep. No. 93-1298, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 7186, 7329. "Patent validity determinations of the ITC are properly not accorded *res judicata* effect because the ITC has no jurisdiction to determine patent validity except to the limited extent necessary to decide a case otherwise properly before it." *Union Mfg. Co. v. Han Baek Trading Co., 763 F.2d 42, 45 (2d Cir. 1985)*.

"In short, the Congress has created two separate jurisdictions: One with jurisdiction over 'unfair acts' in connection with the importation of articles from abroad (the Commission), and the other with jurisdiction over the validity of domestic patents (the district court)." *Ashlow Ltd. v. Morgan Constr. Co., 672 F.2d 371, 375 (4th Cir. 1982)*.

[43] *See New Marshall Engine Co. v. Marshall Engine Co., 223 U.S. 473, 478, 56 L. Ed. 513, 32 S. Ct. 238 (1912)*.

[44] *See New Marshall, 223 U.S. at 478*. The heavy reliance Medtronic placed on *Tandon Corp. v. USITC, 831 F.2d 1017, 4 U.S.P.Q.2D (BNA) 1283 (Fed. Cir. 1987)*, to counter this point is misplaced. *Tandon* dealt with a decision of noninfringement based on technological considerations. Moreover, the *Tandon* Court noted that "it was the intent of Congress that greater weight and finality be accorded to the Commission's findings as compared with those of a trial court." *Id. at 1019*. Hence it hardly seems that the Federal Circuit intended to imply that ITC decisions could never be accorded *res judicata* effect.

[45] Although Medtronic claims that the ITC eventually dismissed the case on jurisdictional grounds, it has presented no evidence to substantiate that claim. As the nonmoving party in this motion, Medtronic must present evidence of this assertion if it is to demonstrate that there is a genuine issue of fact present. *Cf. Liberty Lobby, 477 U.S. at 256*. In fact, the Federal Circuit, when rendering a decision on appeal of this court's denial of Medtronic's motion to disqualify counsel, recognized the existence of Telectronics' license and in no way indicated that this determination was in doubt in any way. *See Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332, 1334, 1335, 5 U.S.P.Q.2D (BNA) 1424 (Fed. Cir. 1988)* ("Medtronic is the current owner of the '242 patent; Telectronics is a current licensee.").

Medtronic also claims that Telectronics has already lost on a similar contention of *res judicata* when its motion to disqualify counsel was decided. Medtronic misreads both the statements of this Court and those of the Federal Circuit. This Court did not reach the issue of *res judicata* in the decision on that motion. *See Telectronics Proprietary Ltd. v. Medtronic, Inc., 690 F. Supp. 170 (S.D.N.Y. 1987)*; *Telectronics, 836 F.2d at 1334*.

supported as provided in this rule, a party opposing the motion may not rest upon mere allegations or denials in his pleading; his response . . . must set forth specific facts showing that there is a genuine issue of fact for hearing." *19 C.F.R. § 210.50(c)*. [46] Medtronic had ample opportunity to substantiate its position during this proceeding and did not succeed in doing so. [47] The fact that Medtronic later voluntarily dismissed **[**40]** its other claims in order to bring an appeal which it later aborted, is no reason to consider the ITC's decision anything less than final.

In ITC proceedings, an administrative law judge ("ALJ") makes an initial determination [48] which can, but need not, be reviewed by the full Commission. If the Commission does not order review of the initial determination within thirty days, it becomes the final determination of the Commission. [49] The President then has the opportunity to disapprove the decision for policy reasons. In this case, the Commission denied review of the ALJ's determination, and it became a final determination. [50]

Because Medtronic has failed to demonstrate that there is any genuine **[**41]** issue of **[***1789]** material fact as to the issue-preclusive effect of the ITC's finding of a license under the '242 patent, Medtronic is collaterally estopped from relitigating that issue.

VII. CONCLUSION AND SUMMARY

For the foregoing reasons:

1. Telectronics' motion under *Rule 12(b) (6)* to dismiss Medtronic's first counterclaim (Sherman Act *§§ 1*, *2*) is granted and Medtronic is granted leave to replead within 20 days;

2. Telectronics' motion under *Rule 12(b) (6)* to dismiss Medtronic's third counterclaim (RICO) is granted and Medtronic is granted leave to replead within 20 days;

3. Telectronics' motion under *Rule 12(f)* to strike Medtronic's ninth affirmative defense (unclean hands) is granted insofar as it refers to Telectronics' antitrust claims, and denied insofar as it refers to Telectronic's patent claim;

4. Telectronics' motion under *Rule 12(f)* to strike Medtronic's twelfth affirmative defense (laches, fraud, estoppel, and unclean hands) is granted;

5. Telectronics' motion under *Rule 12(f)* to strike Medtronic's fourteenth affirmative **[*848]** defense (failure to join an indispensable party) is denied;

6. Medtronic's motion for summary judgment on Telectronics' Clayton Act § 7 claim **[**42]** is granted on the matter of the Adams ('116) patent, and denied as to the Greatbatch ('707), Funke ('355), and Berkovits ('242) patents;

7. Telectronics' motion for sanctions pursuant to *Rule 11* is denied.

8. Telectronics' motion for partial summary judgment that the defense of a license under the '242 patent is res judicata or issue precluded is granted.

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[46] *Compare* *Fed. R. Civ. P. 56* (1982).

[47] *See In re Certain Cardiac Pacemakers & Components Thereof*, No. 337-TA-162, Order No. 52, slip op. at 1-2 (U.S.I.T.C. May 24, 1984).

[48] ***HN30***[] "An order of summary determination [constitutes] an initial determination of the administrative law judge . . . ." *19 C.F.R. § 210.50(f)*.

[49] *See* *19 C.F.R. § 210.53(h)*.

[50] Final determinations by the ITC determination may be appealed to the Federal Circuit under *19 C.F.R. § 210.71*.

SO ORDERED.

Byrd v. Salvation Army

United States District Court for the Middle District of Florida, Orlando Division

May 20, 1988; May 20, 1988, Filed

Case No. 87-375-Civ-Orl-19

Reporter

1988 U.S. Dist. LEXIS 5576 *; 1988 WL 63346

Andrew Byrd, Plaintiff, v. The Salvation Army, Major William G. Collins, and Donald L. Powell, Defendants

Core Terms

conspiracy, exemption, intracorporate, employees, conspire

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN1[] **Regulated Practices, Private Actions**

The Sherman Act does not purport to cover a conspiracy which consists merely in the fact that the officers of the single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN2[] **Concerted Action, Civil Conspiracy**

A conspiracy claim may be asserted against employees of a corporation when they have a "personal stake" which motivates their actions. This exception has been applied where a plaintiff's fellow employees engaged in continual racial harassment of the plaintiff.

Counsel: **[*1]** RICK KOLODINSKY, ESQUIRE, New Smyrna Beach, Fl., for plaintiffs

HARRISON C. THOMSPON, JR. ESQUIRE, WILLIAM E. SIZEMORE, ESQUIRE, Thompson, Sizemore & Gonzalez, Tampa, Fl. for defendant

Opinion by: FAWSETT

Opinion

ORDER

PATRICIA C. FAWSETT, UNITED STATES DISTRICT JUDGE

This case is before the Court upon the Motion of Defendants Major William G. Collins and Donald L. Powell for Partial Summary Judgment, filed April 1, 1988 (Doc. No. 16), the supporting Memorandum of Law (Doc. No. 17), the Notice of Filing Depositions (Doc. No. 18), the Depositions of Andrew Byrd (Doc. No. 19), Major William G. Collins (Doc. No. 20), and Donald L. Powell (Doc. No. 21), and the Plaintiff's Opposition, filed April 14, 1988 (Doc. No. 22).

In this Motion, Defendant's Collins and Powell request that the Court grant summary judgment in their favor on Count III of the Complaint, which asserts a cause of action under Title *42, United States Code, Section 1985(3)* for conspiracy to deprive the Plaintiff of his civil rights. The primary ground urged in the Motion is that Collins and Powell are both employees and agents of a single corporation, Defendant Salvation Army, and so cannot conspire together. Movants cite the rule that **[*2]** a corporation cannot conspire with itself.

There is a sharp dispute among the circuits as to whether employees of a single corporation can conspire together to deprive an individual of his civil rights in violation of *section 1985(3)*. The rule that no intracorporate conspiracy is possible proceeds from decisions under the antitrust laws, particularly the ruling of the Fifth Circuit in *Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952)*, cert. denied, *345 U.S. 925 (1953)*. The Motorola Court held that a corporation's employees and officers cannot conspire together for the purposes of Section 1 of the Sherman Act, which prohibits contracts, combinations and conspiracies in restraint of trade. See also *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)*. The rationale of Motorola is that the acts of the agents of a corporation are acts of the corporation. Accordingly, since a corporation cannot conspire with itself, agents of a corporation cannot be held liable under a conspiracy statute when they act within the scope of their authority. *200 F.2d at 914*. The court stated: "***HN1***[] The [Sherman] Act does not purport to cover a conspiracy **[*3]** which consists merely in the fact that the officers of the single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy." Id.

This reasoning has been applied to *section 1985(3)* claims. E.g., *Buschi v. Kirven, 775 F.2d 1240, 1251 (4th Cir. 1985)*; Girard v. 94th *Street & Fifth Avenue Corp., 530 F.2d 66, 70-72* (2nd Cir.), cert. denied, *425 U.S. 974 (1976)*; *Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972)*. Girard is typical of these decisions. In that case, the defendants were a corporation, which owned and managed a cooperative apartment building, and the officers and directors of that corporation. The plaintiff alleged a conspiracy to deprive her of her civil rights in connection with the corporation's refusal to approve the assignment to plaintiff of a lease to an apartment. The plaintiff asserted that the defendants had engaged in a variety of overt acts in support of the conspiracy including malicious harassment. *530 F.2d at 70*. However, the court found that the plaintiff did not allege that the individual defendants were acting other than as officers and directors or that they were motivated by any independent **[*4]** personal stake in achieving the corporation's objective. The court therefore dismissed the conspiracy claim. *Id. at 70*.

This doctrine has a major exception. Girard itself indicated that ***HN2***[] a conspiracy claim may be asserted against employees of a corporation when they have a "personal stake" which motivates their actions. This exception has been applied where a plaintiff's fellow employees engaged in continual racial harassment of the plaintiff. *Coley v. M & M Mars, Inc., 461 F.Supp. 1073, 1076 (M.D.Ga. 1978)*; *Rackin v. University of Pennsylvania, 386 F.Supp. 992 (E.D.Pa. 1974)*; cf. *Dombrowski, 459 F.2d at 196* ("[I]f the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute."). The exception was concisely described in Coley as follows:

[A]llegations of continual discriminatory harassment at the hands of individual employees are sufficient to survive dismissal because, in the backdrop of racial discrimination, such allegations express the likelihood that these employees **[*5]** were motivated by a personal racial bias and were not acting out of concern for the best interests of their employer.

461 F.Supp. at 1076.

Furthermore, some courts have rejected entirely or construed very narrowly the intracorporate conspiracy exemption as applied to section 1985(3). E.g., Stathos v. Bowden, 728 F.2d 15, 20-21 (1st Cir. 1984); cf. Novotny v. Great American Federal Savings & Loan Association, 584 F.2d 1235 (3rd Cir. 1978) (en banc), vacated on other grounds, 442 U.S. 366 (1979). These courts reason that the intracorporate conspiracy exemption exists under ***antitrust law*** because section 1 of the Sherman Act is concerned only with the evils that occur when business enterprises join to make a decision. [1] Indeed, the actual joining together of individuals to make and effect decisions is socially useful in that joint effort is often required to accomplish a legitimate business goal. Stathos, 728 F.2d at 21. However, "Where 'equal protection' is at issue, . . . one cannot readily distinguish in terms of harm between the individual conduct of one enterprise and the joint conduct of several." Id. Accordingly, the

[*6] intracorporate exemption, if valid at all, is narrowly construed to apply only to "the ministerial acts of several executives needed to carry out a single discretionary decision."

The Eleventh Circuit has not yet expressed an opinion on the intracorporate conspiracy exemption under section 1985(3). District courts Within this circuit disagree as to the applicability of the exemption. Compare Jacobs v. Board of Regents, 473 F.Supp. 663, 670 (S.D.Fla. 1979) (exemption does not apply to 1985(3)) with *Baker v. MacDonald's Corp., 45 FEP Cases 1505, 1510 (S.D.Fla. 1987)* (exemption applies). However, in United States v. Hartley, 678 F.2d 961, 970-972 (11th Cir. 1982), cert. denied, *459 U.S. 1170 (1983)*, the court refused to apply the intracorporate conspiracy exemption to criminal conspiracy charges under 18 U.S.C. section 371. The court noted the peculiar nature of ***antitrust law*** and cited with approval the decision of the Third Circuit in Novotny.

Whether or not the Eleventh Circuit Would apply the intracorporate conspiracy exemption to section 1985(3) need not be decided at this time. The policy considerations involved indicate that even if the exemption is to be applied **[*7]** under section 1985(3), it should be narrowly construed and does not apply to a series of discriminatory actions occurring in the workplace. The Plaintiff in this case has alleged a series of discriminatory actions, taken because of personal bias and not out of concern for the employer, eventually resulting in Plaintiff's termination. The depositions filed in this case indicate that there is sufficient evidentiary support for this allegation to create an issue of material fact.

Collins and Powell also assert that the Plaintiff has not alleged a cognizable right of which he has been deprived by the conspiracy in violation of section 1985(3). See Griffin v. v. Breckinridge, 403 U.S. 88, 102-103 (1971). While Defendants, objections as to the Plaintiff's claim of right under Title VII and the Fourteenth Amendment appear to be well taken, the Court will not reach such ground at this time because the Plaintiff has come forward with sufficient evidence to create an issue of material fact with respect to 42 U.S.C. section 1981. Defendants have not asserted any ground sufficient to grant summary judgment insofar as Plaintiff relies on this statute to support his section 1985(3) claim.

Accordingly, **[*8]** the Motion for Summary Judgment is DENIED.

DONE AND ORDERED in Chambers at Orlando, Florida, this 20th day of May, 1988.

End of Document

[1] Applying section 1 of the Sherman Act to activities of a single firm would furthermore enable plaintiffs to circumvent the more difficult standards of proof under section 2, which prohibits monopolization. Motorola, 200 F.2d at 914.

[Sorisio v. Lenox, Inc.](#)

United States District Court for the District of Connecticut

May 26, 1988, Decided

Civil No. B-84-634(EBB)

Reporter

701 F. Supp. 950 *; 1988 U.S. Dist. LEXIS 13567 **; 1989-1 Trade Cas. (CCH) P68,503

ROBERT SORISIO, d/b/a CONNECTICUT HANDBAG AND LUGGAGE COMPANY v. LENOX, INC., Successor to Hartmann Luggage Company

Core Terms

dealer, franchise, termination, Handbag, luggage, complaints, discount, prices, sales representative, manufacturer, unfair, summary judgment, argues, retail, alleges, merchandise, adherence, coercion, authorized dealer, competitors, plaintiff's claim, distributors, conspiracy, prescribed, practices, lines, suggested retail price, marketing plan, franchisee, products

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 the Sherman Antitrust Act, *15 U.S.C.S. § 1 (1982)*.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN2[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The essence of a claim under the Sherman Antitrust Act, *15 U.S.C.S. § 1*, is concerted action. An agreement between a manufacturer and its distributors to control resale prices of the manufacturer's products (vertical resale price maintenance) is per se illegal. By way of contrast, a manufacturer has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. The manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. An essential element of an antitrust claim, therefore, is evidence of a combination.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN3[] Regulated Practices, Price Fixing & Restraints of Trade

The Connecticut Antitrust Act, *Conn. Gen. Stat. §§ 35-24 et seq.*, incorporates, in modified form, the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.* Although not dispositive, interpretations of the federal act nevertheless are persuasive in construing the state act.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN4[] Summary Judgment, Opposing Materials

Fed. R. Civ. P. 56(c) provides that a court shall grant a motion for summary judgment if it determines 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. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The dispute must involve a material fact, one which affects the outcome of the suit under the governing substantive law. Moreover, the dispute must be genuine, one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN5[] Entitlement as Matter of Law, Genuine Disputes

The party seeking summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact. This may consist simply of pointing out that the plaintiff has failed to present any evidence to establish a necessary element of the cause of action. It then is incumbent upon the nonmoving party to show more than a metaphysical doubt as to the existence of material facts. In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a case under *15 U.S.C.S. § 1*. Thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment a plaintiff seeking damages for a violation of *15 U.S.C.S. § 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

Antitrust pleading is governed by the generally liberal philosophy of *Fed. R. Civ. P. 8*. There are certain acts, such as price fixing that are presumptively deemed to violate the antitrust laws. Where such per se violation is charged, with resultant harm to the plaintiff alleged, the pleading suffices.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

An unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested retail prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

A distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN10[] Regulated Practices, Price Fixing & Restraints of Trade

For a plaintiff to avoid summary judgment on a price-fixing claim he must advance sufficient evidence to raise a genuine dispute as to whether defendant engaged in coercive activity to force adherence to its suggested retail price and plaintiff and other retailers actually adhered to that price.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN11[] Regulated Practices, Price Fixing & Restraints of Trade

Pricing persuasion, pressure, even argument, is permissible conduct.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN12[] Regulated Practices, Price Fixing & Restraints of Trade

Plaintiff must offer evidence which tends to exclude the possibility that the manufacturer and the nonterminated distributors were acting independently. Something more than evidence of complaints is needed. A mere showing of close relations or frequent meetings between the alleged conspirators will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement. Nor does a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, or its consultation with such other competing wholesalers, standing alone, support a finding of conspiracy with them. Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN13[] Regulated Practices, Price Fixing & Restraints of Trade

In a case where the alleged price-fixing scheme is short-term and relatively simple in operation, the court must as a practical matter accept that the best proof available most often will only tend to show the existence of an informal, perhaps even tacit, rather than explicit, agreement.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN14[] Regulated Practices, Price Fixing & Restraints of Trade

Absent evidence of some price-fixing agreement, actual compliance with suggested retail prices is crucial to an inference of a combination.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN15[] **Regulated Practices, Price Fixing & Restraints of Trade**

The mere fact that a business reason advanced by a defendant for its cut-off of a customer is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy. Even if a manufacturer or supplier, acting independently, gave a false or inaccurate reason for its action, whether because of a desire to avoid controversy or some other consideration, this would not violate any legal obligation to the customer, absent proof of a conspiracy or breach of contract.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN16[] **Regulated Practices, Price Fixing & Restraints of Trade**

There must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

Business & Corporate Law > Distributorships & Franchises > Termination > Notice Requirements

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Termination Notice

Governments > Legislation > Types of Statutes

HN17[] **Franchise Relationships, Elements**

A franchise relationship, as defined by the Connecticut Franchise Act, *Conn. Gen. Stat. 42-133f(a)* may not be terminated except upon good cause shown and upon sixty days written notice.

Governments > Legislation > Types of Statutes

HN18[] **Legislation, Types of Statutes**

See *Conn. Gen. Stat. § 42-133e(b)*.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Governments > Legislation > Types of Statutes

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

HN19[] **Franchise Relationships, Elements**

There are several factors that are relevant to the determination that a party operated under a marketing plan or system prescribed in substantial part by another party for purposes of *Conn. Gen. Stat. § 42-133e(b)*. These include control over hours and days of operation, advertising, financial support, auditing of books and inspection of premises, control over lighting, employee uniforms, prices, trading stamps and hiring, sales quotas, and management training. There is no precise formula as to how many of such factors must exist, in the aggregate, before the control exercised by a manufacturer rises to a marketing plan or system prescribed in substantial part by a franchisor.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Antitrust & Trade Law > Consumer Protection > General Overview

HN20[] **Trade Practices & Unfair Competition, State Regulation**

See *Conn. Gen. Stat. § 42-110b(a)*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Governments > Courts > Common Law

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN21[] **Trade Practices & Unfair Competition, State Regulation**

Under the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110b(a)*, plaintiff must only allege that defendant's conduct was unfair. Unfairness is defined as: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers, competitors, or other businessmen.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN22[] **State Regulation, Claims**

A claim under the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110a et seq.*, must be pleaded with particularity to allow evaluation of the legal theory upon which the claim lies. A practice may be unfair even if all three criteria for the definition of unfairness are not met.

Counsel: **[**1]** Beverly Stauffer Knapp, L. Douglas Shrader, Zeldes, Needle & Cooper, Bridgeport, Connecticut

William R. Murphy, Sara Church Dinkler, Tyler, Cooper & Alcorn, New Haven, Connecticut

Judges: Ellen Bree Burns, United States District Judge.

Opinion by: BURNS

Opinion

[*952] RULING ON MOTION FOR SUMMARY JUDGMENT

ELLEN BREE BURNS, UNITED STATES DISTRICT JUDGE

The plaintiff, Robert Sorisio, owner and operator of the Connecticut Handbag and Luggage Company ["Connecticut Handbag"], brought this suit against the defendant, Lenox, Inc., seeking injunctive and monetary relief. Sorisio alleges that the defendant engaged in an unlawful price fixing scheme, and that it wrongfully terminated Connecticut Handbag as an authorized dealer for Hartmann Luggage. The plaintiff alleges violations of federal and state antitrust laws, *15 U.S.C. § 1*, *Conn. Gen. Stat. §§ 35-24 et seq*. (Count One), the Connecticut Franchise Act, *Conn. Gen. Stat. §§ 42-133e et seq*. (Count Two), and the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. §§ 42-110a et seq*. (Count Three). Jurisdiction in this court is under *28 U.S.C. § 1331*. The defendant has moved for summary judgment on all three claims. For the following reasons, the defendant's motion is granted.

FACTS

Plaintiff owns and operates two **[**2]** retail stores in Bridgeport and Norwalk, Connecticut ["Connecticut Handbag"], which offer for sale a variety of luggage, business cases, handbags, and accessories. Third Amended Complaint para. 6 ["Complaint"]. These products vary in price and quality from moderately priced brands to the most expensive and prestigious brands in the retail luggage industry. *Id*. Plaintiff aggressively markets this merchandise, purportedly by offering discounts of between twenty and thirty percent off of the manufacturers' suggested retail prices. *Id*. para. 7. Defendant, Lenox, Inc., the surviving entity in a merger with Hartmann Luggage Company ["Hartmann Luggage"], manufactures and sells "luggage, business cases, and accessories of the highest grade and quality." *Id*. para. 8.

Plaintiff sought to become a Hartmann dealer. In response to his inquiry, the defendant conducted an inspection of plaintiff's properties and performed a credit check in April, 1982. *Id*. para. 13. Plaintiff alleges that he was approved as a dealer, and that he wrote his first order as an authorized Hartmann dealer in February, 1983. *Id*. para. 14.

Sorisio claims that he enjoyed great success in marketing Hartmann's **[**3]** products, apparently at the expense of competing Hartmann dealers, who allegedly lost business when they refused to meet the prices at Connecticut Handbag. *Id*. para. 18. Plaintiff alleges that his competitors lodged complaints and demands with Hartmann Luggage seeking price stabilization. *Id*. para. 19. Plaintiff further alleges that Hartmann Luggage agreed with its retail dealers to fix the retail prices of its products in Connecticut. *Id*. para. 20. In the complaint, plaintiff claims that Hartmann's response to **[*953]** these complaints was two-fold. Allegedly, it implemented a discriminatory supply policy by refusing to provide Connecticut Handbag with its new luggage lines, *id*. paras. 21-23, and it then terminated Sorisio as an authorized dealer, *id*. paras. 24-25. In his Memorandum in Opposition to Defendant's Motion for Summary Judgment ["Opposition Memorandum"], the plaintiff claims that the defendant instituted several retaliatory measures. Plaintiff alleges that Hartmann Luggage coerced the plaintiff into complying with a price-fixing policy, that it refused to sell its new lines of luggage to the plaintiff, that it denied the plaintiff a sales representative after **[**4]** June, 1983, and that it eventually terminated the plaintiff as an authorized dealer. *Id*. at 11-15.

DISCUSSION

A. *Count One - Federal and State Antitrust Claims*

HN1[] Section one of the Sherman Antitrust Act states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." *15 U.S.C. § 1 (1982)*. [1] ***HN2***[] The essence of a *§ 1* claim is concerted action. *Schwimmer v. Sony Corp. of America, 677 F.2d 946, 952* (2d Cir.), *cert. denied*, *459 U.S. 1007, 74 L. Ed. 2d 398, 103 S. Ct. 362 (1982)*. An agreement between a manufacturer and its distributors to control resale prices of the manufacturer's products (vertical resale price maintenance) is per se illegal under *§ 1* of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-09, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*. By way of contrast, "[a] manufacturer . . . has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently . . . . The manufacturer can announce its resale prices in advance and refuse to deal with **[**5]** those who fail to comply." *Monsanto, supra, 465 U.S. at 761*, relying on *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919))*. An essential element of an antitrust claim, therefore, is evidence of a combination.

HN4[] *Rule 56(c) of the Federal Rules of Civil Procedure* provides that a court shall grant a motion for summary judgment if it determines 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." The mere existence of some alleged factual dispute between the parties will not **[**6]** defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. The dispute must involve a material fact, one which affects the outcome of the suit under the governing substantive law. *Id*. Moreover, the dispute must be genuine, one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id*.

HN5[] The party seeking summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact. "This may consist simply of pointing out that the plaintiff has failed to present any evidence to establish a necessary element of the cause of action." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 252* (2d Cir.), *cert. denied*, *484 U.S. 977, 108 S. Ct. 489, 98 L. Ed. 2d 487 (1987)*. It then is incumbent upon the nonmoving party to show more than a "metaphysical doubt" as to the existence of material facts. *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 **[*954]** (1986)*. "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities **[**7]** and drawing reasonable inferences against the moving party." *W.A. Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986)*, *cert. denied*, *480 U.S. 932, 107 S. Ct. 1570, 94 L. Ed. 2d 762 (1987)*.

> ***HN6***[] But ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case. Thus, in *Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, we held bat conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of *§ 1* must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.

Matsushita, supra, 475 U.S. at 588 (citations omitted).

1. Coercion

As the court understands the plaintiff's argument, he claims that he was coerced by Hartmann Luggage into offering his merchandise at a higher price, within an acceptable range of Hartmann's suggested retail prices. This combination, the plaintiff asserts, violates *§ 1* of the Sherman Act. The court concurs with the legal theory. *See* *Albrecht v. Herald Co., 390 U.S. 145, 150 n.6, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*; *United **[**8]** States v. Parke,*

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[1] ***HN3***[] The Connecticut Antitrust Act, *Conn. Gen. Stat. §§ 35-24 et seq*., incorporates, in modified form, the Sherman Antitrust Act. *Shea v. First Federal Savings & Loan Ass'n. of New Haven, 184 Conn. 285, 303-04, 439 A.2d 997 (1981)*. Although not dispositive, interpretations of the federal act nevertheless are persuasive in construing the state act. *Elida Inc. v. Harmor Realty Corp., 177 Conn. 218, 226, 413 A.2d 1226 (1979)*. The parties concur that the plaintiff has no independent antitrust claim by virtue of the state act, as a determination under the federal act will control. Motion for Summary Judgment at 10-11; Opposition Memorandum at 19 n.1.

Davis & Co., 362 U.S. 29, 43, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960); Yentsch v. Texaco, Inc., 630 F.2d 46, 52-53 (2d Cir. 1980). In the instant action, however, plaintiff's theory lacks factual support. [2]

[9]** The thrust of plaintiff's argument is that, based on a threat of termination allegedly implicit in a pricing discussion held with defendant's regional vice president, Sorisio agreed to mark his Hartmann merchandise with a discount of twenty percent or less, rather than his customary thirty percent discount. He nevertheless adhered to the thirty percent discount policy, and he claims that in retaliation Hartmann Luggage refused to sell him its new line of luggage and denied him access to a sales representative.

In United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960), the Court held that,

> ***HN8***[] an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested retail prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

Id. at 43. Sorisio claims that such an unlawful combination occurred when he unwillingly complied with Hartmann's suggested prices. *See* Yentsch, supra, 630 F.2d at 52. Yet, the United States Supreme Court has held that "a ***HN9***[] distributor is free to acquiesce in the **[**10]** manufacturer's demand in order to avoid termination." Monsanto, supra, 465 U.S. at 761. The issue, therefore, is whether the plaintiff can offer evidence that his agreement was coerced. Mere reluctance to adhere to suggested **[*955]** retail prices, absent coercion, will not suffice.

> While evidence of exposition, persuasion, argument, or pressure alone is insufficient to establish coercion, threats of termination, as long as they secure adherence to the fixed price, have been deemed to trespass beyond the boundaries . . . thereby triggering a finding of illegal combination.

Yentsch, supra, 630 F.2d at 53. *See also* Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975) (manufacturer's threat of termination for noncompliance with resale prices constitutes active coercion, "whether made in combination with others or alone"), *cert. denied*, *425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1667 (1976)*. "For [***HN10***[] Sorisio] to avoid summary judgment on [his] price-fixing claim [he] must advance sufficient evidence to raise a genuine dispute as to whether defendant[] engaged in coercive activity to force adherence to its suggested retail price and plaintiff and other retailers actually adhered to that price. " Reborn ***[**11]*** Enterprises, Inc. v. Fine Child, Inc., 590 F. Supp. 1423, 1439 (S.D.N.Y. 1984), *aff'd*, *754 F.2d 1072 (2d Cir. 1985)*.

As an initial matter, plaintiff offers no evidence, other than his own claim, that the discounting policy at Connecticut Handbag differed markedly from that of other Hartmann retailers. According to plaintiff, his discount rate of thirty percent exceeded the rates of twenty percent or less used by other Hartmann dealers. Opposition Memorandum at 28-29; Sorisio Dep. at 52. Plaintiff presented no permanent records to prove that he charged a thirty percent discounted price. Sorisio Dep. at 58-59. Sorisio claimed knowledge of others' pricing practices through prior work experience, a visit to another. retailers store, reading advertisements, and talks with sales representatives. Id. at 35-39. Plaintiff offers no documentary or testamentary evidence on this issue. Testimony from the defendant suggested that discount practices were not unusual among Hartmann dealers. [3] Sorisio conceded, in response to

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[2] Defendant argues that plaintiff's theory of unlawful combination between Connecticut Handbag and Hartmann Luggage is inappropriate because it was not pleaded in the complaint. Reply Memorandum at 4. Hartmann seeks to impose a factual pleading requirement that is not mandated by the Federal Rules of Civil Procedure. Plaintiff alleges that Hartmann's refusal to deal was a product of "agreement and combination with other Hartmann Luggage dealers in the State of Connecticut." Complaint para. 26. The court construes this allegation to subsume an agreement or combination with Connecticut Handbag. *See* 2A J. Moore, *Moore's Federal Practice* para. 8.17[3], at 8-104 (2d ed. 1985) ("the law is now well-settled that ***HN7***[] antitrust pleading is governed by the generally liberal philosophy of Rule 8."); *id*. at 8-113 ("there are certain acts, such as price fixing . . . that are presumptively deemed to violate the antitrust laws. Where such per se violation is charged, with resultant harm to the plaintiff alleged, the pleading suffices.").

[3] Sorisio concedes that he was informed by Irwin Davidson, a regional vice president for Hartmann Luggage, that "a lot of people discount. It just becomes a matter of degrees." Sorisio Dep. at 35; Opposition Memorandum at 28. Certainly other retailers

an inquiry regarding the regular discount practices of other Hartmann dealers in 1983 and 1984, that such dealers discounted "to some degrees when necessary." *Id.* **[**12]** *at 130*.

Plaintiff contends that in April, 1983, during a meeting in his Bridgeport store with Bruce Kalish, defendant's regional vice president, and James Imwalle, Sorisio's Hartmann sales representative, Kalish allegedly stated that other distributors were complaining about the prices in plaintiff's Norwalk store, and that the plaintiff's competitors were "living with twenty percent off, that people are happy." Sorisio Dep. at 54-55. When Sorisio offered **[**13]** to change his prices, Kalish allegedly responded, "I could live with it an awful lot better." *Id*. Imwalle said nothing. *Id. at 72*. Plaintiff agreed to mark his Hartmann merchandise at twenty percent off. Plaintiff did not elicit any corroborative testimony about this conversation from Mr. Kalish or Imwalle during their depositions. *See* Kalish Dep. at 13-19; Imwalle Dep. at 14. Neither person denied that the comments were made, because neither was asked about them. [4] Their testimony merely confirmed that the meeting occurred. Kalish acknowledged that dealer complaints were typical, but that he recalled no specific **[*956]** complaints about Connecticut Handbag. Kalish Dep. at 30, 32.

Sorisio claims **[**14]** that this conversation constituted an implied threat. In his brief, he claims that he complied to ensure approval as a franchisee. Opposition Memorandum at 29-30. In his affidavit, plaintiff claims that he changed the sales tickets to prevent termination of the franchise. Sorisio Affidavit para. 7. The court will assume for purposes of deciding this motion that Kalish made such comments. Sorisio's claim that he felt threatened is undermined by his own deposition testimony. In a response indicating acquiescence, not coercion, Sorisio stated that, "I was essentially doing Mr. Kalish a favor. I was making his life more livable. The spirit of cooperation." Sorisio Dep. at 68. *Cf. Monsanto, supra, 465 U.S. at 761* (mere acquiescence is not actionable). Plaintiff claims that he changed his price tags in Norwalk to show a twenty percent discount, but he also claims that he told Kalish, "' We'll leave Bridgeport alone and if you live more comfortably, Bruce, great, I'm still going to effectively sell it at what I want to.'" *Id. at 56*. Sorisio testified that he interpreted Kalish's concern as one with the marked price, so he showed a twenty percent discount but gave purchasers additional **[**15]** discounts. *Id*. Sorisio Affidavit para. 7. Plaintiff makes no claim that he ever actually sold his Hartmann merchandise at other than his conventional discount levels.

The court concludes that plaintiff has not created a genuine dispute as to the material facts supporting his coercion claim. There is no showing that plaintiff's discounting policy differed markedly from that of his competitors. Nor has the plaintiff offered any evidence of the defendant's purported threats at the April, 1983, meeting, other than his own recollection. Even if this discussion occurred as recounted by Sorisio, this court holds as a matter of law that such is insufficient to constitute "evidence of threats or other *explicitly* coercive conduct" required to establish coercion. *Belfiore v. New York Times Co., 654 F. Supp. 842, 851 (D. Conn. 1986)* (emphasis added), *aff'd*, *826 F.2d 177 (2d Cir. 1987)*, *cert. denied*, *484 U.S. 1067, 108 S. Ct. 1030, 98 L. Ed. 2d 994, 1988 WL 14880* (U.S. Feb. 22, 1988) (No. 87-1118). Plaintiff's own deposition testimony seriously undermines his claim that he perceived Kalish's comments as threatening. ***HN11***[] Pricing persuasion, pressure, even argument, is permissible conduct. *See Yentsch, supra, 630 F.2d at 53*. **[**16]** Nor has the plaintiff demonstrated that he complied by actually charging higher prices. Such actual adherence is required as a matter of law. *See id. at 54-55*; *Belfiore, supra, 654 F. Supp. at 852*; *Reborn Enterprises, Inc., supra, 590 F. Supp. at 1439*.

Sorisio also argues that Hartmann's selective refusal to deal its new line of luggage, and its denial of a sales representative constitute additional coercion. Opposition Memorandum at 34. Sorisio claims that Imwalle informed

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discounted. Bruce Kalish, a regional vice president for Hartmann, indicated that "most of the stores we sold discounted. . . . Not everybody kept full suggested retail." Kalish Dep. at 31. Moreover, Jim Imwalle, a Hartmann sales representative for Sorisio, testified in response to an inquiry seeking "knowledge as to how [Sorisio's] retail prices of Hartmann products compared to other accounts of yours in the State of Connecticut", that "They were all similar." Imwalle Dep. at 24.

[4] The defendant elicited no testimony on this issue when cross examining these two individuals at their depositions. Both depositions antedate that of the plaintiff. Imwalle Dep. 11/12/85; Kalish Dep. 1/21/86; Sorisio Dep. 7/21/86. The first indication that plaintiff's action would be based, in part, on a theory of combination between defendant and Connecticut Handbag resulting from a coercive threat allegedly made by defendant, was the Opposition Memorandum, filed on December 1, 1987.

him of Hartmann's refusal to deal with Connecticut Handbag on the new Hartmann lines at a June, 1983, meeting. Imwalle purportedly said,

> "I don't know how to tell you this, but there's a hit list out from Hartmann, and," he said, "certain people are on it and I believe you are on it, that you will not be eligible to receive this new merchandise."

Sorisio Dep. at 76-77. Sorisio further claims that Imwalle said that the reason was Sorisio's pricing policies. *Id. at 77-78*. Imwalle agreed that he informed Sorisio of Hartmann's decision. Imwalle Dep. at 29. His version of the reasoning is different. He remembered discussing it with Kalish, but didn't think that Kalish ever gave him a specific reason. **[**17]** *Id. at 30*. [5] Imwalle also testified that this was not Kalish's decision to make, but was a 'Headquarters" determination. *Id*. Plaintiff claims that he eventually telephoned Kalish in August, 1983, to request the new product line. Sorisio Dep. at 84. Kalish purportedly confirmed that Connecticut Handbag would not receive the new line, refused to discuss it, and stated, "Effectively, we're going to be sold out for the year on it. We have **[*957]** committed." *Id. at 85*. Sorisio does not allege that price was discussed. He had no further discussions with Hartmann representatives regarding the new line. *Id. at 89-91*.

The court concludes that plaintiff has not established a factual predicate upon which a jury could conclude that Hartmann's refusal to sell Sorisio its new line of luggage was a price-related attempt to coerce the plaintiff into raising his prices. The plaintiff has failed to establish that any threats, express or implied, antedated or accompanied Hartmann's conduct. Moreover, plaintiff adduced no evidence, other than his own deposition testimony, to suggest that this episode was related **[**18]** to his pricing policies.

Plaintiff's claim of failure to provide a sales representative equally is unavailing. Imwalle left Hartmann's employ in July, 1983. Imwalle Dep. at 31. The plaintiff claims that during his phone call with Kalish in August, 1983, he inquired about a replacement. Sorisio Dep. at 85. Kalish allegedly stated that he would provide a sales representative "possibly in '84," but that Barry Kaspar, Imwalle's replacement, would not be calling at Connecticut Handbag. Kalish does not recall this conversation. Kalish Dep. at 29-30. Barry Kaspar, Imwalle's replacement, testified in his deposition that Kalish instructed him not to call on Connecticut Handbag, and that the reason was image related. Kaspar Dep. at 16. Other than to conclude that the lack of a sales representative was a coercive measure on Hartmann's part, Sorisio does not allege that he had any conversation with anyone that suggested that Hartmann's motivation was price related. The lack of a sales representative did not prevent Sorisio from ordering and obtaining Hartmann's other products. Opposition Memorandum at 16; Kaspar Dep. at 17; Bienstock Dep. at 45. [6] Moreover, Janet Bienstock, the sales representative **[**19]** who replaced Kaspar in February, 1984, testified that she attempted, in early 1984, to "introduce [her]self and offer [her] services as their new sales representative." Bienstock Dep. at 4, 25. She was unable to locate Connecticut Handbag's Brookfield, Connecticut, office location, and she claims that follow-up phone calls to Sorisio were unsuccessful. *Id. at 26-27*. In deposition testimony, Sorisio referred to Bienstock's call of March 27, 1984, at 2:13 P.M. Sorisio Dep. at 104, 107. This suggests a gap in sales coverage, not a failure to provide a sales representative. Bienstock testified that she did visit Sorisio's retail locations in March or April, 1984, but that this visit was in conjunction with Hartmann's nationwide image review of its retailers. Bienstock Dep. at 27-28. Whether viewed individually, or in conjunction with Kalish's purported price-related threat, Hartmann's failure to provide Sorisio with a sales representative is insufficient to establish coercion.

2. Complaints

The plaintiff's theory is that Hartmann Luggage terminated Sorisio in response **[**20]** to complaints lodged by competitors, thus serving to fix prices at levels higher than those charged by Connecticut Handbag. Opposition Memorandum at 14. Sorisio further claims that Hartmann's image-related reasons for the termination of his dealership were pretextual. *Id. at 17*. The requisite combination alleged is not between Hartmann and the plaintiff, but between Hartmann and plaintiff's competitors.

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[5] Kalish does not remember this conversation with Imwalle, Kalish Dep. at 20-21.

[6] The page numbers on the copy of Bienstock's deposition are not clear. The court's citations are approximate.

HN12[] Plaintiff must offer "evidence which tends to exclude the possibility that the manufacturer and the nonterminated distributors were acting independently." *Monsanto, supra, 465 U.S. at 764*. "Something more than evidence of complaints is needed." *Id*. The Second Circuit has provided guidelines that indicate what will be considered insufficient as a matter of law to warrant an inference of a conspiracy or combination.

> "[A] mere showing of close relations or frequent meetings between the alleged **[*958]** conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement." Nor does a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, or its consultation with **[**21]** such other competing wholesalers, standing alone, support a finding of conspiracy with them. Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them.

H.L. Moore Drug Exchange v. Eli Lilly & Co., 662 F.2d 935, 941 (2d Cir. 1981) (citations omitted), *cert. denied*, *459 U.S. 880, 74 L. Ed. 2d 144, 103 S. Ct. 176 (1982)*.

Plaintiff has established some evidence of complaints. Sorisio's knowledge of these complaints comes from Imwalle's deposition testimony. Sorisio Dep. at 142. Imwalle recounted receiving inquiries from three specific area dealers, Imwalle Dep. at 25-28, two of whose complaints addressed concerns with Connecticut Handbag. *Id*. at 25. [7] Imwalle claimed that no discussions ensued with either dealer, as he responded to these inquiries with "I am not allowed to discuss the pricing policies of my dealers to you or anybody else." *Id. at 26, 27*. Kaspar recalled complaints from other dealers but, like Imwalle, he refused to discuss Connecticut Handbag with his accounts. Kaspar Dep. at 24. Bienstock testified that Sorisio's stores **[**22]** were mentioned to her by her other accounts, but that she never discussed Connecticut Handbag with them. Bienstock Dep. at 37. She further stated that none of these accounts threatened to cease carrying Hartmann products if it continued to deal with Sorisio. *Id*. at 51-52. No evidence suggests that Imwalle, Kaspar, or Bienstock communicated these complaints to Sorisio.

[23]** The Second Circuit has noted that "in *HN13*[] a case where the alleged scheme is short-term and relatively simple in operation, we must as a practical matter accept that the best proof available most often will only tend to show the existence of an informal, perhaps even tacit, rather than explicit, agreement." *Apex Oil Co., supra, 822 F.2d at 253*. Plaintiff's proof does not rise to an inference of an informal or tacit agreement. Although evidence exists documenting general discussions of Hartmann's marketing policies, no evidence suggests that Sorisio's price cutting served as the basis for competitors' complaints. Indeed, the evidence consistently suggests that defendant's personnel refused to entertain any complaints addressed specifically to Connecticut Handbag. Moreover, the only evidence as to whether Sorisio's competitors threatened to stop buying from Hartmann if it allowed continued discounting at Connecticut Handbag indicates that no such threats were made. Bienstock Dep. at 51-52. *Cf. Burlington Coat Factory Warehouse v. Belk Bros. Co., 621 F. Supp. 224, 235 (S.D.N.Y. 1985)*; *Reborn, supra, 590 F. Supp. at 1433*.

Sorisio argues that evidence of his own coercion **[**24]** should serve to suggest inferentially that other dealers similarly were coerced. As the court did not find sufficient evidence of plaintiff's coerced compliance with defendant's suggested retail prices, this argument is unavailing. Nor has the plaintiff established any actual adherence to Hartmann's alleged price-fixing policy, either by Connecticut Handbag or its competitors. *HN14*[]

[7] One of the dealers, Jack Erlich, indicated in deposition testimony that he didn't recall any discussions where he lodged formal complaints with Imwalle. Erlich Dep. at 15. He recalls speaking to a Hartmann salesperson after finding out what type of store Sorisio operated "and to find good merchandise in that type of a store. . . ." *Id. at 12*. No testimony was elicited suggesting that this dealer complained about prices. Another dealer, Steve Silver, testified that he recalled several discussions with various Hartmann sales representatives, but only one that definitely involved Connecticut Handbag. This was in a December, 1983, discussion with Kaspar, when Kaspar volunteered that Hartmann was selling merchandise to Sorisio but was looking to try to close the account. Silver Dep. at 5-6. Silver disavowed any discussions of Sorisio's discounting policies with Hartmann, *id*. at 7, or other retailers, *id. at 11*.

Absent evidence of some agreement, actual compliance is crucial to an inference of a combination. *See* ***[*959]*** *Yentsch, supra, 630 F.2d at 54*, *Belfiore, supra, 654 F. Supp. at 852*; *Reborn, supra, 590 F. Supp. at 1439*.

Plaintiff would have the fact finder infer the existence of a combination by virtue of his attack on the image-related business reasons proffered by Hartmann for its termination of Sorisio. Opposition Memorandum at 17. As a general proposition,

> ***HN15***[] the mere fact that a business reason advanced by a defendant for its cut-off of a customer is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy. Even if a manufacturer or supplier, acting independently, gave a false or inaccurate reason for its action, whether because of a desire to avoid **[**25]** controversy or some other consideration, this would not violate any legal obligation to the customer, absent proof of a conspiracy or breach of contract.

H.L. Moore Drug Exchange, supra, 662 F.2d at 941. The Second Circuit discussed the relevance of failure to follow internal procedures governing termination in *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919 (2d Cir. 1985)*. In that case, the court did not allow the defendant's failure to adhere to its internal termination procedures to serve as evidence of concerted action. The court compared *Burlington* to *Monsanto*, noting that, in both cases, marketing requirements were not disclosed to a dealer prior to termination but these standards assumed import only after litigation was commenced. *769 F.2d at 924*. In *Burlington*, the record contained uncontroverted evidence that such a policy existed, but the record was devoid of any evidence of complaints by competing dealers. *Id. Monsanto*, according to the court, did "involve an issue as to the honesty of the claim that the cancellation was based on retail marketing requirements." *Id*. Moreover, evidence of complaints by competing dealers **[**26]** existed in that case. *Id*.

Although the instant action appears, at first blush, to fit within the *Monsanto* mold, a significant issue distinguishes these two cases. In *Monsanto*, the Court found "substantial *direct* evidence of agreements to maintain prices" between Monsanto and its distributors. *465 U.S. at 765*. Indirect evidence in the form of a newsletter produced by one of the distributors also implied the existence of such an agreement. *Id. at 765-66*. With this agreement as a backdrop, the Court then determined that a jury issue existed as to whether Spray-Rite's termination was pursuant to the agreement. *Id. at 767*. The record included testimony that Monsanto representatives informed Spray-Rite of complaints from other distributors. *Id*. Monsanto expressly requested that Spray-Rite comply with its resale prices, and then explicitly threatened termination if it did not raise its prices. *Id. at 767-78*.

In the instant action, plaintiff adduced no direct evidence of an agreement between Hartmann and its distributors to maintain prices. The court determined that plaintiff's circumstantial evidence on this same question is insufficient as a matter of law. "There ***HN16***[] must be direct **[**27]** or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto, supra, 465 U.S. at 768*. Absent evidence of any such "conscious commitment" in the instant action, the court will not consider the merits of plaintiff's challenge to the veracity of Hartmann's reasons for terminating the plaintiff's dealership.

Accordingly, the defendant is granted summary judgment on the federal and state antitrust claims.

B. *Count Two - Connecticut Franchise Act Claim*

In Count Two of his complaint, Sorisio alleges that Hartmann's termination of its relationship with Connecticut Handbag constituted a violation of the Connecticut Franchise Act ["Act"]. *Conn. Gen. Stat. §§ 42-133e et seq*. ***HN17***[] A franchise relationship, as defined by the Act, may not be terminated except upon good cause shown and upon **[*960]** sixty days written notice. *Conn. Gen. Stat. § 42-133f (a)*.

> "Franchise" means an oral or written agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan **[**28]** or system prescribed in substantial part by a franchisor . . . *and* (2) the operation of the franchisee's business

pursuant to such a plan or system is substantially associated with the franchisor's trademark, service mark, tradename, logotype, advertising or other commercial symbol designating the franchisor or its affiliate. . . .

HN18[] *Conn. Gen. Stat. § 42-133e(b)* (emphasis added).

Defendant argues that the Act is inapplicable to the instant action because the relationship between Hartmann and Connecticut Handbag was not that of a franchise. Hartmann contends that it did not prescribe, in substantial part, a marketing plan for Sorisio and that plaintiff's business was not substantially associated with its trade name. The court concurs.

Sorisio has failed to establish that he operated under a "marketing plan or system prescribed in substantial part" by Hartmann. In *Consumers Petroleum of Connecticut, Inc. v. Duhan, 38 Conn. Supp. 495, 452 A.2d 123 (App. Sess. 1982)*, the court enumerated **HN19**[] several factors that are relevant to this determination. These include control over hours and days of operation, advertising, financial support, auditing of books and inspection of premises, control over lighting, **[**29]** employee uniforms, prices, trading stamps and hiring, sales quotas, and management training. *Id. at 498-99*. There is no precise formula as to how many of such factors must exist, in the aggregate, before the control exercised by a manufacturer rises to a marketing plan or system prescribed in substantial part by a franchisor. Nevertheless, plaintiff has established very few such factors in the instant case.

The record is devoid of evidence that Hartmann prescribed operations, uniforms, hiring or sales quotas, or that it audited books or provided financing. The "image criteria" used by Hartmann to establish standards for its retailers is not a prescription. It is strictly an internal document, unavailable to the retailers, and contains merely general standards, not specific plans or systems. Motion for Summary Judgment at 31; Defendant's Exhibit O (Subject to Protective Order). The evidence of inspections (one when Hartmann first considered Connecticut Handbag in early 1982, and one when it performed a nationwide review in 1984) is de minimis. Instructions on product promotion, display and training, both of which were geared toward intrastore product differentiation, do not constitute **[**30]** indicia of control. *Grand Light & Supply Co., Inc. v. Honeywell, Inc., 771 F.2d 672, 677 (2d Cir. 1985)*; *McKeown Distributors, Inc. v. Gyp-Crete Corp., 618 F. Supp. 632, 642 (D. Conn. 1985)*. No evidence exists that Hartmann prescribed prices. It suggested retail prices, and discounting practices were prevalent. *See supra*. Plaintiff's argument, therefore, rests squarely on the fact that Sorisio received and executed a "franchise agreement", and that Hartmann required Sorisio to stock its full line of luggage before he could be approved as a dealer. Opposition Memorandum at 43-45.

The court concurs with the plaintiff that the use of the word "franchise" in an agreement between a manufacturer and a dealer may be a probative factor. *Id. at 45*. *Cf.* *McKeown Distributors, Inc., supra, 618 F. Supp. at 642-43* (absence of the term "franchise" in agreement is relevant to determination of franchise under the Act). Sorisio's initial inquiry to Hartmann was directed at acquiring a franchise, and the response acknowledged plaintiff's "interest in becoming a Hartmann franchised dealer." Plaintiff's Exhibits 2, 5. Plaintiff also relies on Hartmann's "Acknowledgement of Authorized **[**31]** Franchised Dealer Policy" form, which requires that a signatory dealer agree to adhere to Hartmann's policy, as stated in its "Notice to Dealers." *Id*. Exhibit 9. Sorisio and Imwalle executed **[*961]** such a form, but it is undated. [8] Hartmann claims that they have no record of receiving this executed form. A dispute exists, therefore, about whether Sorisio was an authorized dealer commencing some time in early 1983. *See* Imwalle Dep. at 17; Kalish Dep. at 25. *Cf.* McCornack Dep. at 9-10 (Sorisio was a dealer for close-out merchandise only and the shipment of general goods to Connecticut Handbag was an error).

This status, authorized dealer, is not necessarily synonymous with "franchisee" as that term is used in the Act. The policy that Sorisio agreed to requires that the authorized dealer (1) sell only to retail customers, (2) **[**32]** only in the location initially approved by Hartmann, and (3) obtain permission from Hartmann prior to expanding the franchise to additional locations. Plaintiff's Exhibit 9. In addition, the policy contains a prohibition against

[8] Accompanying the form is a hand-written note, which purports to be from Imwalle and that instructs Sorisio to sign the form but not to date it. Imwalle's note is dated 4/23/83, although he could not recall when he signed the document. Imwalle Dep. at 67-68. Sorisio testified that he received Imwalle's dated note with the policy form. Sorisio Dep. at 110.

transshipping. Violation of the policy is grounds for termination as a dealer. The dealer's signature is required as an acknowledgement of this policy. *Id*. Coupled with the policy is the requirement that a dealer must buy and present all of Hartmann's lines. These are prescriptive measures, but together they do not approach the level of *operational* control required under the Act. *See, e.g., Carlos v. Philips Business Systems, Inc., 556 F. Supp. 769, 776* (E.D.N.Y.) (construing Connecticut Act, evidence of defendant's "overwhelming" control over plaintiff's business established franchise relationship), *aff'd*, *742 F.2d 1432 (2d Cir. 1983)*.

Even if a marketing plan was substantially prescribed by Hartmann, the court holds that Sorisio's stores were not "substantially associated with [Hartmann's] trademark . . . [or] trade name. . . ." *Conn. Gen. Stat. § 42-133e(b)(2)*. Plaintiff contends that there is no exclusivity provision in the Act, requiring **[**33]** a franchisee to carry only a franchisor's merchandise. At least two federal district courts noted this also, and held that only the portion of the business operated pursuant to a marketing plan or system needed to be "substantially associated" with the franchisor's trademark. *See Hydro Air of Connecticut, Inc. v. Versa Technologies, Inc., 599 F. Supp. 1119, 1125 (D. Conn. 1984)*; *Grand Light & Supply Co., Inc. v. Honeywell, Inc*., Civ. No. N78-342 (D. Conn. July 13, 1984), *rev'd*, *771 F.2d 672 (2d Cir. Conn. 1985)*.

The Second Circuit explicitly overruled this interpretation in *Grand Light, supra.* The court interpreted dicta in *Muha v. United Oil Co., 180 Conn. 720, 726, 433 A.2d 1009 (1980)*, the only Connecticut Supreme Court opinion construing the Act, to mean that "the absence of exclusivity in the lessor/lessee relationship would have been significant, even if there had been a trademark." *771 F.2d at 678*. In *Grand Light*, the Second Circuit stated that exclusivity is not required under the Act, but that "more than three percent be involved," which was the amount of Grand Light's business attributable to Honeywell. *Id*. The policy issue, as defined by the court, required **[**34]** much more.

> Where the franchisee is completely dependent on the public's confidence in the franchised product for *most or all his business*, abrupt severance of the franchise tie, without good cause and without sufficient notice, could spell ruination. No such dependence existed here.

Id. 771 F.2d at 677 (emphasis added).

Similarly, no such dependence is demonstrated in the instant action. Sorisio concededly carries many lines of luggage, "more than any department store in the State." Sorisio Dep. at 17. Defendant argues, and plaintiff does not contest, that Sorisio's purchases of Hartmann merchandise constituted less than ten percent of his total product purchases in 1982, 1983, and 1984. Motion for Summary Judgment at 36 & n.7. He argues that, had he been able to purchase Hartmann's new lines in 1983 and 1984, a larger percentage of his **[*962]** business would have been devoted to Hartmann's products. Opposition Memorandum at 46-47. Plaintiff's argument transcends reasonable inference into the clearly speculative. Neither the record nor the plaintiff suggests, nor will the court infer, that Hartmann merchandise would have comprised "most if not all of [Sorisio's] business. "

Absent a marketing **[**35]** plan or system prescribed by defendant and a substantial association with Hartmann's trademark or trade name, the court concludes that the Connecticut Franchise Act is inapplicable to this action. Defendant's motion for summary judgment on Count Two is granted.

C. *Count Three - Connecticut Unfair Trade Practices Claim*

HN20[] The Connecticut Unfair Trade Practices Act ["CUTPA"] provides that "no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Conn. Gen. Stat. § 42-110b(a)*. Plaintiff's complaint contains three allegations of CUTPA violations. Sorisio claims that the conduct underlying his antitrust claim also violates the CUTPA. Complaint para. 29. [9] In his brief, Sorisio argues that even if summary judgment is granted on the antitrust claims, a jury might find defendant's "refusal to deal" or termination were an unfair practice. Opposition Memorandum at 49-51. Plaintiff argues that Hartmann did much

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[9] Plaintiff also maintains that his termination as a franchisee without a good cause or written notice violates the CUTPA. The court held that the Connecticut Franchise Act is inapplicable to this action, thus rendering plaintiff's second CUTPA claim moot.

more than merely refuse to deal; it purportedly "refus[ed] to sell plaintiff the new Hartmann luggage lines, den[ied] him the service of a sales representative, and then terminat[ed] plaintiff as a Hartmann **[**36]** franchise dealer in order to reduce or eliminate price competition in Connecticut." *Id. at 51*.

An allegation of conspiracy or combination is not required in order to state a claim under the CUTPA, but evidence establishing a nexus between Hartmann's conduct prior to June 8, 1984, and the public interest is required. *Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc., 190 Conn. 528, 540, 461 A.2d 1369 (1983)*, as superseded by Public Act 84-468 § 2 (June 8, 1984) ("Proof of public interest shall not be required in any action brought under [CUTPA]."). The amendment has not been given retroactive application. *L. Cohen & Co. v. Dun & Bradstreet, Inc., 629 F. Supp. 1425, 1432 (D. Conn. 1986)* (and cases cited therein).

Plaintiff alleges and the court discerns no "specific and substantial" public interest inherent in Hartmann's decisions to forego sales of its new lines of luggage to Connecticut Handbag and to allow an eight-month **[**37]** gap in sales representative coverage. Hartmann's decision to terminate Sorisio as a dealer occurred after June 8, 1984 and, need not be cloaked in the mantle of public interest. ***HN21***[] Plaintiff must only allege that this conduct was unfair, as defined by the CUTPA. Connecticut's Supreme Court defines unfairness as

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (competitors or other businessmen).

Ivey, Barnum & O'Mara, supra, 190 Conn. at 539 n.13, 461 A.2d 1369 (citation omitted).

HN22[] A CUTPA claim must be pleaded with particularity to allow evaluation of the legal theory upon which the claim lies. *See Grand Light, supra*, Civ. No. N78-342 (D. Conn. April 23, 1987), *aff'd*, *838 F.2d 1202 (2d Cir. Conn. 1987)* (oral opinion per local rule 0.23). A practice may be unfair even if all three criteria are not met. **[**38]** *McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 569, 473 A.2d 1185 (1984)*; *Gibbs v. Mase, 11 Conn. App. 289, 296, 526 A.2d 7* ***[*963]*** *(1987)*. Plaintiff alleges that the defendant's conduct was "immoral, unethical, oppressive or unscrupulous." This second criterion is " "largely duplicative " of the other two factors. *Carpentino v. Transport Ins. Co., 609 F. Supp. 556, 563 (D. Conn. 1985)* (citation omitted).

Sorisio argues that, to the extent that defendant's conduct violates ***antitrust law***, it violates public policy, thus serving as grounds for a CUTPA claim. Opposition Memorandum at 49. Because the court determined that no such violation occurred, this argument is unavailing. Plaintiff concedes that a "simple refusal to deal" is within the defendant's rights. *Id. at 50-51*. He argues, however, that a refusal to deal complicated by additional conduct may offend public policy, specifically as a violation of the Federal Trade Commission Act. *Id*. at 51. Defendant acknowledges that its conduct may be "actionably 'unfair' under CUTPA even if not actually violative of the antitrust laws. . . ." Motion for Summary Judgment at 40 n.10. Plaintiff's position fails, however, because the additional conduct **[**39]** he relies on was dismissed by the court for occurring prior to June 8, 1984, and for lacking public interest. Plaintiff's remaining claim is that Hartmann "terminat[ed] plaintiff as a Hartmann franchise dealer in order to reduce or eliminate price competition in Connecticut." Opposition Memorandum at 51. Sorisio was not a franchise dealer when he was terminated. He may or may not have been an authorized dealer. Even assuming that he was authorized as a dealer, plaintiff offers no basis to conclude that Sorisio's termination violates the Federal Trade Commission Act or any other statute, common law, or "established concept of fairness. " He does not suggest that Hartmann violated its dealership agreement, or that its conduct constituted unfair competition. *Cf. Copy-Data Systems, Inc. v. Toshiba America, Inc., 663 F.2d 405, 411 (2d Cir. 1981)*, *on remand 582 F. Supp. 231 (S.D.N.Y. 1984)*, *rev'd 755 F.2d 293* (2d Cir.), *cert. denied*, *474 U.S. 825, 88 L. Ed. 2d 66, 106 S. Ct. 80 (1985)*. He argues instead that Hartmann's stated image-related rationale for the termination was pretextual, and that its true goal was price fixing. As held earlier, evidence of price fixing has not been established in either the plaintiff's **[**40]** complaint or his brief. The court is unwilling to open this inquiry to a jury absent a particularized allegation of how the termination constituted a violation of an established concept of unfairness. [10] Summary Judgment is appropriate.

Sorisio also alleges that, even if the Connecticut Franchise Act does not govern this action, when Hartmann informed him that he was a franchisee it required him to comply with the defendant's "Authorized Dealer Franchise Policy," a deceptive practice that plaintiff claims violated the CUTPA. As stated earlier, the alleged deception and Sorisio's "coerced compliance" with the dealer's policy occurred prior to June 8, 1984. Again, plaintiff alleges no nexus with a "specific and substantial" public interest. Public policy with regard to franchise relationships **[**41]** was codified during this period of time in the Connecticut Franchise Act, which the court held, *supra*, does not govern the parties' relationship.

In his brief, Sorisio argues that "the implication of such representation was that plaintiff was protected by this state's franchise statute." Opposition Memorandum at 52. He argues that this cause of action arose in July, 1984, when he was terminated by Hartmann. The court disagrees. The defendant's use of the term "franchise" in correspondence and in the " Authorized Dealer Franchise Policy" form became "deceptive" only when the court held the Connecticut Franchise Act inapplicable to the parties' relationship. Plaintiff has no more claim to CUTPA damages on this theory than would Hartmann, should it pursue vexatious litigation damages. **[*964]** Reasonable arguments existed on the franchise question. The court will not allow plaintiff to bootstrap his way into a claim of deceptive representation based on a judicial determination rendered after three years of active discovery and thorough briefs submitted by both parties. This theory of CUTPA fails, and summary judgment for the defendant is appropriate.

CONCLUSION

Summary Judgment is granted **[**42]** on Counts One, Two and Three of the complaint.

SO ORDERED.

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[10] Plaintiff neither alleges in his complaint nor pleads in his brief that defendant's conduct caused substantial injury to consumers, competitors, or other business people. *See* *Ivey, Barnum & O'Mara, supra, 190 Conn. at 539 n.13, 461 A.2d 1369*. *See also* *McLaughlin Ford, supra, 192 Conn. at 569-70, 473 A.2d 1185* (to succeed on this third criterion, plaintiff must satisfy three-pronged "substantial injury test").

Disher v. Information Resources, Inc.

United States District Court for the Northern District of Illinois, Eastern Division

May 27, 1988, Decided ; May 31, 1988, Filed

No. 83 C 6964

Reporter

691 F. Supp. 75 *; 1988 U.S. Dist. LEXIS 5007 **; 1988-2 Trade Cas. (CCH) P68,187; Fed. Sec. L. Rep. (CCH) P94,052

David C. Disher, Plaintiff, v. Information Resources, Inc., a Delaware corporation, John L. Malec, Gian M. Fulgoni, both individually and as voting trustee, William C. Walter, both individually and as voting trustee, Defendants

Core Terms

stock, antitrust, voting trust, damages, state court, shares, breach of fiduciary duty, state law claim, induced, fiduciary duty, federal claim, alleges, parties, confidentiality agreement, rescind, res judicata, misrepresentations, argues, rescission, customers, breached, securities fraud, merits, void, restrictive covenant, collateral estoppel, fiduciary breach, summary judgment, proceedings, injunction

LexisNexis® Headnotes

Banking Law > Types of Banks & Financial Institutions > National Banks > Affiliates & Subsidiaries

Securities Law > Civil Liability Considerations > Preservation of Remedies & Rights

HN1[] **National Banks, Affiliates & Subsidiaries**

The general rule is that a securities fraud plaintiff is to be placed in the same position as he would have been had there been no fraud. This includes that such a plaintiff is entitled to profit to the full extent that he would have profited had there been no fraud. The plaintiff is limited to actual damages, except where the defendant's profit from the transaction exceeds the plaintiff's actual damages. The plaintiff is not entitled to the full benefit of his bargain except where necessary to prevent unjust enrichment of the defendant.

Securities Law > Civil Liability Considerations > Preservation of Remedies & Rights

HN2[] **Civil Liability Considerations, Preservation of Remedies & Rights**

A plaintiff cannot recover for losses and ignore profits where both result from a single wrong. Instead, a plaintiff can only recover for net losses occurring after the fraud was committed.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN3[] Clayton Act, Claims

Antitrust plaintiffs must show more than simply an injury causally linked to an antitrust violation; instead plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. Antitrust injury alone does not satisfy the standing requirement. Even if suffering antitrust injury, the plaintiff must be a proper plaintiff under § 4 of the Clayton Act, *15 U.S.C.S § 15*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4[] Private Actions, Standing

The first inquiry regarding standing in an antitrust action is whether the injury sustained by plaintiff is the type the antitrust laws were intended to prevent. The Sherman Act, *15 U.S.C.S. § 1 et seq.*, is intended to assure customers the benefit of price competition and protect the economic freedom of participants in the market.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN5[] Diversity Jurisdiction, Citizenship

It is a well-settled rule that diversity of citizenship is determined as of the date the action is commenced.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN6[] Subject Matter Jurisdiction, Jurisdiction Over Actions

The ordinary rule for pendent jurisdiction is that all remaining pendent claims are dismissed for lack of subject matter jurisdiction if all the federal claims are dismissed before trial.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN7[] Subject Matter Jurisdiction, Supplemental Jurisdiction

Judicial economy, the essential policy behind the modern doctrine of pendent jurisdiction which created, supports the retention of pendent jurisdiction in any case where substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN8[] **Federal & State Interrelationships, Erie Doctrine**

In determining the effect of the state court judgment, the federal court must give that judgment the same preclusive effect it would have in the courts of Illinois. Ordinarily, res judicata bars all issues that were raised or could have been raised. Illinois ordinarily does not permit the splitting of causes of action. However, where the parties agree to dismiss certain claims, parts of claims, or forms of relief without prejudice, res judicata will not bar raising those claims or parts of claims in a subsequent proceeding.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN9[] **Estoppel, Collateral Estoppel**

The elements of collateral estoppel are: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must be fully represented in the prior action.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN10[] **Damages, Punitive Damages**

Illinois does not permit a claim for punitive damages where no actual damage is shown.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN11[] **Summary Judgment, Burdens of Proof**

The burden is on movants to show they are entitled to summary judgment.

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > Claims Against & By

Securities Law > Blue Sky Laws > Exemptions & Exclusions > Exempt Securities

Business & Corporate Law > ... > Shareholders > Meetings & Voting > General Overview

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > General Overview

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > Standards of Care

Governments > Fiduciaries

HN12[] **Duties & Powers, Claims Against & By**

A trustee has a duty to reasonably defend the trust against a suit for rescission. Also, fiduciaries will not ordinarily be held liable for incorrectly speculating as to the results of a lawsuit. But a fiduciary must act reasonably and in good faith.

Contracts Law > Breach > General Overview

Estate, Gift & Trust Law > ... > Private Trusts Characteristics > Trustees > Removal & Resignation

Governments > Fiduciaries

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN13[] **Contracts Law, Breach**

A claim for breach of fiduciary duty can be maintained even if the agreement creating the fiduciary relationship is subsequently held to be void since, at the time the breach occurs, the fiduciary was bound to perform his or her fiduciary duties.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Governments > Fiduciaries

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN14[] **Wire Fraud, Elements**

Not every common law breach of fiduciary duty that involves mailings or use of the telephone constitutes a violation of the mail and wire fraud statutes. The scheme to defraud element of those crimes must still be satisfied. The scheme need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentation or omissions calculated to deceive persons of ordinary prudence and comprehension. Also, the scheme must be one to obtain money or property from the victim.

Judges: [1]** William T. Hart, United States District Judge.

Opinion by: HART

Opinion

[*77] MEMORANDUM OPINION AND ORDER

WILLIAM T. HART, UNITED STATES DISTRICT JUDGE.

A. Background

For about five years this case and a parallel case in the state courts of Illinois have been pending. Some of the claims had exclusively federal jurisdiction and were brought only in this court. Other federal claims, although not exclusively federal, were also brought only in this court. A number of state claims were brought in both courts. Through various amendments, plaintiff, usually with the agreement or acquiescence of defendants, has attempted to leave all of his damages claims for this court. Three "trials" have been held before Judge Albert S. Porter of the Circuit Court of Cook County and the Illinois Appellate Court has issued two published opinions. The first "trial" was on plaintiff's motion for preliminary injunction enjoining the enforcement of a confidentiality agreement he had with his employer. The injunction was denied by the Circuit Court, but the Appellate Court remanded the case for further consideration of the preliminary injunction. *See* *Disher v. Fulgoni, 124 Ill. App. 3d 257, 464 N.E.2d 639, 79 Ill. Dec. 735*, **[**2]** *appeal denied*, *101 Ill. 2d 564 (1984)*. In the meantime discovery was proceeding in this court, but the court ordered the parties not to duplicate discovery that was being taken in the state court proceedings. In December 1984, this court **[*78]** entered a judgment in favor of plaintiff dismissing defendant Information Resources, Inc.'s ("IRI") counterclaim. This court continued to monitor the status of this case while the state court proceeded to trials on the merits.

The Circuit Court bifurcated the case and conducted two trials. Disher succeeded on some claims and lost on others. Most important for him, he succeeded in having his stockholdings in IRI released from a voting trust. He also obtained a permanent injunction against enforcement of the confidentiality agreement. On appeal, the Circuit Court was affirmed in part and reversed in part, but Disher's success at having the stock released and the confidentiality agreement enjoined remained intact. The case was to be remanded to the Circuit Court for further proceedings and the Illinois Supreme Court only recently denied leave to appeal. *See Disher v. Fulgoni, 161 Ill. App. 3d 1, 514 N.E.2d 767, 112 Ill. Dec. 949 (1987)* **[**3]** ("*Disher II*"), *appeal denied*, *119 Ill. 2d 555, 522 N.E.2d 1243, 119 Ill. Dec. 384* (April 7, 1988).

Following the decision in *Disher II*, the parties stipulated to the dismissal of Counts VI and VII and defendants have moved for summary judgment on all other Counts. Plaintiff has also conceded that Count V should be dismissed.

Plaintiff David Disher was formerly employed by defendant IRI. The other three defendants are officers or directors of IRI who were also trustees of a voting trust that is central to this litigation. Disher directed IRI's BehaviorScan program which involved market research through the use of consumer panelists, supermarket product scanners, and cable television. Through the scanners, the purchases of the panelists were monitored and through the cable television hookups with the panelists certain advertising could be directed toward different groups of panelists. From the data gathered, various conclusions could be made as to the effect of the advertising. This type of research was only feasible for companies who spent large sums on advertising, estimated to be about 150 companies in the United States. At the time Disher was discharged, **[**4]** A.C. Nielsen Company was considering establishing a competitive system.

When Disher started with IRI in 1981, he took a lower salary than he previously earned because of the opportunity to purchase IRI stock through stock option rights. In 1982, IRI wanted to buy out the shares of one of its founders, Penny Baron, but did not have sufficient capital to do so. Instead, certain employees, including Disher, were given the opportunity to surrender their option rights in return for the ability to purchase twice as many shares of Baron stock. IRI arranged partial financing and paid interest on the loans. The employees were required to place the stock in a voting trust of which defendants were the trustees. Defendant Fulgoni acted as Disher's agent in purchasing the stock for Baron and placing it in the voting trust. The details of this arrangement are described in *Disher II, 514*

N.E.2d at 769-70. In February 1982, Disher purchased 1,000 shares. In April he was promoted and was able to purchase 500 more shares under the same conditions as the original purchase.

Disher was discharged in April 1983 and sought to obtain release of his stockholdings, but was unable to. IRI **[**5]** offered to seek to get his stock for him if he would sign a noncompetition agreement, but he declined the offer. Disher was offered a position with A.C. Nielsen, but after A.C. Nielsen received correspondence from IRI, the offer was made conditional on rescinding a confidentiality agreement Disher had with IRI. Although Disher ultimately succeeded in having the state court enjoin enforcement of the confidentiality agreement, he never obtained the job with A.C. Nielsen. Without adequate income, Disher eventually had to sell off his property, including his home. Disher eventually succeeded at having the voting trust rescinded and the stock he had purchased for $ 18,000 was sold for over $ 1,000,000. However, Disher had earlier demanded that it be sold at the time individual shares were selling for about $ 6 more. Had he been able to sell at that time, he would have sold the stock for about $ 236,000 more.

[*79] *B. Count I - Securities Fraud*

Count I alleges a federal claim for securities fraud. Defendants claim this Count should be dismissed because the undisputed facts show Disher suffered no damage. They argue he instead made a profit of more than $ 1,000,000. Disher **[**6]** argues he lost $ 236,000 by not being able to sell his shares when he wanted to and that he also suffered consequential damages of having to sell his home and other property below market value due to his lack of financial resources. For purposes of deciding the present motion, it is assumed that defendants induced plaintiff to trade his stock options for the right to purchase Baron stock by falsely representing that the voting trust would end when the stock began to be publicly traded. There were also other alleged false representations, but they need not be delineated.

Plaintiff does not point to evidence that he was induced to enter into the voting trust separate from the arrangement to purchase the Baron stock. He also points to no evidence that he could have purchased the Baron stock without entering into a voting trust. Therefore it must be assumed, as is alleged in paragraph 18 of plaintiff's amended complaint, that the false representation about voting trusts was for the purpose of inducing plaintiff to enter into the transaction involving Baron stock. If Disher had not entered into the transaction, he would have had only half as much stock under his prior stock option plan. **[**7]** Even if he had sold that amount at the highest price, it would have been worth less than the amount he was able to sell at a lower price in September 1985 since the price of a share had not dropped over 50% from the highest price. Additionally, plaintiff has not shown an amount of consequential damages that exceeds the greater profit he made by being able to purchase twice as many shares.

Plaintiff correctly argues that ***HN1***[] the general rule is that a securities fraud plaintiff is to be placed in the same position as he would have been had there been no fraud. *Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 155, 31 L. Ed. 2d 741, 92 S. Ct. 1456 (1972)*. This includes that such a plaintiff is entitled to profit to the full extent that he would have profited had there been no fraud. *Levine v. Futransky, 636 F. Supp. 899, 900 (N.D. Ill. 1986)*. The plaintiff is limited to actual damages, except where the defendant's profit from the transaction exceeds the plaintiff's actual damages. *See* *Affiliated Ute, 406 U.S. at 155*; *Harris Trust & Savings Bank v. Ellis, 810 F.2d 700, 706-07 (7th Cir. 1987)*; **[**8]** *Torres v. Borzelleca, 641 F. Supp. 542, 544-45 (E.D. Pa. 1986)*. The plaintiff is not entitled to the full benefit of his bargain, *Madigan, Inc. v. Goodman, 498 F.2d 233, 239-40 (7th Cir. 1974)*, except where necessary to prevent unjust enrichment of the defendant. *Hackbart v. Holmes, 675 F.2d 1114, 1122 (10th Cir. 1982)*.

As discussed above, plaintiff has not suffered any actual loss. Had he not been induced to trade his rights under the stock option plans for his right to purchase Baron stock, his profits would have been less than they actually were. Plaintiff has not shown that he is entitled to the full benefit of his bargain because defendants would otherwise be unjustly enriched. Instead, plaintiff tries to separate out the fraud regarding the voting trust from the fraud inducing the purchase. Such a split, however, is inconsistent with the facts. Also, one of the cases relied on by plaintiff is contrary to plaintiff's argument. *Abrahamson v. Fleschner, 568 F.2d 862, 878-79 (2d Cir. 1977)*, *cert. denied*, *436*

U.S. 905, 913, 56 L. Ed. 2d 403, 98 S. Ct. 2236 (1978), holds that **[**9]** ***HN2***[] a plaintiff cannot recover for losses and ignore profits where both result from a single wrong. Instead, under *Abrahamson*, a plaintiff can only recover for net losses occurring after the fraud was committed. In this case, plaintiff was purportedly fraudulently induced into purchasing the stock. All profits and losses occurred after the fraud was committed and must be netted against each other. Other cases cited by plaintiff are not to the contrary. Since plaintiff has not suffered any damages, Count I is dismissed. *See* *Etshokin* ***[*80]*** *v. Texasgulf, Inc., 612 F. Supp. 1220 (N.D. Ill. 1985)*.

C. Count II & VIII - Antitrust Violations

Count II alleges federal antitrust violations and Count VIII alleges violations of Illinois antitrust provisions. The Illinois law tracks federal law. *Collins v. Associated Pathologists, Ltd., 844 F.2d 473 (7th Cir. 1988)*. As did the parties, the court applies the same rules to both Counts. Defendants have presented a number of grounds for dismissing the antitrust Counts. It is only necessary to discuss antitrust injury and standing.

Plaintiff alleges that **[**10]** defendants sought to monopolize the market for the BehaviorScan system. Plaintiff also alleges that one tactic for monopolizing the market was forcing IRI employees to sign overbroad confidentiality agreements. For purposes of deciding the present motion, defendants concede these allegations are true. Plaintiff claims he was injured when defendants informed A.C. Nielsen and other potential employers about the confidentiality agreement. A.C. Nielsen declined to hire plaintiff to avoid litigation over trade secrets.

Plaintiff is alleging an attempt to monopolize the market for IRI's BehaviorScan system. While he refers to "anticompetitive" labor market tactics, he has not alleged in his complaint, or shown by citation to admissible evidence, that IRI also sought control over part or all of the relevant labor market. *Radovich v. National Football League, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957)*, even if still good precedent despite more recent cases on the issue of antitrust standing, does not apply to the present case. Instead, plaintiff's standing must be based on the alleged monopolization of the BehaviorScan market. [1]

[11]** ***HN3***[] Antitrust plaintiffs "must show more than simply an 'injury causally linked' to an antitrust violation; instead 'plaintiffs must prove *antitrust injury*, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Association, 830 F.2d 1374, 1377 (7th Cir. 1987)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. *Accord Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 489, 93 L. Ed. 2d 427 (1986)*. Antitrust injury alone does not satisfy the standing requirement. Even if suffering antitrust injury, the plaintiff must be a proper plaintiff under § 4 of the Clayton Act, *15 U.S.C. § 15*. *Id*.

HN4[] The first inquiry is whether the injury sustained by plaintiff was "the type the antitrust **[**12]** laws were intended to prevent." *Beverly, 830 F.2d at 1379* (quoting *Brunswick, 429 U.S. at 489*). The Sherman Act is intended to assure customers the benefit of price competition and protect the economic freedom of participants in the market. *Id. 830 F.2d at 1379* (quoting *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983))*. The relevant market in the present case involves the provision of BehaviorScan-type services. Disher was not a participant in the market; he neither provides such services nor purchases them. *See* *Beverly, 830 F.2d at 1379*. Also, the purported monopolization was directed not at Disher, but at A.C. Nielsen and other competitors. *Cf. id*. That defendants took direct action against Disher does not change the analysis. *Cf. id*. (attempt to control brokerage services by boycotting a listing service does not make the listing service's injury an antitrust injury). Plaintiff did not suffer antitrust injury and therefore cannot bring an antitrust action. Even if plaintiff's injuries **[**13]** could be found to be antitrust **[*81]**

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[1] One of defendants' other grounds for dismissal is the failure to establish a relevant market. References in this opinion to a BehaviorScan market should not be interpreted as implicitly holding a relevant market has been shown. To the contrary, the court agrees with defendants that plaintiff has not shown a relevant market. That issue, however, need not be fully discussed since it is held plaintiff lacked antitrust injury and standing.

injuries, he would not have standing. IRI's competitors and customers, who suffer a more direct injury than Disher, are far more appropriate parties for bringing the action. It is unnecessary to grant standing to employees such as Disher. *See* id. at 1379-80. Counts II and VIII are dismissed.

D. Jurisdiction Over State Law Claims

Before turning to the next Count, there must be a brief digression to discuss jurisdiction. Disher originally filed a two-count complaint against all four defendants alleging federal securities fraud and federal antitrust violations. At the time, all parties were citizens of Illinois for purposes of determining diversity jurisdiction. Disher subsequently established Ohio as his new place of residence. He then amended his complaint to add additional federal claims and also state law claims. All the new claims arose out of the same conduct, transactions, or occurrences alleged in the original complaint. The state law claims were then alleged to be before the court on both diversity jurisdiction and pendent jurisdiction.

[14]** ***HN5***[] It is a well-settled rule that diversity of citizenship is determined as of the date the action is commenced. *Fidelity & Deposit Co. of Maryland v. City of Sheboygan Falls, 713 F.2d 1261, 1266 (7th Cir. 1983)*; *Benskin v. Addison Township, 635 F. Supp. 1014, 1017 (N.D. Ill. 1986)*; C.A. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3608 (2d ed. 1984). At the time plaintiff commenced this suit, there was no diversity of citizenship between the parties and therefore no basis for diversity jurisdiction. It does not matter that plaintiff amended his complaint after he moved to Ohio. The amendment relates back to the date the lawsuit was commenced. *See* *Fed. R. Civ. P. 15(c)*. There still was no diversity jurisdiction. *Oliney v. Gardner, 771 F.2d 856, 858-59 (5th Cir. 1985)*; Wright, Miller, & Cooper, § 3608 at 458-59. There is no diversity jurisdiction over Disher's state law claims; there is only pendent jurisdiction over those claims.

HN6[] The ordinary rule for pendent jurisdiction is that all remaining pendent claims **[**15]** are dismissed for lack of subject matter jurisdiction if all the federal claims are dismissed before trial. *Moses v. County of Kenosha, 826 F.2d 708, 710 (7th Cir. 1987)* (per curiam). Since all of Disher's federal claims are being dismissed, the court ordinarily would not reach the merits of the pendent claims. There are, however, two exceptions that apply to the present case. Since the state antitrust claim is governed by the same rule that requires dismissal of the federal antitrust claim, it is proper to dismiss the state antitrust claim on its merits. *Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1178 (7th Cir. 1987)*. The other applicable exception is judicial economy. ***HN7***[] "Judicial economy, the essential policy behind the modern doctrine of pendent jurisdiction which [*United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)]* created, supports the retention of pendent jurisdiction in any case where substantial judicial resources have already been committed, so that sending the case to another court **[**16]** will cause a substantial duplication of effort." *Graf v. Elgin, Joliet & Eastern Railway Co., 790 F.2d 1341, 1347-48 (7th Cir. 1986)*. *Accord* Moses, 826 F.2d at 711.

The present case has been before this court since 1983. At the same time, related state proceedings have been conducted which appear to be reaching a final stage. *See* *Disher II, supra.* The state proceedings could not resolve all the disputed claims since one of the claims was an exclusively federal claim. The exclusively federal claim and the other federal claims, however, are now being dismissed from the federal action. Some of the state law claims, though, were also left for resolution in this court. Since (a) this case has been pending in this court for about five years and (b) the remaining state law claim forms the partial basis of the federal racketeering claim and resolution of that state law claim affects the racketeering claim, the court finds this to be an appropriate **[*82]** case for exercising its discretion to retain jurisdiction over the pendent claims, despite the dismissal of the federal claims, for purposes of resolving the present motion for summary **[**17]** judgment. *See* Graf, 790 F.2d at 1348.

E. Count IV - Breach of Fiduciary Duty

Count IV alleges a state law claim for breach of fiduciary duties. Defendants Fulgoni and Walter allegedly breached their duties as trustees of the voting trust by (i) inducing plaintiff to deposit the IRI shares into the voting trust through material misrepresentations and omissions; (ii) conditioning the release of plaintiff's stock upon plaintiff executing a covenant not to compete; (iii) refusing to rescind the trust and return plaintiff's stock to him after he made a timely demand under Ill. Rev. Stat. ch. 121 1/2, para. 137.13; and (iv) allowing all holders of voting trust certificates except plaintiff to exchange some of their certificates for stock in early 1984. Count I of Disher's state court complaint alleged (i), Count VIII alleged (iii) as an action for rescission for the violation of Illinois's securities law, and Count IX alleged (iv). [2] The allegation regarding the covenant not to compete may have been part of the allegedly outrageous manner in which plaintiff was terminated which was incorporated into Count VII for wrongful termination of employment. Prior to **[**18]** trial in state court, the parties entered into an agreed order dismissing the damages aspect of Count I without prejudice and dismissing Count VII without prejudice.

After the second trial, the Circuit Court entered a judgment dismissing Counts I and VIII with prejudice. Regarding Count I, the court found no violation of duty by defendants as to the purchase of the stock and the formation of the voting trust. Regarding Count VIII, the court found the securities exempt from registration and therefore rescission could not be obtained based on no registration. The court entered judgment for plaintiff on Count IX, ordering defendants to release all of plaintiff's shares still held in trust. The court found defendants Fulgoni and Walter had breached their fiduciary duty by failing to include plaintiff in the decision to amend the voting trust. Both sides appealed. The Appellate Court affirmed the trial court's **[**19]** judgment for plaintiff on Count IX. *Disher II, 514 N.E.2d at 775-76*. The question of whether rescission was a proper remedy was held to be moot. *Id. at 776-77*. Plaintiff had appealed the judgment against him on Count I, but had informed the Appellate Court that reaching that issue was unnecessary if it was otherwise held that the trust should be rescinded. The Appellate Court therefore never considered the issues concerning Count I. As for Count VIII, the securities were held not exempt from registration and para. 137.13 was held to be applicable. The Appellate Court reversed the judgment against plaintiff on Count VIII, remanding it to the Circuit Court to consider appropriate relief. *Id. at 773-74*.

Defendants argue that any claim as to misrepresentations in the formation of the voting trust is barred by *res judicata* in that the Circuit Court entered a judgment against plaintiff on Count I of the state complaint and that judgment was not reversed. The parties, however, agreed to dismiss the damages claim of Count I without prejudice. ***HN8***[] In determining the effect **[**20]** of the state court judgment, this court must give that judgment the same preclusive effect it would have in the courts of Illinois. *Wozniak v. County of DuPage, 845 F.2d 677 (7th Cir. 1988)*; *Torres v. Rebarchak, 814 F.2d 1219, 1222 (7th Cir. 1987)*. Ordinarily, *res judicata* bars all issues that were raised or could have been raised. *Wozniak*, slip op. at 7; *Rebarchak, 814 F.2d at 1222*. Illinois ordinarily does not permit the splitting of causes of action. *Wozniak*, slip op. at 8; *Rebarchak, 814 F.2d at 1224*. However, where the parties agree to dismiss certain claims, parts of claims, or forms of relief **[*83]** without prejudice, *res judicata* will not bar raising those claims or parts of claims in a subsequent proceeding. *See id. at 1225-26*; *Restatement (Second) of Judgments § 26(1)(a)* (1982). Plaintiff's claim is not barred by *res judicata*.

It is still possible, though, that the misrepresentation claim is barred by collateral estoppel. ***HN9***[] The elements of collateral estoppel are: **[**21]**

> 1) the issue sought to be precluded must be the same as that involved in the prior action, 2) the issue must have been actually litigated, 3) the determination of the issue must have been essential to the final judgment, and 4) the party against whom estoppel is invoked must be fully represented in the prior action.

Klingman v. Levinson, 831 F.2d 1292, 1295 (7th Cir. 1987). *See also Wozniak*, slip op. at 10. Plaintiff argues the third element is not satisfied since it was unnecessary for the Appellate Court to resolve the issues concerning Count I. The court agrees that collateral estoppel does not apply to preclude issues determined by the trial court as to Count I since the Appellate Court found it unnecessary to reach any issues involving Count I. *See County of Cook v. Lynch, 648 F. Supp. 738, 740-41 (N.D. Ill. 1986)* (quoting *Restatement (Second) of Judgments § 27 comment o*). [3]

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[2] The four aspects of Count IV will hereafter be referred to as Counts IV(i), IV(ii), IV(iii) and IV(iv).

[3] If Disher had waived his opportunity to appeal Count I, there very well may have been an estoppel effect. This court, however, does not find Disher waived his appeal of Count I. Disher only made clear to the Appellate Court which appellate issues involved duplicative relief and therefore would not have to be reached if Disher was successful on one of the other issues. *See* Brief of

[22]** Plaintiff, on the other hand, argues that the state court judgment is *res judicata* as to breach of fiduciary duty in that plaintiff was successful on Counts VIII and IX of his state complaint. [4] **[**23]** Plaintiff, however, points to no order or stipulation reserving his damages claims as to Counts VIII and IX for later adjudication. Under the rule against splitting causes of action, his damages claims would be barred by *res judicata* even though he succeeded on his claims for injunctive relief. *See Wozniak, supra; Rebarchak, supra.* But perhaps the parties agreed to separate the damages claims related to Counts VIII and IX and leave them for another proceeding. [5] Defendants do not raise *res judicata* as to the federal claims related to state Counts VIII and IX and therefore it will not be applied in their favor. It is clear, though, that *res judicata* does not apply in plaintiff's favor.

Plaintiff's discussion of the issue confuses *res judicata* with collateral estoppel. The court will consider whether collateral estoppel applies to certain issues specifically raised by plaintiff. It is clear that all the elements of collateral estoppel are satisfied as to state Count IX. Therefore, defendants Walter and Fulgoni cannot dispute that they breached their fiduciary duties in allowing other holders of voting trust certificates, but not plaintiff, to exchange **[**24]** some of their certificates for stock in early 1984. As for Count IV(iii), the question is whether the issues are the same. State Count VIII was a claim for rescission under Illinois's securities law and federal Count IV is an alleged breach of fiduciary duty. Defendants Walter and Fulgoni -- who were the only defendants to Count VIII -- are only precluded from contesting **[*84]** that plaintiff had the right to rescind the voting trust under Illinois law. They can still contest whether their refusal to rescind the trust was a breach of fiduciary duty. In discussing claims concerning whether Disher's confidentiality agreement with IRI was enforceable, the Appellate Court stated that IRI's attempt to merge the confidentiality agreement into a non-competition restrictive covenant "would have rendered Disher substantially unemployable in his chosen profession." *Disher II, 514 N.E.2d at 780*. The court did not make a finding that the proposed covenant was an attempted extortion. Moreover, the "finding" as to the hypothetical effect of the restrictive covenant was not essential to the court's ruling that the confidentiality agreement -- not the covenant -- was overbroad. **[**25]** Disher can rely on no collateral estoppel effect as to this issue.

The court will consider each aspect of Count IV in turn.

Count IV(i) alleges plaintiff was induced into entering into the voting trust through material misrepresentations. As with the securities fraud claims, defendants argue that plaintiff made a profit and therefore can prove no damages. Plaintiff does not argue that Illinois law as to damages for fiduciary breaches is different from federal securities law as regards compensatory damages in this case. As discussed above, plaintiff cannot show he suffered a loss in being induced into entering into the voting trust. He therefore suffered no compensatory damages. He argues, however, that he is also entitled to punitive damages under Illinois law. But ***HN10***[] Illinois does not permit a claim for punitive damages where no actual damage is shown. *McGrew v. Heinold Commodities, Inc., 147 Ill. App. 3d 104, 497 N.E.2d 424, 494, 100 Ill. Dec. 446 (1986)*; *Florsheim v. Travelers Indemnity Co. of Illinois, 75 Ill. App. 3d 298, 393 N.E.2d 1223, 1233, 30 Ill. Dec. 876 (1979)*. **[**26]** Count IV(i) is dismissed.

Count IV(ii) alleges defendants conditioned the release of plaintiff's stock upon plaintiff executing a restrictive covenant not to compete. Defendants argue, among other things, that the restrictive covenant was never entered into and therefore the proposal caused Disher no injury. Disher does not dispute this. Therefore Count IV(ii) is

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Plaintiff-Appellant David C. Disher at 3-5, reproduced in Defendant's Supplementary Appendix at 10-12. Disher will not be penalized for aiding the Appellate Court by pointing out the overlap and relationship between issues.

[4] Count IX was added in an amendment to conform the pleadings to the judgment. A copy of this amendment was not provided to the court, but presumably Count IX was only a claim for injunctive relief. *See* Transcript of July 18, 1985 proceedings before Judge Porter at 15, Defendants' Appendix at 201. Count VIII only sought rescission and delivery of the stock certificates as relief.

[5] At a state court hearing on July 18, 1985, defendants' attorney referred to plaintiff amending his complaints to present damages claims in federal court only. Plaintiff's attorney referred to this being done by agreement. Defendants' attorney did not concede the amendments had been done by agreement, but also did not dispute that they had been. Judge Porter stated he would not go on to consider damages if nothing further was to be presented. ***Id. at 15-16***, Defendants' Appendix at 201-02. Under the *Restatement*, acquiescence as well as agreement can result in the splitting of a cause of action. *Id*. *§ 26(1)(a)*.

dismissed. Disher can obtain no damages as regards the proposed restrictive covenant. The court is not ruling on whether the alleged facts as to the restrictive covenant are otherwise admissible to show motive or intent, or for some other purpose.

Count IV(iii) alleges defendants improperly refused to rescind the trust after Disher made a timely demand for rescission under Illinois law. As discussed above, defendants cannot contest that they should have honored Disher's request. They argue, however, that their refusal to honor the request is not a breach of fiduciary duty. They argue the statutory obligation to rescind in circumstances of the type in this case apply to all sellers and refusal to rescind is a statutory violation, not a fiduciary breach. Defendants cite no cases in support of this view. Plaintiff argues **[**27]** that violation of a statute can also be a breach of fiduciary duty. As an example, he argues that conversion of funds held by a fiduciary, which is also a statutory theft violation, is a breach of fiduciary duty. The only case cited by plaintiff is inapposite and does not even support the example cited by plaintiff.

Paragraph 137.13 provides a civil remedy for sales of securities in violation of Illinois's Securities Act. It provides for rescission, not damages. *See Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Insurance Co., 698 F.2d 320, 324 (7th Cir. 1983)*; *Renovitch v. Stewardship Concepts, Inc., 654 F. Supp. 353, 359 (N.D. Ill. 1987)*. It further provides that a purchaser seeking rescission can obtain his or her attorney's fees incurred in an action brought pursuant to para. 137.13. Plaintiff, however, is not making a claim under Illinois's securities law. His claim is one for breach of fiduciary duty. It is inapposite for defendants to argue para. 137.13 only provides certain remedies when plaintiff is not seeking remedies under the statute. **[*85]** Plaintiff, in this claim, is not seeking relief for the securities **[**28]** law violation -- that is the registration problem -- but is seeking relief for a fiduciary not following the procedures required by para. 137.13.

This issue is not adequately briefed by either side, but ***HN11***[] the burden is on movants to show they are entitled to summary judgment. Therefore the court should not dismiss the claim on this argument. In any event, the court believes this aspect of plaintiff's claim should not be dismissed. ***HN12***[] A trustee has a duty to reasonably defend the trust against a suit for rescission. A. W. Scott, *Law of Trusts* § 178 at 1429 (3d ed. 1967). Also, fiduciaries will not ordinarily be held liable for incorrectly speculating as to the results of a lawsuit. *See* *Scott v. Perona, Perona & Tonozzi, 115 Ill. App. 3d 76, 450 N.E.2d 24, 26, 70 Ill. Dec. 811 (1983)*. But a fiduciary must act reasonably and in good faith. That the trial court held that the securities were exempt from registration indicates the trustee's position was reasonable. However, Disher **[**29]** claims the trustees acted unreasonably and with disloyalty toward him. Defendants do not argue the uncontested facts are to the contrary. Therefore, it must be assumed that defendants acted unreasonably and with disloyalty.

Defendants also argue that Disher cannot pursue his claim for breach of fiduciary duty because the trust was found to be void *ab initio* and was rescinded. Illinois law, however, provides that a trustee's duties remain in effect even during a period in which litigation seeks to void or invalidate a trust. Ill. Rev. Stat. ch. 17, para. 1672. The issue raised by defendants here was also raised by the defendants in *Scott*, a case not cited by the parties but which appears to be the only case considering the issue. The trial court held that a claim for breach of fiduciary duty cannot be maintained where the underlying trust has been determined to be void. The majority on the Appellate Court appears to have believed otherwise, but reaching that issue was not necessary to its decision. *See* *Scott, 450 N.E.2d at 25-26*. The dissent, however, found it necessary to reach the issue and held the trial court had been wrong. *Id. 450 N.E.2d at 27* **[**30]** (Stouder, P.J., dissenting). This court holds that ***HN13***[] a claim for breach of fiduciary duty can be maintained even if the agreement creating the fiduciary relationship is subsequently held to be void since, at the time the breach occurs, the fiduciary was bound to perform his or her fiduciary duties. Additionally, as plaintiff points out, the Appellate Court in *Disher II* found both that the trust was void and that fiduciary duties were breached. The issue now raised was not expressly considered by the Appellate Court, but defendants make no argument here that they had no opportunity to make the argument before the Appellate Court. At least as to Count IV(iv), which was also claimed in state court, if not Count IV(iii) as well, defendants are estopped from arguing they could not have breached fiduciary duties because the trust agreement was voided. Count IV(iii) cannot be dismissed on the merits.

Count IV(iv) alleges defendants Fulgoni and Walter breached their fiduciary duties in amending the trust without involving Disher. The state court has already found this to be a breach of fiduciary **[**31]** duty and as a result ordered defendants to release Disher's shares. As already discussed, plaintiff can raise this claim even if the trust agreement was void *ab initio*. Defendants also argue that plaintiff has not alleged any damages as regards this aspect of the claim. Defendants, however, took action that permitted some beneficiaries of the trust to withdraw shares while not permitting Disher and others to do so. The state court found this to be a breach of the duty of loyalty and impartiality entitling Disher to withdraw all his shares. Had plaintiff been able to withdraw all or part of his shares at the time of the breach, he may have been able to sell at a higher price and might not have been put in the situation where he had to sell off personal assets. Count IV(iv) cannot be dismissed.

F. Count III - RICO

Count III alleges a claim under the Racketeer Influenced and Corrupt Organizations **[*86]** Act ("RICO"), *18 U.S.C. § 1961 et seq.* The purported predicate acts are securities fraud, wire fraud, and mail fraud. Defendants again argue plaintiff has not shown he was damaged. If the predicate acts are limited to the securities fraud alleged **[**32]** in Count I (which also constitutes mail and wire fraud), then plaintiff has not shown any damages. Plaintiff argues, however, that the breaches of fiduciary duty can also constitute mail and wire fraud. The securities fraud induced plaintiff to enter into the voting trust and, as already discussed, plaintiff did not suffer a loss by entering into that arrangement and therefore incurred no damages. The fiduciary breaches that remain, however, did not cause plaintiff to enter into the trust agreement, but instead prevented him from withdrawing at a time when IRI shares were at a higher value. The fiduciary breaches therefore caused damage. If they can constitute RICO predicate acts, then plaintiff will still have a viable RICO claim if he can overcome defendants' other challenges to the RICO claim.

HN14[] Not every common law breach of fiduciary duty that involves mailings or use of the telephone constitutes a violation of the mail and wire fraud statutes. *See United States v. Kwiat, 817 F.2d 440, 444* (7th Cir.), *cert. denied*, *484 U.S. 924, 108 S. Ct. 284, 98 L. Ed. 2d 245 (1987)*. **[**33]** The scheme to defraud element of those crimes must still be satisfied. *See United States v. Wellman, 830 F.2d 1453, 1461 (7th Cir. 1987)*. "The scheme need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentation or omissions calculated to deceive persons of ordinary prudence and comprehension." *Id. at 1462* (quoting *United States v. Pearlstein, 576 F.2d 531, 535 (3d Cir. 1978))*. *See also United States v. Dial, 757 F.2d 163, 170* (7th Cir.), *cert. denied*, *474 U.S. 838, 88 L. Ed. 2d 95, 106 S. Ct. 116 (1985)* (concealment). Also, in light of the Supreme Court's recent decision in *McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987)*, the scheme must be one to obtain money or property from the victim. *Wellman, 830 F.2d at 1462*; *United States v. Holzer, 840 F.2d 1343, 1348 (7th Cir. 1988)*; [6] *United States v. Lytle, 677 F. Supp. 1370, 1381-84 (N.D. Ill. 1988)*.

[34]** Plaintiff's reliance on *Dial* is misplaced. In *Dial*, the defendant broker breached his fiduciary duty to his customers by trading on his own account ahead of his customers' accounts. The portion of the opinion cited by plaintiff refers to fraud in soliciting customers in that Dial implicitly represented to his customers he would seek the best price for them, a representation contrary to his breach of fiduciary duty. *757 F.2d at 168*. To the extent Disher was induced into the trust agreement by misrepresentations as to when he could pull his shares out of the trust, he has suffered no damage since, as already discussed, he did not suffer a loss on the transaction. In *Dial*, there were also misrepresentations at the time transactions were made on the customers' accounts. These misrepresentations, which were independent of the breaches of fiduciary duty, caused losses for the customers. *Id. at 169*. Disher can only rely on the fiduciary breaches as being fraud that caused him damage if the breaches themselves were misrepresentations or some other type of fraud. He, however, only argues that the fiduciary breaches were part of a scheme to induce **[**35]** him to enter into the trust agreement. [7] He did not incur any damages as a result of that

[6] Plaintiff relies in part on *United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987)*, *modified in part*, *842 F.2d 909 (6th Cir. 1988)*, *rehearinq qranted & opinion vacated*, *1988 U.S. App. LEXIS 8293*, No. 86-1923 (6th Cir. May 3, 1988). *Runnels* is not considered because, after plaintiff filed his brief, the Seventh Circuit rejected the holding in *Runnels. See Holzer, 840 F.2d at 1347-48*. Also the Sixth Circuit recently granted another rehearing in *Runnels*.

scheme. [8] **[*87]** Plaintiff did not suffer any damages as a result of any purported RICO violations and therefore Count III is dismissed. It is unnecessary to consider defendants' other grounds for dismissing this Count.

[36]** *G. Conclusion*

All of plaintiff's claims are dismissed with prejudice except Counts IV(iii) and IV(iv) against Walter and Fulgoni. These are state law claims. It was determined that it was appropriate to consider the merits of the state law claims for purposes of deciding the motion for summary judgment. The court, however, does not believe it is appropriate to retain jurisdiction over Counts IV(iii) and IV(iv) for further proceedings. As already discussed, the ordinary rule is to dismiss pendent state law claims when the federal claims are dismissed before trial. Judicial economy was served by resolving all issues -- federal and state -- in the motion for summary judgment. It will not be further served by retaining jurisdiction over the state law claims. The state court had a trial on the merits of a claim identical to Count IV(iv). The state court was ready and willing to reach the issue of damages, but plaintiff urged that court not to decide damages. On a claim similar to Count IV(iii) the Appellate Court remanded the case for determination of an appropriate remedy. The Illinois Supreme Court very recently denied leave to appeal. The state court, having completed trials **[**37]** of this case on the merits, having also conducted hearings on preliminary injunctions, and now having the case on remand, is more familiar with the facts of the case than this court. Moreover, state law claims are more appropriately resolved in state court. Therefore, Counts IV(iii) and IV(iv) are dismissed without prejudice.

IT IS THEREFORE ORDERED that:

(1) Counts V, VI, and VII of the Amended Complaint are voluntarily dismissed with prejudice.

(2) Defendants' motion for summary judgment is granted in part and denied in part.

(3) Counts I, II, III, IV(i), IV(ii), and VIII of the Amended Complaint are dismissed with prejudice.

(4) Counts IV(iii) and IV(iv) of the Amended Complaint are dismissed without prejudice.

(5) The Clerk of the Court is directed to enter judgment in favor of all defendants and against plaintiff without prejudice as to Counts IV(iii) and IV(iv) and with prejudice as to all other Counts of the Amended Complaint. Plaintiff shall pay costs to defendants Information Resources, Inc. and John Malec. Defendants Gian Fulgoni and William C. Walter shall bear their own costs and plaintiff shall bear all his own costs.

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[7] Recent cases hold that breaches of fiduciary duties do not constitute mail or wire fraud under the theory that the victim is deprived of honest and loyal services. *See* Holzer, 840 F.2d at 1343; Lytle, 677 F. Supp. at 1381-84. Those cases, however, involve the question of whether there was a scheme to obtain money or property. They do not involve the question of whether the fiduciary breach constitutes fraud.

[8] Without developing any argument and without citing any predicate act other than mail or wire fraud, plaintiff refers to "extortionistic demands." *See* 18 U.S.C. § 1961(1)(A); 18 U.S.C. § 1961(1)(B) (incorporating 18 U.S.C. § 1951). Since the argument is not developed, the court does not consider whether extortion as a RICO predicate act has been shown. Since the argument is not developed, the court also does not consider whether a "scheme to defraud [defendants'] employees of money they could have earned by selling their services to IRI's competitors by unlawfully restraining the labor market" has been shown and would constitute wire or mail fraud.

United States v. BNS, Inc.

United States Court of Appeals for the Ninth Circuit

May 13, 1988, Argued and Submitted ; May 27, 1988, Filed

Nos. 88-5849, 88-5850

Reporter

848 F.2d 945 *; 1988 U.S. App. LEXIS 7233 **; 1988-1 Trade Cas. (CCH) P68,038

United States of America, Plaintiff, v. BNS Inc.; Gifford-Hill & Co., Inc., Defendants-Appellants, v. Koppers Company, Inc., Participant-Appellee; United States of America, Plaintiff-Appellant, v. BNS Inc.; Gifford-Hill & Co., Inc., Defendants, v. Koppers Company, Inc., Participant-Appellee

Prior History: **[**1]** On Appeal from the United States District Court for the Central District of California, D.C. Nos. CV 88-1452-R, CV 88-1452-R, Manuel L. Real, District Judge, Presiding.

Core Terms

district court, injunction, aggregate, consent judgment, antitrust, public interest, preliminary injunction, merger, tender offer, acquisition, consent decree, shareholders, antitrust violation, irreparable harm, hardships, target, disapproves, takeover, anticompetitive, hold-separate, proceedings, trusteeship, violations, exceeded, appoint, parties, premium, enjoin, Writs, court's jurisdiction

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Penalties

Civil Procedure > Remedies > Writs > All Writs Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Clayton Act, Penalties**

A district court has the authority under the All Writs Act, *28 U.S.C.S. § 1651*, to issue a preliminary injunction to preserve its jurisdiction under the Antitrust Procedures and Penalties Act (APPA), *15 U.S.C.S. § 16(b)-(h)*.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

HN2[] **Appeals, Appellate Jurisdiction**

An appellate court may modify an injunction entered by a trial court.

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Judges: Pregerson, Boochever, and Beezer, Circuit Judges. Beezer, Circuit Judge, dissenting.

Opinion

[*946] ORDER

On April 5, 1988, the United States District Court **[**2]** for the Central District of California entered a preliminary injunction prohibiting BNS Inc. from attempting to acquire a controlling interest in Koppers Co. through a cash tender offer. The order was issued to maintain the status quo while the court considered a proposed consent decree pursuant to the Antitrust Procedures and Penalties Act (APPA), *15 U.S.C. § 16(b)-(h) (1982)*.

The United States, BNS, and Gifford-Hill & Co., an affiliated firm, stipulated to the proposed decree to remedy anticompetitive effects the government alleged would result in the Los Angeles and Orange County aggregate market from the acquisition of Koppers. Aggregate is rock, sand, and gravel suitable for mixing in concrete, asphalt, and other road or construction materials. Both BNS, through Gifford-Hill, and Koppers, through its wholly-owned subsidiary Sully-Miller Contracting Co., manufacture and distribute road and construction materials in Southern California. The consent decree, if approved by the district court, would require BNS to maintain Koppers' aggregate facility in Irwindale, California **[**3]** separately and to divest it by January 1, 1989.

[*947] Koppers, which was granted leave to "participate" in the APPA proceedings under *15 U.S.C. § 16 (f)*, requested the injunction. The court found that its jurisdiction under the APPA would be hindered and irreparable harm to competition in the aggregate market threatened if the transaction was completed before it reviewed the consent decree. The government, BNS, and Gifford-Hill opposed the injunction, and sought interlocutory review under *28 U.S.C. § 1292(a)(1) (1982)*.

We conclude that ***HN1***[] the district court had authority to issue a preliminary injunction to preserve its APPA jurisdiction under the All Writs Act, *28 U.S.C. § 1651 (1982)*. Control by BNS of Koppers' aggregate operation and related facilities in Irwindale during the pendency of the court's proceedings could conceivably result in irreparable anticompetitive harm. We believe that if BNS is sufficiently divorced from control of that operation and related facilities, which currently are managed by Sully-Miller, **[**4]** the district court's concerns will be adequately addressed.

HN2[] An appellate court may modify an injunction. *State of Washington v. Central Contractors Ass'n, 453 F.2d 383, 384 (9th Cir. 1971)*; *see* *Bresgal v. Brock, 843 F.2d 1163*, slip op. at 3844-47 (9th Cir. 1987) (amended opinion). Upon consideration of possible harm to competition in the aggregate market and the relative hardships to the parties in this case, we have concluded that appointment of an independent trustee to assume control of Sully-Miller will preserve the district court's jurisdiction. We therefore order that the injunction be modified as follows:

(1) The preliminary injunction shall remain in force until a trustee is appointed by the district court to assume control of Sully-Miller. At such time as BNS may acquire a controlling interest in Koppers, the trustee shall:

(a) manage the Irwindale aggregate operation and related facilities separately and independently from the other assets owned by Koppers, BNS, and Gifford-Hill;

(b) maintain the confidentiality of all records and plans **[**5]** pertaining to the aggregate operation and related facilities; and

(c) remain in control of Sully-Miller until the court enters its order approving or disapproving the consent decree under the APPA.

(2) In the event the court disapproves the proposed decree, the trustee shall remain in control of Sully-Miller for an additional fourteen-day period to permit the parties to take such action, if any, that they deem appropriate.

(3) The trustee shall not assume control of Sully-Miller until the United States District Court for the Western District of Pennsylvania has lifted the injunction on the proposed acquisition ordered in *Koppers Co. v. American Express Co., Civ.* No. 88-557 (W.D. Pa. April 15, 1988).

(4) Reasonable costs of such trusteeship shall be paid by BNS. In the event that BNS does not agree to this provision, the preliminary injunction previously entered by the district court shall remain in effect without modification until such time as the court approves or disapproves the proposed consent decree.

Because this matter has been expedited, we have not set forth our reasons in detail. An opinion will follow.

The district court's order is MODIFIED and the **[**6]** case REMANDED for the immediate appointment of a trustee in accordance with this order.

Dissent by: BEEZER

Dissent

BEEZER, Circuit Judge, dissenting:

BNS Inc. and Gifford-Hill & Co., Inc. (BNS) have announced an offer to purchase the common stock of Koppers and Company, Inc. (Koppers). In a filing under the Hart-Scott-Rodino Act, *15 U.S.C. § 18a*, BNS volunteered that overlap of aggregate production by BNS and Koppers in Irwindale, California might raise an antitrust question. After an investigation, the Justice Department concluded that a takeover would be anticompetitive only in the aggregate market in Irwindale. The United States filed a civil antitrust action against **[*948]** BNS to remedy this discrete problem. The United States and BNS stipulated to entry of a proposed final judgment (the "consent judgment") according to which BNS would divest itself of Koppers' aggregate facility in Irwindale. The United States and BNS submitted to a proceeding under the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16* ("APPA" or the "Tunney Act"), to review the proposed antitrust consent judgment. Koppers, the target of the tender offer, having **[**7]** obtained the status of "participant" in this proceeding, petitioned for and received a preliminary injunction prohibiting BNS from consummating the purchase of Koppers' shares. The United States and BNS appeal. I would dissolve the injunction.

This case presents the question whether a district court may enjoin a tender offer under the Antitrust Procedures and Penalties Act, at the request of a target company that is but a "participant" in the proceeding, and over the objection of the United States. The district court lacked authority to grant the injunction. Even if the district court had authority, the district court improperly granted an injunction in this case. The order we issue today does not correct the district court's mistakes.

I

The district court did not have authority to issue a preliminary injunction under the All Writs Act, *28 U.S.C. § 1651*. That Act merely states that courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." A writ in aid of jurisdiction presupposes jurisdiction. In this case, the district court's jurisdiction is itself in question. Our task is to decide whether the APPA establishes **[**8]** jurisdiction allowing for an injunction under the circumstances of this case. In my view, the district court's injunction entails three jurisdictional problems.

A

To begin with, the district court based its injunction on matters beyond the subject matter of the APPA. The APPA authorizes a district court to review the proposed consent judgment between the government and a defendant. A 60-day notice and comment period culminates in the district court's statement on whether it is in the public interest for the government to resolve its complaint by means of the proposed consent judgment.

As this framework suggests, the APPA confines a district court to scrutiny of violations the government has alleged. At its core the APPA states:

> Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of *such* judgment is in the public interest.

15 U.S.C. § 16(e) (emphasis added). The APPA goes on to say that for the purpose of making a public interest determination, the district court may consider "(1) the competitive impact of such judgment, including termination of alleged violations. **[**9]** . . ." *Id.* In addition, the district court may consider "(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint. . . ." *Id.*

From the very language of the statute, Congressional intent is unmistakable: the district court has jurisdiction only over violations alleged in the complaint. [1] As we indicated in an earlier APPA case, *United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)*, this court does not accept that a district court may, or should, "look beyond the strict relationship between complaint **[*949]** and remedy in evaluating the public interest." The reason is plain: courts must respect prosecutorial discretion inherent in the executive branch. As we said in *Bechtel*, "balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *Id.*

[10]** In this case the government alleged only a violation in the aggregate market in Irwindale. The government's complaint is crystal-clear:

> a. actual and potential competition between Gifford-Hill and Koppers in the extraction, processing and sale of aggregate in the Irwindale Aggregate District will be eliminated; and
>
> b. competition generally in the extraction, processing and sale of aggregate in the Irwindale Aggregate District may be substantially lessened.

At the instigation of Koppers, the district court based its injunction on entirely different concerns -- concerns about an anticompetitive merger in general, and about an anticompetitive ready-mix market in particular.

Most narrowly, the district court wanted to make sure that if it became convinced that violations existed in the ready-mix market, as well as in the aggregate market, the court could "make them go away." In its findings of fact the district court noted that California had reached a settlement with BNS that "raises questions regarding the efficacy of the proposed consent judgment." California's settlement with BNS dealt chiefly with the ready-mix market, not the aggregate market. The United **[**11]** States's complaint alleged an antitrust violation only in the aggregate market. By referring to California's settlement with BNS, the district court made clear it was acting on a concern about the ready-mix market, a matter not raised in the government's complaint.

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[1] Legislative history is in accord. The Senate Report on the proposed bill observed that the court is "to make a judgment as to whether or not the proposed relief is sufficient with respect to the conduct alleged in the complaint." S. Rep. No. 298, 93rd Cong., 1st Sess. 3 (1973). In debate in the House of Representatives, Rep. Barbara Jordan explained that "the judge cannot compel the parties to write a different consent decree. He cannot compel the parties to go to trial. But what the judge can do is make a judgment as to whether the proposed solution to the alleged violations are [sic] in the public interest. And this is all the bill requires of the judge." 120 Cong. Rec. 36,344 (November 19, 1974).

Most broadly, the district court granted the preliminary injunction to preserve the court's asserted jurisdiction over "the matter of this merger." The district court wanted to establish "whether or not this merger . . . was one that affected competition adversely."

As these statements suggest, the district court assumed a wide-ranging power to supervise antitrust enforcement. The matter of the government's complaint was simply an antitrust violation in the aggregate market in Irwindale, California. The district court exceeded its jurisdiction by basing the injunction on matters beyond the sole violation alleged by the government.

B

In defining a court's jurisdiction, Congress may limit available remedies. *See* 26 U.S.C. § 7421(a) (Anti-Injunction Act). *See also* Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1084 (9th Cir.) (civil RICO statute does not authorize **[**12]** grant of injunctive relief to private plaintiff), *cert. denied*, *479 U.S. 1103, 107 S. Ct. 1336, 94 L. Ed. 2d 187 (1986)*. The All Writs Act does not override a statutory withholding of remedies: if a statute providing jurisdiction forbids injunctions, a court may not issue injunctions "in aid" of its jurisdiction under that statute. The statute in this case, the APPA, only doubtfully allows for injunctions the government does not request, and certainly does not allow for injunctions over the government's objection. The solution the district court adopted -- an injunction against the merger, over the government's objection -- exceeded the court's jurisdiction.

Besides enabling the district court to enter a consent judgment, the APPA affords a district court authority to "determine that the entry of such judgment is in the public interest." *15 U.S.C. § 16(e)*. The APPA gives the district court a well-tailored, limited set of remedies. By withholding approval of the consent judgment, the district court may deprive the government of the court's contempt powers for use in enforcing the judgment. By declaring that the proposed settlement is not in **[**13]** the public interest, the district court may pressure the government to reconsider its approach to resolving the antitrust violation at issue.

[*950] The APPA does not give the district court authority to grant relief that the government not only did not seek in its complaint but objects to in the APPA proceeding. In this case, the district court's rogue injunction has the effect of converting the government's complaint into an attack on the merger itself, rather than on one small part of the merger. As indicated above, this result is at odds with the notion of prosecutorial discretion. As we said in *United States v. Edmonson, 792 F.2d 1492, 1497* (9th Cir.), *cert. denied*, *479 U.S. 1037, 107 S. Ct. 892, 93 L. Ed. 2d 844 (1986)*, "The decision whether to prosecute, and the decision as to the charge to be filed, rests in the discretion of the Attorney General."

An example shows the fallacy of district court authority to enjoin. Suppose in this case the government decides that a derailed merger is worse for the economy than minor anticompetitive effects in Irwindale. Then the government could dismiss this action, and the district court would **[**14]** have no recourse. Under the APPA -- under the Constitution -- the court could not compel the Justice Department to perpetuate an action it has decided to abandon. As the Court said in *Heckler v. Chaney, 470 U.S. 821, 831-32, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985)*, the "decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."

The district court selected a remedy not authorized by the APPA. Again, the court assumed broad powers over antitrust enforcement. Just as the district court would have no authority to keep the action alive, the court had no authority to convert the action into something other than what the government chose to bring. In particular, the court did not have jurisdiction to grant an injunction over the government's objection.

C

Furthermore, the district court did not have jurisdiction over Koppers' request in the first place. The APPA allows a district court to authorize "participation in proceedings before the court by interested persons or agencies, including . . . intervention as a party pursuant to the Federal Rules of Civil Procedure." *15 U.S.C. § 16* **[**15]** *(f)(3)*. Koppers sought leave from the district court "to participate" in the APPA proceeding. Koppers did not seek to intervene under the Federal Rules -- did not apply for intervention under Rule 24, did not serve a motion announcing intervention under Rule 5.

In short, Koppers was not, and is not, a party to the action. In *United States v. Stroh Co.*, 1982-2 Trade Cas. (CCH) P. 64,804 (D.D.C. June 4, 1982), a district court was faced with a competitor of the defendant that attempted to intervene and request a preliminary injunction in an APPA proceeding. The court denied intervention. Because the outsider lacked party status, "it has no standing to pursue such relief." *Id.* at 71,959 n.2. Similarly, because Koppers is not a party, it has no standing to pursue a preliminary injunction. By treating Koppers as if it were a party, then allowing Koppers to move for an injunction, the district court exceeded its jurisdiction under the APPA. [2]

[16]** *Stroh* should be a model for this case in all respects. Another outsider in *Stroh* attempted to intervene so as to interject issues "unrelated to the central issue in this case." *United States v. The Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) P. 64,782 at 71,829 n.3 (D.D.C. June 8, 1982). One of the unrelated issues, as in our case, was the "conjectured failure of the plant divestiture provision." *Id.* at 71,829 n.2. **[*951]** In rejecting this attempt to intervene, the court observed:

> This attempt seeks to shift this Court's attention from the concerns of the Tunney Act -- where the focus is on whether approval of the proposed settlement is in the public interest -- to the earlier decision of the original parties [the government and the defendant] to forego further litigation and settle this case.

Id. at 71,829 n.3.

In our case, unfortunately, the district court went along with Koppers' attempt to shift the court's attention. By considering matters outside the complaint, by issuing an injunction over the government's objection, and by granting a request for an injunction from a non-party, the district court exceeded its jurisdiction **[**17]** under the APPA. Because the district court exceeded its jurisdiction, the district court could not invoke the All Writs Act "in aid" of its jurisdiction.

II

Even if the district court had authority to issue an injunction, the district court abused its discretion in holding that this case meets the standard for a preliminary injunction. In addition, the district court misunderstood the law with respect to important issues in litigation. *See Wilson v. Watt, 703 F.2d 395, 398 (9th Cir. 1983)*.

A

Considered as the moving "party," Koppers had the burden of demonstrating "probable success on the merits and the possibility of irreparable injury" or "that serious questions are raised and the balance of hardships tips sharply in its favor," or some combination of likely success and probable harm on the continuum between these extremes. *Id. at 399*. The district court abused its discretion by concluding that Koppers had met its burden. Not only is it impossible for Koppers to prevail on the merits, but Koppers does not even raise serious questions about the need for an injunction. Furthermore, the balance of hardships tips sharply in Koppers' disfavor.

[18]** Koppers will gain nothing on the merits: no permanent injunction can result from the APPA proceeding. At the end of the 60-day review, the most the district court can do is disapprove the consent judgment. At that point the district court's APPA jurisdiction would expire. The government would then have to decide what to do. The government might dismiss the complaint, might go to trial on the present complaint, might even amend the complaint to seek an injunction against the merger. Even if the government chose to take further action, the

[2] Even if Koppers had sought to intervene, Koppers would not have qualified for party status. In *Stroh* the judge rejected as "plainly incorrect" the competitor's argument that the APPA confers a conditional right to intervene, and the judge denied intervention on any ground. 1982-2 Trade Cas. (CCH) P. 64,804 at 71,959 n.1. The judge properly considered that the competitor "is motivated by its own private interest." *Id.* at 71,961. Here Koppers plainly is motivated by its own private interest and so would not qualify for party status.

government would do so in a later proceeding. Koppers would no longer be a "participant" and so could not shape the contents of the ultimate judgment.

Koppers does not even raise serious questions about the need for an injunction. As indicated above, if the district court disapproved the consent judgment the government would have to decide what to do. The government has not indicated it would seek to enjoin the merger. Instead, the government has indicated it would, at most, sue for the same relief as is provided by the consent judgment -- divestiture of the Irwindale aggregate plant. As the government's Competitive Impact Statement notes, "the **[**19]** government is satisfied that the proposed Final Judgment provides substantially all the relief it could expect to obtain if it were to litigate the case to a full trial on the merits."

In any event, the balance of hardships tips sharply against Koppers. Koppers' particular concerns suggest that the absence of an injunction during the 60 days of the APPA proceeding scarcely would impose a hardship on the public. Koppers maintained, and the district court found, that an acquisition pending the district court's determination of public interest would create unreasonable risks in several areas: Gifford-Hill might obtain confidential information about Koppers' aggregate operations; Koppers might have to sacrifice new pro-competitive ventures and opportunities; Koppers' ability to contract might suffer; and employee recruitment and morale in Irwindale might deteriorate.

[*952] These concerns do not impose a real hardship on the public; they pose at most a small, speculative threat to competition. Koppers is reduced to harping on these minor concerns because the consent judgment disarms any real threat to competition. The United States and BNS have stipulated that they will abide **[**20]** by the proposed consent judgment even before it is approved. The proposed consent judgment includes a "hold-separate" provision. This provision will maintain Koppers' Irwindale aggregate business as an active going concern until BNS divests itself of the business. [3] The hold-separate provision precludes any real harm to competition during the 60 days of APPA review. [4]

[21]** The hold-separate provision is a typical feature of cases like this one. As the D.C. Circuit explained in *F.T.C. v. Exxon Corp., 205 U.S. App. D.C. 208, 636 F.2d 1336, 1343-44 (D.C. Cir. 1980)* (citing cases):

> As a result of the short life-span of most tender offers, the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated. . . . Courts have often denied requests for a preliminary injunction if some less extreme means exist to safeguard the public interest. Perhaps the most common of such means is an order that permits the transaction to go forward, but requires the acquiring company to hold the acquired company as a separate entity during the course of subsequent antitrust litigation.

In this case a court did not even have to impose a hold-separate requirement. The parties voluntarily included such a requirement in their proposed consent judgment. Pursuant to the parties' stipulation, the government has the leverage to force BNS to heed the hold-separate provision of the proposed judgment. But even if BNS flouted that provision, the harm would not be irreparable: the United **[**22]** States could then sue for a judgment that would repair the competitive balance in Irwindale, such as by requiring BNS to sell off all its facilities there.

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[3] The hold-separate provision requires BNS and Gifford-Hill (i) to hold the business, including its assets, management, and operations, separate and apart from those of defendants; (ii) to provide and maintain sufficient working capital and lines of credit to maintain a viable, ongoing business; (iii) to use "all reasonable efforts" to keep the business "a viable and active competitor"; to preserve all plant and equipment, maintain all rights and permits, and conduct all necessary repairs; and (iv) to maintain separate financial books and records.

[4] If the consent judgment were approved, the hold-separate provision would continue in effect until BNS had divested itself of the Irwindale facility (pursuant to the decree's divestiture provision). The divestiture provision states that if BNS does not sell the Irwindale business by the end of the year, a trustee will be appointed to sell the facility at the best price attainable. The district court's proper role in the APPA proceeding is to consider whether the divestiture proposal, on these terms, is in the public interest.

By contrast, the injunction poses a grave threat of irreparable harm to BNS, to Koppers' shareholders, and to the public interest in efficient transfers of corporate control in the marketplace. The injunction causes delay in consummating the tender offer. Delay affords Koppers' management the opportunity to entrench itself or to negotiate a sale with another bidder more sympathetic to the personal stake of Koppers' management. As Judge Friendly recognized in overturning a preliminary injunction entered by a district court, "the grant of a temporary injunction on antitrust grounds at the behest of a target company spells the almost certain doom of a tender offer." *Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 870* (2d Cir.), *cert. denied*, *419 U.S. 883, 42 L. Ed. 2d 123, 95 S. Ct. 150 (1974)*.

The injunction casts a pall over the takeover. Yet Koppers is unlikely to be able to arrange a more profitable offer for its shareholders. BNS's cash tender offer is $ 60 per share, a price **[**23]** greater than the highest price at which a share of Koppers' common stock has ever been traded on the exchange. The offer is $ 15 higher than the highest price a share of Koppers' stock reached during 1988 prior to the offer. Multiplied by the 28 million shares outstanding, the offer would result in a premium **[*953]** of $ 420,000,000 for Koppers' shareholders.

If the injunction thwarts the takeover, the injunction will deprive BNS of ownership and control of a company that BNS has calculated to be worth at least $ 420,000,000 more than the preexisting market value. This is irreparable harm. [5] The injunction will deprive Koppers' shareholders of a premium in the same amount. This is irreparable harm. The district court, in deciding on the injunction, gave short shrift to these serious consequences. As a result, the district court badly miscalculated the balance of harms.

[24]** Worst of all, the injunction will prevent an efficient change of corporate control. BNS is willing to pay a $ 420,000,000 premium for Koppers. The reason is that BNS is confident it can make Koppers more productive, and hence more profitable, than Koppers is on its own. To make the premium pay off, BNS will have to deploy Koppers' assets so much more productively that the present value of increased future profits from Koppers' assets will exceed $ 420,000,000. A court has no reason to doubt that BNS can make the premium pay off. Assuming BNS is successful, the takeover is efficient in that it transfers assets to new owners who can deploy them more productively -- to the extent that the nation's economic welfare will increase by upwards of $ 420,000,000.

The injunction imperils the takeover and so threatens to choke off this large increase in economic welfare. In addition, the injunction will set a precedent that may discourage efficient transfers of control in the future.

The injunction wreaks economic havoc way out of proportion to any threat to competition. The public interest in preventing antitrust violations (an interest already safeguarded by the hold-separate provision) **[**25]** relates to a single facility in Irwindale, California responsible for one percent of Koppers' total sales. The public interest in efficient transfers relates to a possible deadweight loss in the economy of $ 420,000,000. The balance of hardships weighs heavily against Koppers -- against the injunction. The district court abused its discretion by granting the injunction.

B

Even if the district court had not abused its discretion in applying the standard for a preliminary injunction, the injunction still could not pass muster. The district court misunderstood the APPA with respect to important issues in litigation. These issues include the impact of the acquisition on Koppers and the culpability of BNS for the antitrust violation. The district court's misunderstanding of these issues hopelessly taints the court's decision to grant the preliminary injunction.

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[5] As if this were not enough, BNS also faces the loss of sunk costs in the form of loan commitment fees and other expenses, such as attorneys' fees. These costs amount to $ 13,000,000. They would be wasted if delay from the injunction sabotaged the takeover. Not only did the district court fail to weigh this loss into the balance of hardships, the district court denied BNS's request for a substantial bond to protect BNS against the irretrievable loss of its sunk costs. This decision alone was abuse of discretion calling for us to dissolve the injunction.

(1) As is apparent from its findings, the district court, in deciding to grant the injunction, added "serious irreparable harm to . . . the business to be acquired" into the balance of hardships. The APPA does not justify a district court in considering harm to the target of a tender offer. The APPA requires a district court **[**26]** to focus narrowly on whether a consent judgment is in the public interest. The public has no interest in whether a particular company is harmed, only in whether competition is harmed.

Accordingly, courts previously have not allowed a private party to use the APPA procedures to enjoin a tender offer. In cases when consent judgments have been entered in similar circumstances, tender offers have been completed within -- and without regard to -- the statutory sixty-day comment period under the APPA. *See, e.g., United States v. Stroh Brewery*, *47 Fed. Reg. 18,445* (April 29, 1982); *United States v. Heileman*, *47 Fed. Reg. 56,064* (December 14, 1982). The district court's decision **[*954]** to consider and act upon Koppers' complaints is unprecedented.

By considering the impact of the acquisition on a company as such, the district court misapprehended the APPA. What is worse, by considering the impact on a target company, the district court perverted the APPA into an anti-takeover statute. Ignoring the statute's public interest orientation, the district court allowed Koppers to block a tender offer under the APPA, even though Koppers would be **[**27]** unable to do so otherwise. A target of a tender offer does not suffer the "antitrust injury" required for standing to bring an action claiming that the proposed acquisition violates the antitrust laws. *See* *Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; *Central Nat. Bank v. Rainbolt, 720 F.2d 1183 (10th Cir. 1983)*. The district court's willingness to entertain Koppers' complaints in an APPA proceeding clashes with settled ***antitrust law***. All in all, the district court's misunderstanding of what harm is relevant demands that this court quash the injunction.

Ironically, the district court's assessment of harm is erroneous. Considering Koppers as the sum of its shareholders, the acquisition does not threaten irreparable harm. As mentioned before, the acquisition promises an enormous premium to shareholders. Accordingly, Koppers' shareholders have tendered seventy-five percent of the company's shares. Wall Street Journal, May 23, 1988, p. 26, col. 4. It is the injunction that threatens irreparable harm to Koppers' shareholders, not the acquisition.

The district court's assessment of harm makes sense only **[**28]** in relation to Koppers' management. The interest of Koppers' management, however, is the most narrow, self-serving of all. Koppers' management seeks to stall the tender offer and deprive Koppers' shareholders of the ability to choose to tender their stock to BNS. Koppers' management seeks to entrench itself in derogation of the rights of its shareholders. [6] Considering that the thrust of the APPA is to safeguard the public interest, the parochial motive of Koppers' management was another reason to prevent Koppers from taking a prominent role in the APPA proceeding.

(2) The district court found that "BNS will not suffer irreparable harm . . . since, among other reasons, **[**29]** BNS knew at the time it made its tender offer and selected the April 7 expiration date that the proposed transaction presented serious questions of antitrust illegality and that it had no right to consummate the acquisition until the issue of antitrust illegality was completely resolved." This finding again betrays the district court's misunderstanding of the APPA. The district court's logic would require that the court enjoin the merger in each and every APPA case. After all, a party is subject to APPA proceedings precisely because that party has acknowledged it has antitrust problems (and has settled them with the government).

An automatic injunction is not the intent of the APPA. The APPA is neutral towards an acquiring company; that company is not somehow in flagrante delicto just because the acquisition poses antitrust problems. Treating BNS as culpable is particularly outlandish considering that the antitrust concern is a minor part of the merger and that BNS voluntarily disclosed the problem. The district court's misunderstanding of the APPA as making the acquirer culpable obviously invalidates the district court's decision to grant an injunction.

III

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[6] In the APPA proceeding Koppers couched its objections in terms of harm to competition as against the public interest. None of Koppers' customers or competitors, however, felt the need to object to the merger as harmful to competition. The special interest of Koppers' management explains why only Koppers sought a preliminary injunction.

The district court **[**30]** exceeded its jurisdiction, abused its discretion, and seriously misunderstood the APPA. The order we issue today does not correct the district court's mistakes. In some ways the order aggravates those mistakes.

[*955] A

Finding authority for the injunction in the All Writs Act, our order allows the district court to exceed its jurisdiction under the APPA. Indeed, our order finds a new way for the district court to exceed jurisdiction under the APPA. The APPA does not authorize a district court to appoint a trustee to take control of and manage part of the target company. Already the district court has usurped the prosecutor's function in antitrust enforcement. Now this court authorizes the district court to manage an aggregate business through a court-appointed trustee.

Although the idea of appointing a trustee sounds like a compromise, it is no such thing. A judge on this panel raised the idea sua sponte at oral argument. The parties have not stipulated that they seek or even are willing to accept this solution. At oral argument, BNS merely allowed that the trusteeship idea sounded better than the status quo. Koppers expressed no interest whatsoever in the idea. Logically, **[**31]** Koppers would not be amenable to a trusteeship: Koppers' management is not interested in a reasonable solution to the antitrust impasse in Irwindale. Koppers' management is interested in one thing only -- delaying the $ 1.69 billion takeover as a whole.

The idea of proceedings to appoint a trustee, as opposed to the trusteeship itself, might appeal to Koppers' management. The proceedings would give management still another avenue for delay. The district court would have to select a trustee and work out details of the trusteeship. Koppers would have the opportunity to drag its feet each step of the way.

The most remarkable aspect of the trusteeship idea is that if the district court disapproves the consent decree, the trustee shall remain in control "for an additional fourteen-day period to permit the parties to take such action, if any, that they deem appropriate." Again, the notion that Koppers would take any action to advance the acquisition is unrealistic: Koppers' management seeks only to delay. But a more important problem concerns jurisdiction. The district court's jurisdiction under the APPA expires when the court disapproves the consent decree. If the district court is **[**32]** to supervise the trustee during the succeeding two weeks, the court yet again will have to exceed its jurisdiction.

B

The good intention of our order is to support effective enforcement of the antitrust laws. The likely effect of our order, however, will be to impair effective enforcement. As we said in *Bechtel*, the court's role under the APPA is merely to determine whether a consent judgment "is 'within the reaches of the public interest.' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree." *648 F.2d at 666* (internal sources omitted).

In accordance with the law this court creates today, every takeover target will seek an injunction under the APPA. District courts, with the authority to grant injunctions in hand, will find themselves enmeshed in the determination of whether a pending merger should be subjected to judicial strangulation.

Meanwhile the government, facing the possibility of injunctions, will begin to exercise its prosecutorial discretion more deliberately. The government will begin to weigh the tradeoff between the benefit and cost of seeking consent judgments under the APPA. The benefit would **[**33]** be the possibility of settling a minor antitrust violation expediently. The cost would be the possibility that a district court may issue an injunction that has the effect of preventing an efficient transfer of corporate control.

In light of this cost -- which did not exist before today's order -- the government will exercise its discretion by prosecuting the antitrust laws less vigorously. In particular, the government often will choose not to seek a consent decree. The government will prefer to forego the small benefit of settling a minor antitrust violation rather than risk a district court's terminating a major, value-increasing merger. Because the government must initiate a consent judgment before a district court may review it, the district court will not be able to pick up the slack. Antitrust enforcement will suffer.

[*956] In this case, the better solution would be to dissolve the injunction. That precedent would relieve the government of the fear that settling an antitrust violation will risk defeat of a valuable merger. The government would be free to prosecute the antitrust laws vigorously, to seek consent judgments without regard to whether a district court might **[**34]** enjoin a fruitful transaction.

IV

The district court lacked authority to grant the injunction. Even if the district court had authority, the district court improperly granted an injunction in this case. The order we issue today perpetuates the district court's mistakes. I would dissolve the injunction.

[Consolidated Metal Products, Inc. v. American Petroleum Institute]

United States Court of Appeals for the Fifth Circuit

June 6, 1988

No. 87-1200

Reporter

846 F.2d 284 *; 1988 U.S. App. LEXIS 7746 **; 1988-1 Trade Cas. (CCH) P68,051

Consolidated Metal Products, Inc., Plaintiff-Appellant, v. American Petroleum Institute, Defendant-Appellee

Prior History: [1]** Appeal from the United States District Court for the Northern District of Texas.

Disposition: Affirmed.

Core Terms

monogram, user, conspiracy, products, manufacturers, subcommittee, sucker, antitrust, summary judgment, rule of reason, sucker rod, threaded, cases, anticompetitive, three-piece, consumers, trade association, heads, specifications, contends, genuine, steel, oil, unreasonable restraint, coupler, buyers, no evidence, per se rule, certification, competitors

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Discovery, Methods of Discovery**

Fed R. Civ. P. 56(c) permits summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Summary Judgment, Entitlement as Matter of Law**

When a motion for summary judgment is made and supported as provided in *Fed R. Civ. P. 56(e)*, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but 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

HN3[] **Summary Judgment, Entitlement as Matter of Law**

Only disputes over material facts, facts that might affect the outcome of the lawsuit under the governing substantive law, will preclude summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment should be used cautiously when resolution of the dispositive issue requires a determination of state of mind.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

While the court recognizes the importance of preserving litigants' rights to a trial on their claims, the court is not prepared to extend those rights to the point of requiring everyone 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.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN7[] **Summary Judgment, Entitlement as Matter of Law**

As required when reviewing a grant of summary judgment, the court views the written record in the light most favorable to the party opposing the motion, when deciding if a genuine issue of material fact exists.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1* states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Every commercial agreement restrains trade. Whether this action violates the Sherman Act, *15 U.S.C.S. § 1* depends on whether it is adjudged an unreasonable restraint.

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**

Claims under the Sherman Act, *15 U.S.C.S. § 1* should be subject to rule of reason analysis unless the challenged action falls into the category 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 the precise harm they have caused or the business excuse for their use.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

The decision to apply the per se rule turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Practices Governed by Per Se Rule, Boycotts**

Concerted refusals to deal or group boycotts should be condemned as per se violations.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

The term "group boycott" is in reality a very broad label for divergent types of concerted activity. To 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.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

Per se treatment is justified only where the purpose and effect of the challenged practice are to threaten the proper operation of our predominantly free market economy, or where the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

To state a per se violation, the mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive. The court emphasizes that the denial of necessary business relations is crucial to per se illegality.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

The per se rule applies only where exclusionary or coercive conduct has been present.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

HN17[] **Antitrust & Trade Law, Sherman Act**

The absence of procedural safeguards can in no sense determine the antitrust analysis. The antitrust laws do not themselves impose on joint ventures a requirement of due process.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Per Se Rule & Rule of Reason, Per Se Violations**

The court holds that a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not per se violate the Sherman Act, *15 U.S.C.S. § 1* when, for whatever reason, it fails to evaluate a product favorably to the manufacturer.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN19[] **Antitrust & Trade Law, Sherman Act**

To prove an antitrust violation under the rule of reason a plaintiff must show the defendant's conduct adversely affected competition. That is, the rule of reason requires plaintiffs to show that the defendants' actions amounted to a conspiracy against the market -- a concerted attempt to reduce output and drive up prices or otherwise reduce consumer welfare. Under the rule of reason, the antitrust laws protect competition, not particular competitors. In addition, the absence of procedural safeguards in the process of making business decisions can in no sense determine the antitrust analysis.

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

HN20[] Sherman Act, Claims

A showing that the defendants harmed the plaintiffs is not enough to prove a violation of the Sherman Act, *15 U.S.C.S. § 1*, under the rule of reason. It is a natural part of a competitive market that products, firms, and -- sometimes -- entire sectors of the economy fail. A plaintiff does not have a claim under the rule of reason simply because others refuse to promote, approve, or buy its products.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN21[] Antitrust & Trade Law, Sherman Act

Under the rule of reason, the plaintiff must establish two elements basic to an anticompetitive conspiracy: (1) that the defendant engaged in some form of joint action and (2) that this joint action amounted to an unreasonable restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN22[] Antitrust & Trade Law, Sherman Act

To survive summary judgment on the issue of antitrust conspiracy, the plaintiff must present evidence that tends to exclude both the possibility of conduct consistent with permissible competition and the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] Antitrust & Trade Law, Sherman Act

It is axiomatic that trade standards must exclude some things as substandard and it is unsurprising that standard-setting bodies sometimes err. A single such error does not amount to a conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] Antitrust & Trade Law, Sherman Act

Under the Sherman Act, *15 U.S.C.S. § 1*, an unreasonable restraint of trade may be established by proof of either an unlawful purpose or an anticompetitive effect.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN25[] **Sherman Act, Claims**

It is not enough to meet the plaintiff's burden under the rule of reason that the plaintiff was harmed because the defendant refused without justification to promote, approve, or buy the plaintiff's product. Neither anticompetitive animus nor the other elements of a claim under the Sherman Act, *15 U.S.C.S. § 1*, can be inferred solely from the incorrectness of a single business decision by a standard-setting trade association. The "reasonableness" of a restraint is judged by its general effect on the market, not by the circumstances of a particular application. An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a sound basis for antitrust liability.

Counsel: Philip J. Hirschkop, Alexandria, Virginia, Jonathan R. Mook, Attorneys, for Appellant.

James J. Bierbower, Washington, District of Columbia, Roy D. Snyder, Jr., Attorneys, for Appellee American.

Arnold S. Block, Washington, District of Columbia, Attorney, for Dover Corp.

Judges: Wisdom, Garwood, and Jones, Circuit Judges.

Opinion by: WISDOM

Opinion

[*286] WISDOM, Circuit Judge:

In this suit, Consolidated Metal Products, Inc., a manufacturer of oil well equipment, contends that the American Petroleum Institute ("API"), a trade association representing all sectors of the domestic petroleum industry, delayed trade standard certification to certain equipment manufactured by Consolidated and thereby excluded it from the market in violation of *section 1* of the Sherman Act. *15 U.S.C. § 1*. After a thorough review of the evidence, the district court granted summary judgment for API. Although Consolidated offered evidence that API had no basis to conclude that its equipment would not perform up to trade standards, the district court found this insufficient **[**2]** to raise a genuine issue of fact material to whether the delay was a conspiracy in restraint of trade. Consolidated appeals.

The principal question in this case is whether unjustified denial of a valuable product certification by a standard-setting body, without more, violates *section 1* of the Sherman Act. We hold that it does not and affirm the judgment of the district court.

I.

Sucker rods are part of the equipment used to pump oil from wells having low natural pressure. A pump jack at the surface imparts an up-and-down motion to a sucker rod string that extends through the tubing of the well to a pump submerged in the fluid of the well. Each sucker rod is 25 to 30 feet long, 1/2 to 1 1/8 inches in diameter, and has coupler heads on each end. The heads allow the rods to be strung together inside the tubing until they reach the submerged pump.

Conventional sucker rods are manufactured of a single piece of steel. First, steel is forged into a shaft. Then, the ends of the shaft are hot-forged into coupler heads, making a one-piece sucker rod.

In 1980, when domestic oil production and the demand for sucker rods were at record levels, Consolidated developed an innovative method **[**3]** for manufacturing the rods. Using its patented high-strength steel, Consolidated manufactured the rods in three individual pieces: the steel shaft and two threaded coupler heads. Consolidated then roll-threaded the coupler heads onto the steel shaft. Because this process eliminated the costly hot-forging required by the conventional design, Consolidated's rods were cheaper to produce than conventional rods. Consolidated began marketing its rods in 1981, and that year sold nearly 12 million feet of them -- a substantial amount.

In addition to its various other activities, API is the only domestic body that sets standards for oil field equipment. Equipment manufacturers may apply to API for approval of their products and, if API finds that the equipment meets its standards, it will (for an annual fee) grant a license to display the API monogram is a registered trademark of API. By using it, the licensee warrants to purchasers that the monogrammed product complies with API specifications. The API monogram has commercial value in that its use enhances product sales.

API has been setting standards for, and approving, sucker rods since at least 1927. API approval of products is not, **[**4]** however, required by any law and oil field equipment, including sucker rods, is sold without it.

Consolidated had been selling sucker rods without the API monogram for some time when, after several initial inquiries, it formally applied to API for approval of its innovative rod design on June 1, 1981. Around the same time, other manufacturers who had been marketing unconventional sucker rods also applied for API approval. These other new rods included a three-piece **[*287]** design in which the coupler heads were welded, rather than roll-threaded, onto the steel shaft.

J.M. Spanhel of the API production department staff was authorized to grant or deny sucker rod manufacturers the license to use the API monogram. [1] **[**5]** Spanhel was familiar with the three-piece threaded design from Consolidated's earlier inquiries with API. He told Consolidated that he thought its design was not contemplated by API's sucker rod specification, contained in API Spec. 11B, [2] but nonetheless arranged for Consolidated to make presentations to API's sucker rod standards committee.

The sucker rod standards committee referred the applications of Consolidated and the other three-piece rod manufacturers to the manufacturer subcommittee. After hearing presentations by the applicants, the manufacturer subcommittee deferred all action to the user subcommittee. The user subcommittee met on June 24, 1981 to consider the various applications and heard presentations by several sucker rod manufacturers, including Consolidated. Spanhel asked the user subcommittee to determine how the requirements of Spec. 11B should be applied to Consolidated's rod. The minutes of that meeting state:

> The User Subcommittee unanimously agreed that there is no current justification for the appointment of a task group to investigate the writing of specifications for sucker rods which do not meet the current [Spec.] 11B specifications. This Subcommittee encourages all potential manufacturers to continue to develop new products.

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[1] The API production department is headed by a general committee that oversees standardization committees charged with formulating standards on categories of equipment. The sucker rod standardization committee was composed of manufacturer and user subcommittees. Although these committees participate in the development and revision of API specifications, the final authority for the administration of API's product approval program is vested in the director of the production department who, for this matter, had delegated his authority to Spanhel.

[2] At the time Consolidated and the other innovators applied for the API monogram, Spec. 11B had not been changed substantially since 1927.

> This Subcommittee has concurred **[**6]** that sucker rods can be welded in a manner that meets the current [Spec.] 11B specifications. This Subcommittee believes that Consolidated Metal's sucker rods do not meet 11B specifications because of tensile strength characteristics.

At this point API and Consolidated began their long and heated dispute over whether Spec. 11B did or did not "cover" Consolidated's three-piece threaded design and whether the user subcommittee made any determination on the matter. API contends that the user subcommittee's interest in tensile strength in part reflects a concern with the strength of the threaded joint between the shaft and heads in Consolidated's design, a concern Spanhel also held. In any event, API contends, Spanhel understood the user subcommittee's ruling, reasonably, as either rejecting or tabling Consolidated's application for product approval. Accordingly, API contends, Spanhel's own judgment in the matter was confirmed and he justifiably refused to grant Consolidated's application for the monogram.

Consolidated, on the other hand, contends that Spec. 11B "covered" its design because it did not specifically exclude threaded-on coupler heads. Consolidated also insists **[**7]** that the user subcommittee's concern with tensile strength could be addressed merely by changing the type of steel in the rod and had nothing to do with the threaded joints. Spanhel, Consolidated contends, should have known this and could not reasonably have understood the user committee's statements as accepting any delay in API approval of Consolidated's rod.

On several occasions during the three months after the June 1981 standards meeting, Consolidated and API discussed the possible approval of Consolidated's rods. Consolidated continued to press for approval, insisting that Spec. 11B "did not exclude" its design, and Spanhel, for API, continued to insist upon more time to study the performance of the three-piece threaded **[*288]** rod. In September 1981, after Consolidated threatened to sue, API set up a standards subcommittee to consider revising Spec. 11B to incorporate the three-piece threaded design. The discussions between Consolidated continued unchanged in both acrimony and substance. API completed and approved specifications for three-piece threaded rods on January 14, 1983 and formally licensed use of its monogram on Consolidated's rod on April 15, 1983.

Seven days **[**8]** later, on April 22, 1983, Consolidated filed the complaint in this case, alleging a conspiracy between Continental Emsco, Inc., Dover Corporation (both established manufacturers of conventional sucker rods), API, and several unnamed co-conspirators. All were listed as defendants' responses, and two years of discovery have focussed on whether it was "reasonable" for API to delay Consolidated a monogram license from June 1981 to April 1983. The district court granted summary judgment in favor of all the defendants. Consolidated appeals only the judgment for API.

II.

Rule 56(c) of the Federal Rules of Civil Procedure ***HN1***[] permits summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law". *Rule 56(e)* provides:

> ***HN2***[] When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations **[**9]** or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.

HN3[] Only disputes over material facts, facts that might affect the outcome of the lawsuit under the governing substantive law, will preclude summary judgment. [3]

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[3] *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986)*. *See also* *Phillips Oil Co. v. OKC Corp., 812 F.2d 265, 272 (5th Cir.)*, *cert. denied*, ***484 U.S. 851, 108 S. Ct. 152, 98 L. Ed. 2d 107 (1987)***, and the cases cited there.

It is true that summary judgment is less common in antitrust cases than in other cases, but this is not because different rules apply to those cases. [4] Rather, it is because the relevant factual disputes in antitrust cases are typically more complicated that those in other cases. [5] **[**11]** Accordingly, **[**10]** it is typically more difficult for the trial court to resolve all doubt about the merits of an antitrust claim on the basis of the written, pre-trial record alone. [6] But this is certainly not always so.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court upheld a summary judgment against the **[*289]** plaintiffs on their claim under *section 1* of the Sherman Act, stating:

> To survive [the defendants'] motion for summary judgment, [the plaintiffs] must establish that there is a genuine issue of material fact as to whether [the defendants] entered into an illegal conspiracy that caused [the plaintiffs] to suffer a cognizable injury. . . . This showing has two components. First, [the plaintiffs] must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from illegal conduct.
>
> . . .
>
> Second, the issue of fact must be "genuine." *Fed.R.Civ.Pro. 56(c)*, *(e)*. . . . When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. [7] **[**13]**

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[4] *See, e.g., Walker v. U-Haul Co. of Mississippi, 734 F.2d 1068, 1070-71 (5th Cir.1984)*; *Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 303 (5th Cir.)*, *cert. denied*, ***469 U.S. 833, 105 S. Ct. 123, 83 L. Ed. 2d 65 (1984)***; *Parsons v. Ford Motor Co., 669 F.2d 308, 313 (5th Cir.)*, *cert. denied*, ***459 U.S. 832, 103 S. Ct. 73, 74 L. Ed. 2d 72 (1982)***; *General Chemicals v. Exxon Chemical Co., USA, 625 F.2d 1231, 1233 (5th Cir.1980)*. *See also Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1110 (5th Cir.1979)*.

[5] In *Poller v. Columbia Broadcasting System, Inc.*, the Supreme Court stated:

> ***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. 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. . . .

368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962). *See also Industrial Investment Development Corp. v. Mitsui & Co., 671 F.2d 876, 884 (5th Cir.1982)*, *vacated on other grounds*, ***460 U.S. 1007, 103 S. Ct. 1244, 75 L. Ed. 2d 475 (1983)***, concluding that summary judgment is inappropriate against antitrust plaintiffs "where there is ample evidence of a conspiracy" and when "plaintiffs have not had an opportunity to depose one of the conspirators on the effect and intent of their efforts". *Cf.* ***Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir.1970)***, stating that ***HN5***[] summary judgment should be used cautiously "when resolution of the dispositive issue requires a determination of state of mind".

[6] *See* 10A C.A. Wright, A. Miller, and M. Kane, Federal Practice and Procedure § 2732.1 at 319 (2d ed. 1983).

[7] *475 U.S. 574, 585-86, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538 (1986)* (footnotes and citations omitted). In this passage, the Court cites a passage in *First National Bank of Arizona v. Cities Service Co.*, which states:

> ***HN6***[] 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 everyone 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.

391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569 (1968), *cited in Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1355-56, 106 S. Ct. at 2509-10.

Thus, when defending its antitrust claim **[**12]** against summary judgment, Consolidated faces the same hurdle as the plaintiff in any other cause of action: it "must come forward with 'specific facts showing that there is a *genuine issue for trial*'". [8]

HN7[] As required when reviewing a grant of summary judgment, we view the written record in the light most favorable **[**14]** to Consolidated, the party opposing the motion, when deciding if a genuine issue of material fact exists. [9] We conclude that, viewed in any light, the record in this antitrust case presents no basis for a trial.

III.

Section 1 of the Sherman Act ***HN8***[] states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal". But as the Supreme Court observed in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*,

> ***HN9***[] Every commercial agreement restrains trade. Whether this action violates *§ 1* of the Sherman Act depends on whether it is adjudged an *unreasonable* **[**15]** restraint. [10]

To prove an "unreasonable" restraint, Consolidated may proceed along two avenues of proof. "The rule of reason" requires Consolidated to show that API's product approval program is a conspiracy to produce an anticompetitive effect on the relevant market. "The *per se* rule" requires Consolidated to show that API's product approval program is conduct presumed to have such an anticompetitive effect.

A.

We address first the *per se* rule and its scope. In *Northwest Wholesale Stationers*, the Supreme Court stated that *section* ***[*290]*** *1* ***HN10***[] claims should be subject to rule of reason analysis

> unless the challenged action falls **[**16]** into the category 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 the precise harm they have caused or the business excuse for their use." *Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*.
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> . . . ***HN11***[] The decision to apply the *per se* rule turns on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562, 60 L. Ed. 2d 1 (1979)*. [11] **[**17]**

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[8] *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356 (original emphasis), quoting *Fed.R.Civ.P. 56(e)*. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)*; *Liberty Lobby, 477 U.S. at 247-48, 106 S. Ct. at 2509-10*. *See also* *Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 137-38 (5th Cir.1987)*, applying *Celotex* and upholding summary judgment against antitrust plaintiff. *See generally* Comment, Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 S. Ct. *37 Emory L.J. 171, 191-215 (1988)*, and Turner, The Durability, Relevance, and Future of American Antitrust Policy, *75 Calif.L.Rev. 797, 814-15 (1987)*, both concluding that *Matsushita, Liberty Lobby*, and *Celotex* signal a retreat from *Poller*.

[9] *See, e.g.,* *Phillips Oil Co. v. OKC Corp., 812 F.2d at 272*, and the cases cited there.

[10] *472 U.S. 284, 289, 105 S. Ct. 2613, 2616-17, 86 L. Ed. 2d 202 (1985)* (original emphasis; citation to *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 243-44, 62 L. Ed. 683 (1918)*, omitted).

[11] *Id. 472 U.S. at 289-90, 105 S. Ct. at 2617*.

The Court termed this, mildly, "an area of ***antitrust law*** that has not been free of confusion". [12]

There must be principled limits on the *per se* rule. The Supreme Court has long recognized that ***HN12***[] "concerted refusals to deal or group boycotts" should be condemned as *per se* violations. [13] Nonetheless, because a *per se* ruling declares illegal an entire class of business practices on the basis of only attenuated inquiry into the economic consequences, the Court has also long cautioned against its overzealous use. [14] **[**19]** As the Eighth Circuit observed,

> ***HN13***[] The term "group boycott" . . . is in reality a very broad label **[**18]** for divergent types of concerted activity. To 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. [15]

Recently, in *FTC v. Indiana Federation of Dentists*, the Court again cautioned against resolving *section 1* cases "by forcing the [defendant's] policy into the 'boycott' pigeonhole", especially when it would "extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact . . . is not immediately obvious". [16]

[20]** **[*291]** As *Northwest Wholesale Stationers* explained, ***HN15***[] to state a *per se* violation, "the mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive". [17] **[**22]** The Court emphasized that the denial of necessary business relations is crucial to *per se* illegality:

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[12] *Id. at 289* & n. 3, *105 S. Ct. at 2616 n. 3*. *See* 7 P. Areeda, ***Antitrust Law*** paras. 1508-1511 (1986 & Supp. 1987); L. Sullivan, Law of Antitrust 229-30 (1977). *See also* Turner, 75 Calif.L.Rev. at 799-800; Bauer, Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination, 79 Colum.L.Rev. 685, 692-94 (1979).

[13] *Northwest Wholesale Stationers*, 472 U.S. at 289, 105 S. Ct. at 2616-17.

[14] *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. ["BMI"]*, *441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562-63, 60 L. Ed. 2d 1 (1979)*, stating that ***HN14***[] *per se* treatment is justified only where the purpose and effect of the challenged practice "are to threaten the proper operation of our predominantly free market economy", or where the "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output"; *Continental T.V., Inc. v. GTE Sylvania, Inc. ["GTE Sylvania"]*, *433 U.S. 36, 49-50, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977)*, stating that "*per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive"; *United States v. Topco Associates, Inc., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 1133, 31 L. Ed. 2d 515 (1972)*, stating that "it is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act.".

[15] *Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir.1976)*, *cert. dismissed*, ***434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977)***, quoting *Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 125 (8th Cir.1973)*, *cert. denied*, ***415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974)***. *Accord* *United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1365-69 (5th Cir.1980)*; *E.A. McQuade Tours, Inc. v. Consolidated Air Manual Committee, 467 F.2d 178, 186-87 (5th Cir.1972)*, *cert. denied*, ***409 U.S. 1109, 93 S. Ct. 912, 34 L. Ed. 2d 690 (1973)***. *See also* *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, 672 F.2d 1280, 1284-85 (7th Cir.1982)*; *United States Trotting Ass'n, Inc. v. Chicago Downs Ass'n, Inc., 665 F.2d 781, 788 (7th Cir.1981)* (en banc).

[16] *476 U.S. 447, 458-59, 106 S. Ct. 2009, 2017-18, 90 L. Ed. 2d 445 (1986)*. Moreover, in the course of deciding whether a business practice challenged under *Section 1* fits within the "boycott pigeonhole", many courts find themselves in a detailed inquiry into the economic effects of the practice -- precisely the sort of "rule of reason" analysis the *per se* approach is supposed to eliminate for "obviously" anticompetitive practices. *See* Sullivan, ***Antitrust Law*** at 239, 241-45; Bauer, 79 Colum.L.Rev. at 694-95, 703-04 & n. 82.

[17] 472 U.S. at 298, 105 S. Ct. at 2017-18. As one commentator notes, however, it is often difficult to determine what *will* suffice:

> While the per se illegality rule seems appropriate for naked horizontal boycotts such as those involved in *Klor's, Inc. v. Broadway-Hale Stores, [359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*,] there are often problems in determining

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." Sullivan, [Law of Antitrust] at 261-62. *See, e.g. Silver [v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)]* (denial of necessary access to exchange members); *Radiant Burners Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 [81 S. Ct. 365, 5 L. Ed. 2d 358] (1961)* (denial of necessary certification of product); *Associated Press v. United States, 326 U.S. 1 [65 S. Ct. 1416, 89 L. Ed. 2013]* ***[**21]*** *(1945)* (denial of important sources of news); *Klor's Inc. [v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)]* (denial of wholesale supplies). In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, *Silver, supra; Radiant Burners, Inc., supra*, and frequently the boycotting firms possessed a dominant position in the relevant market. *E.g., Silver, supra; Associated Press, supra; Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 [61 S. Ct. 703, 85 L. Ed. 949] (1941)*. *See generally* Brodley, Joint Ventures and Antitrust Policy, 95 Harv.L.Rev. 1523, 1533, 1563-65 (1977). [18]

Similarly, in *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, this court engaged in a lengthy analysis of the same cases and concluded that ***HN16***[] the *per se* rule applied only "where exclusionary or coercive conduct has been present." [19]

Consolidated offers no evidence, when viewed in the light of these cases, that merits treating API's product approval program as a "group boycott", *per se* illegal under *section 1*. [20] **[**23]** In the various cases discussed in *Northwest Wholesale Stationers* and *E.A. McQuade Tours*, the touchstone of *per se* illegality is that the customers or suppliers of the plaintiff had, as a group, agreed or been forced to cease doing business with the plaintiff. [21] In

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> whether a collective refusal to deal is "naked." The status of refusals to deal associated with lawful joint ventures or similar cooperative enterprises will also need further clarification.

Turner, 75 Calif.L.Rev. at 802.

[18] *Northwest Wholesale Stationers*, 472 U.S. at 294, 105 S. Ct. at 2619.

[19] *467 F.2d at 187*. *See also Realty Multi-List, 629 F.2d at 1366-67*.

[20] We note that *Northwest Wholesale Stationers* specifically forecloses the use Consolidated wishes to make of *Silver, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389*. Unlike the New York Stock Exchange, API is not a self-regulating monopoly sanctioned by Congress. Thus, Consolidated's litany of alleged deficiencies in API's monogram licensing process -- including, for example, the lack of any avenue of appeal from the decisions of API's Standards Committee and API's monogram licensing staff -- is irrelevant. "The ***HN17***[] absence of procedural safeguards can in no sense determine the antitrust analysis. . . . The antitrust laws do no themselves impose on joint ventures a requirement of due process." *Northwest Wholesale Stationers*, 472 U.S. at 293, 105 S. Ct. at 2619. *Cf. Realty Multi-List, Inc., 629 F.2d at 1367 n. 30*, and *Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652 (5th Cir.1977)*, both construing *Silver* as outside the *per se* principle.

[21] In *Fashion Originators' Guild, 312 U.S. at 461, 61 S. Ct. at 705*, the defendants "admit that to destroy . . . competition [by other manufacturers] . . . they have in combination purposely boycotted and declined to sell their products to retailers". In *Eastern States Retail Lumber Dealers Assoc. v. United States, 234 U.S. 600, 608-09, 612, 34 S. Ct. 951, 952-53, 954, 58 L. Ed. 1490 (1914)*, the evidence suggested that a combination of retail lumber dealers had agreed not to do business with wholesalers who sold directly to the retailers' customers. In *Klor's, 359 U.S. at 213, 79 S. Ct. at 710*, the plaintiff was an appliance retailer whose principal competitor had secured the agreement of the plaintiff's suppliers not to sell appliances to the plaintiff (or to charge exhorbitant prices). The plaintiff, without alternative sources of supply, was forced from the business. In *Radiant Burners, 364 U.S. at 658, 81 S. Ct. at 366-67*, the only supplier of natural gas in Chicago agreed with an association of gas appliance manufacturers to supply gas only to homes using appliances approved by the association. The effect was that consumers could not use products unless approved by the association: there could be no demand for a competing manufacturer's gas appliances unless the association approved.

this **[*292]** case, Consolidated complains of lost sales but fails to allege that sucker rod users are in some way constrained from buying its products. Indeed, Consolidated admits that, before the demand for domestically-produced oil fell, it was able to sell a substantial amount of its rods.

[24]** ***HN18***[] We hold that a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not *per se* violate *section 1* when, for whatever reason, it fails to evaluate a product favorably to the manufacturer. [22] **[**25]** Here, denial of API certification in no real sense "excludes" Consolidated from the market: without certification, Consolidated admits that it is still free to sell its products and consumers are free to buy them. [23] In no real sense is the monogram "necessary" to the sale of sucker rods: Consolidated does not allege that consumers are somehow unable to use its rods as they would API-monogrammed rods. [24] Thus, Consolidated offers no evidence of a *per se* violation of *section 1*.

B.

Neither does Consolidated present a factual dispute material to proving a *section 1* violation under the rule of reason. As this court said in *Northwest Power Products v. Omark Industries*, ***HN19***[] "to prove an antitrust violation under the rule of reason . . . [a plaintiff] must show the defendant's conduct adversely affected competition". [25] That is, the rule of reason **[*293]** requires plaintiffs to show that the defendants' actions amounted to a conspiracy against the market -- a concerted attempt to reduce output **[**26]** and drive up prices or otherwise reduce consumer welfare. [26] **[**27]** Under the rule of reason, the antitrust laws protect competition, not particular

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In *Associated Press*, 362 U.S. at 4, 65 S. Ct. at 1417, AP's bylaws forbade member news associations from doing business with non-members: an explicit boycott. Also, the *per se* holding in *Associated Press* may be based more on the territorial division imposed by AP than by any boycott. *Id. at 24-25, 65 S. Ct. at 1426-27* (Douglas, J., concurring). *See also* Realty Multi-List, 629 F.2d at 1366-67 n. 30, arguing that *Associated Press* is not a "boycott" case.

In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp. ["ASME"]*, *456 U.S. 556, 570-71, 102 S. Ct. 1935, 1944-45, 72 L. Ed. 2d 330 (1982)*, a case Consolidated contends is dispositive of this one, the Court discusses discriminatory application of trade standards in conjunction with cases of *per se* violations. Although this suggests that the challenged practice in *ASME* could have been *per se* illegal, we note that the later case of *Northwest Wholesale Stationers* does not include *ASME* in its extensive discussion of cases of *per se* violations. *See* *472 U.S. at 293-94, 105 S. Ct. at 2619*. In any event, *ASME* involved both regulations that have the force of law and a direct conspiracy between the *ASME* staff and the plaintiff's competitors. *456 U.S. at 559, 561-62, 102 S. Ct. at 1939-41*. These factors are absent here.

[22] *See* *Eliason Corp. v. National Sanitation Foundation, 614 F.2d 126, 129 (6th Cir.)*, *cert. denied*, ***449 U.S. 826, 101 S. Ct. 89, 66 L. Ed. 2d 29 (1980)***. *But see* Sullivan, ***Antitrust Law*** at 249, arguing that it follows from *Radiant Burners* that purely advisory trade standards are a *per se* violation of *Section 1* if shown to be "unreasonable": "any other course would create too great a risk of competitive injury". As we discuss below, although purely advisory trade standards may violate *Section 1* under the "rule of reason", the antitrust laws do not give every producer denied certification a right to review in the federal courts.

[23] Unlike the defendants in *Fashion Originators' Guild, Eastern States, Associated Press*, and *Klor's*, API has secured no agreement by suppliers or customers not to deal with Consolidated. *See* note 21.

[24] Unlike the trade standards challenged in *ASME*, API specifications do not have the force of law and, unlike the defendants in *Radiant Burners*, API does not deny buyers of uncertified rods access to other goods necessary to use them. *See* note 21.

[25] *576 F.2d 83, 90 (5th Cir.1978)*, *cert. denied*, ***439 U.S. 1116, 99 S. Ct. 1021, 59 L. Ed. 2d 75 (1979)***. *See also* *North Mississippi Communications, Inc. v. Jones, 792 F.2d 1330, 1334 (5th Cir.1986)*; *Industrial Investment Development Corp., 671 F.2d at 889-90 n. 16*; *Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1350-51 (5th Cir.1980)*, *cert. denied*, ***450 U.S. 1030, 101 S. Ct. 1740, 68 L. Ed. 2d 226 (1980)***; *Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 296 (5th Cir.1981)*.

[26] *National Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma ["NCAA"]*, *468 U.S. 85, 99-100, 104 S. Ct. 2948, 2959-60, 82 L. Ed. 2d 70 (1984)*; *BMI*, 441 U.S. at 19-20; *United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16, 98 S. Ct. 2864, 2875 n. 16, 57 L. Ed. 2d 854 (1978)*. *See* Sullivan, The Viability of the Current Law on Horizontal Restraints, *75*

competitors. [27] In addition, the absence of procedural safeguards in the process of making business decisions "can in no sense determine the antitrust analysis". [28]

Accordingly, ***HN20***[] a showing that the defendants harmed the plaintiffs is not enough to prove a violation of *section 1* under the rule of reason. It is a natural part of a competitive market that products, firms, and -- sometimes **[**28]** -- entire sectors of the economy fail. A plaintiff does not have a claim under the rule of reason simply because others refuse to promote, approve, or buy its products.

The plaintiff's contentions in this case, however, amount to little more than this. It is undisputed that API approval has commercial value and that API took two years to approve Consolidated's product. What is more important in this case is what Consolidated fails to assert. It does not allege that API somehow coerces users to buy only monogrammed rods, it provides little concrete information about "the sucker rod market", and it no longer contends that there was an anticompetitive conspiracy between its competitors and API. Consolidated asserts only that because API is a trade association, it is a "walking conspiracy" and then contends, at bottom, that because the monogram has great value, Consolidated is entitled to a trial on the question whether API was justified in taking two years to approve its product.

We disagree. ***HN21***[] Under the rule of reason, the plaintiff must establish two elements basic to an anticompetitive **[**29]** conspiracy: (1) that the defendant engaged in some form of joint action and (2) that this joint action amounted to an unreasonable restraint of trade. [29] Although Consolidated may be able to show that the delay in API approval of its product was unjustified, this does not, by itself, present a genuine dispute over either of these elements necessary to its *section 1* claim.

1. *Proof of a conspiracy*. Consolidated offers no evidence tending to show a conspiracy. API, the sole defendant on appeal, **[**30]** concedes that it is a trade association and is the only domestic standard-setting body for oil well equipment. A trade association by its nature involves collective action by competitors. Nonetheless, a trade association is not by its nature a **[*294]** "walking conspiracy", its every denial of some benefit amounting to an unreasonable restraint of trade. [30] **[**31]** In particular, it has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations. [31]

Calif.L.Rev. 835, 840-51 (1987), arguing that antitrust injury includes more than just the deadweight loss from reduced output and increased price. *See also* Kaplow, The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative, 95 Harv.L.Rev. 1817 (1982), discussing the broader social costs of market power; Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, *34 Hastings L.J. 67 (1982)*, discussing distributive concerns and ***antitrust law***.

[27] *See* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697-98, 50 L. Ed. 2d 701 (1977)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 344, 82 S. Ct. 1502, 1534, 8 L. Ed. 2d 510 (1962)*. *See also* *Costello Publishing Co. v. Rotelle, 216 U.S. App. D.C. 216, 670 F.2d 1035, 1042 n. 7 (D.C.Cir.1981)*; *Travelers Ins. Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80, 84 (3d Cir.)*, *cert. denied*, ***414 U.S. 1093, 94 S. Ct. 724, 38 L. Ed. 2d 550 (1973)***; Breyer, Antitrust, Deregulation, and the Newly-Liberated Marketplace, *75 Calif.L.Rev. 1005, 1018 (1987)*.

[28] *Northwest Wholesale Stationers*, 472 U.S. at 293, 105 S. Ct. at 2619.

[29] *Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1485 (D.C.Cir.1984)*. There are other elements to a *section 1* claim, such as damages, but we need not address them here. *See generally* *Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1059 (5th Cir.1985)*, *cert. denied*, ***474 U.S. 1102, 106 S. Ct. 884, 88 L. Ed. 2d 919 (1986)***; *Solomon v. Houston Corrugated Box Co., Inc., 526 F.2d 389, 395-96 (5th Cir.1976)*.

[30] *See* *Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563, 582-87, 45 S. Ct. 578, 584-86, 69 L. Ed. 1093 (1925)*. The mere exchange of information, or even consciously parallel action, is insufficient to establish a conspiracy under *section 1*. *Id. at 583-85, 45 S. Ct. at 585-86*; *Park, 764 F.2d at 1060*; *Kreuzer*, 735 F.2d at 1187. Moreover, the mere showing of relationships between alleged conspirators is insufficient to imply a conspiracy; *section 1* requires an actual agreement, explicit or implicit. *Kreuzer, 735 F.2d at 1488*. Although the agreement need not be proved directly, the plaintiff must show that there

HN22[] To survive summary judgment on the issue of conspiracy, the plaintiff must present evidence that tends to exclude both the possibility of conduct consistent with permissible competition and the possibility that the alleged conspirators acted independently. [32] API's delay in licensing its monogram to Consolidated, even if hindsight shows it to be unjustified, is not enough in itself to fall within the forbidden category. *HN23*[] It is axiomatic that trade standards must exclude some things as substandard [33] and it is unsurprising that standard-setting bodies sometimes err. A single such error does not amount to a conspiracy.

[32]** Consolidated offers no evidence that API's product approval program is merely a ploy to obscure a conspiracy against competing producers. On its face, Spec. 11B is, in the language of *Radiant Burners*, both "reasonable" and "objective". [34] It contains requirements for the strength and durability of the steel used and requirements for standard dimensions and threads on the coupler heads. These requirements reflect a sensible concern for the users of the equipment. Further, Spec. 11B explains these requirements with diagrams and engineering specifications that are neither vague, judgmental, nor imprecise. In short, nothing about Spec. 11B suggests that it is a sham.

2. *Unlawful purpose as proof of unreasonable restraint*. Even if Consolidated could show a conspiracy, it fails to offer any evidence of an unreasonable restraint of trade. **[**33]** *HN24*[] Under *section 1*, an unreasonable restraint of trade "may be established by proof of *either* an unlawful purpose or an anticompetitive effect". [35]

Other than the possible lack of justification for the delay, Consolidated offers scant evidence suggesting an unlawful purpose behind API actions. The evidence suggests that in processing Consolidated's application for the monogram, API followed its normal procedure for analysis of a new product. Although the user subcommittee's initial verdict on Consolidated's application does not make clear how the three-piece threaded rod could be made to comply with API standards, it did not foreclose the possibility. [36] There are no indications **[*295]** that approval was delayed in bad faith. [37] Indeed, that API certified the three-piece welded rod design at **[**34]** the same time it

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was a single plan, the essential nature and general scope of which was known to those responsible for its implementation. *H & B Equipment Co., Inc. v. International Harvester Co., 577 F.2d 239, 245 (5th Cir.1978)*.

[31] *Maple Flooring, 268 U.S. at 586-87, 45 S. Ct. at 592-93*.

[32] *Matsushita*, 475 U.S. at 588, 106 S. Ct. at 1357.

[33] ***Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154, 159 (D.Ore. 1966)***, *aff'd* *399 F.2d 155 (9th Cir.1968)*, *cert. denied*, ***393 U.S. 1024, 89 S. Ct. 636, 21 L. Ed. 2d 569 (1969)***. *See also* *Eliason Corp., 614 F.2d at 129-30*; *Hatley, 552 F.2d at 652-53*; *Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166, 169 (E.D.Tenn.1962)*, *aff'd*, ***313 F.2d 635 (6th Cir.)***, *cert. denied*, ***373 U.S. 949, 83 S. Ct. 1678, 10 L. Ed. 2d 704 (1963)***. Moreover, a conspiracy cannot be inferred from a *single* instance of denied certification. *H & B Equipment, 577 F.2d at 245*.

[34] *364 U.S. at 658, 81 S. Ct. at 366-67*. *See generally* Sullivan, Law of Antitrust at 248-49, discussing "sham" standards programs.

[35] *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 243, 100 S. Ct. 502, 509-10, 62 L. Ed. 2d 441 (1980)* (original emphasis).

[36] The record suggests that the user subcommittee neither approved nor disapproved Consolidated's sucker rod design. The minutes of the subcommittee meeting simply state a concern about the tensile strength characteristics of the rod Consolidated presented for approval and indicate that the subcommittee put on hold the broader matter of the three-piece threaded design. The depositions of the subcommittee members manifest uncertainty about what course the users thought best to take: some seem concerned about the new design's durability, others, not; none recall any consensus on the matter.

[37] After the user subcommittee decision, Spanhel, the API official in charge of processing monogram licenses, denied Consolidated's application. We see no merit in Consolidated's argument that Spanhel misconstrued the user subcommittee's decision. The user subcommittee's concerns and indecision about Consolidated's product certainly did *not* constitute a recommendation that Consolidated be granted the API monogram immediately.

passed over Consolidated's three-piece threaded design suggests the absence of any desire to suppress innovative products.

[35]** Moreover, API's user committee, which found that Consolidated's rod design did not meet Spec. 11B, is composed not of Consolidated's competitors but of *buyers* of sucker rods -- businesses who could have no motive for driving Consolidated from the market. [38] **[**36]** Although it is at least conceivable that the API staff in charge of licensing the monogram might have been influenced by competing manufacturers to drive Consolidated from the market, [39] Consolidated presents no evidence suggesting this possibility. The evidence in the written record suggests nothing more than a technical debate among engineers. [40]

3. *Anticompetitive effect as proof of unreasonable restraint*. Neither does Consolidated offer evidence that could show that API's actions had an anticompetitive effect. There is no dispute that the API monogram is very important to buyer **[**37]** acceptance of sucker rods. [41] But this alone is not enough to prove that denial of API certification amounts to a restraint of trade barred by *section 1*. [42]

[38]** **[*296]** As we have said, Consolidated offers no evidence that its customers were coerced by API or otherwise constrained to buy only monogrammed products. [43] **[**39]** Absent evidence of coercion, there is no

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[38] *See Moore v. Boating Industry Ass'n, 819 F.2d 693, 703 (7th Cir.1986)*, *cert. denied*, ***484 U.S. 854, 56 U.S.L.W. 3246, 108 S. Ct. 160, 98 L. Ed. 2d 115 (1987)***. *See also Matsushita*, 475 U.S. at 593-94, 106 S. Ct. at 1359-60, and *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 762-64, 104 S. Ct. 1464, 1470-71, 79 L. Ed. 2d 775 (1984)*, both concluding that courts should not permit factfinders to infer implausible conspiracies.

[39] In *ASME*, for example, direct collusion between trade association staff and the plaintiff's competitors led to the association's denial of product certification. *456 U.S. at 561-63, 102 S. Ct. at 1939-41*.

[40] It is significant that API did ultimately revise Spec. 11B to incorporate the three-piece threaded design and certified Consolidated's rod. API's decision to establish a subcommittee to study the three-piece, threaded design was consistent with earlier concerns about how the design performed in the field. Consolidated's contention that this process was excessively slow is unsupported by any evidence of how expeditiously API usually acts on such applications. Nor does Consolidated show clandestine meetings, bribes, or other evidence that the user subcommittee or Spanhel were unduly influenced by Consolidated's competitors.

[41] Consolidated's original complaint alleges that:

> because of widespread acceptance of and reliance on the API standards as a measure of quality and fitness for use, certification by the API through the licensing of its monogram is essential for manufacturers of sucker rods and related equipment to compete effectively in the marketplace.

In its response, API denies this "to the extent that during the 1980-82 . . . shortage of production equipment including sucker rods, due to the explosive growth in domestic petroleum exploration, . . . plaintiff and other producers . . . sold large quantities of rods which did not bear the API monogram".

[42] Whatever API's admission, reproduced in note 41, is taken to mean, Consolidated must present more concrete information on "the sucker rod market" to show the market effects of API's product approval program required by the rule of reason. *See Monsanto, 465 U.S. at 762, 104 S. Ct. at 1470*; *GTE Sylvania*, 433 U.S. at 51, 97 S. Ct. at 2558; *Northwest Power Products*, 576 F.2d at 90-91. Neither party offers this court much useful information about "the sucker rod market". For example, we do not know how many of the rods are sold each year, how many of these bear the API monogram, whether there are substitutes for sucker rods, or how concentrated the market is on the supply or demand side. *See generally* Landes and Posner, Market Power in Antitrust Cases, 94 Harv.L.Rev. 937 (1981), discussing considerations relevant to market power. *See also* Stigler, A Theory of Oligopoly, 72 J. Pol. Econ. 44 (1964), *reprinted in* Stigler, The Organization of Industry 39 (1968), discussing market factors necessary to successful anticompetitive collusion. *But see* Rowe, Market as Mirage, *75 Calif.L.Rev. 991 (1987)*, discussing the subjectivity inherent in determining the relevant market.

[43] We note again that in this respect, this case differs significantly from *ASME*, where the Court found that

reason to assume that buyers do not rely voluntarily on the API monogram. Product information is crucial to a competitive market. [44] Consumers seek it out, for example, by reading *Consumer Reports*, or relying upon the Good Housekeeping and Underwriters Laboratories seals of approval. This information saves buyers the trouble of investigating products themselves and the risk of trying untested products. API product approval may be important to user acceptance of new sucker rods just as a favorable review in *Consumer Reports* magazine, the "Good Housekeeping Seal of Approval", and the seal of the Underwriters Laboratories are important to buyer acceptance of new consumer goods. [45] Even if user reliance gives API significant influence over the market, that influence may enhance, not reduce, competition and consumer welfare. [46]

[40]** Although there is some danger that API could use its influence to reduce competition, this danger is small so long as users rely voluntarily upon the API monogram. [47] **[**41]** If users choose freely to rely on API approval, API has influence principally because it has done a good job evaluating products. If API fails to evaluate products accurately, consumers free to sample non-monogrammed goods will gradually discover the monogram's diminished usefulness and cease relying upon it. Thus, the greatest threat to competition is in the short run, before a significant number of buyers shop around. Even this threat is mitigated to the extent that producers of unmonogrammed equipment have alternative means of reassuring consumers of the quality of their products. They may, for example, offer warranties, commission product tests by someone other than API, provide free (or low-cost) samples of their product, and advertise. [48]

Here, however, Consolidated had no trouble gaining acceptance of its product even in the short run; it was able to sell substantial amounts of its rods as soon as **[*297]** production began. Consolidated's problem is better characterized as difficulty retaining its business when overall demand for rods slackened. We do not know if Consolidated lost a greater proportion of its sales during the decline of domestic oil production than other sucker

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> [ASME's] codes, while only advisory, have a powerful influence: federal regulations have incorporated many of them by reference, as have the laws of most States, the ordinances of major cities, and the laws of all the Provinces of Canada. . . . Obviously, if a manufacturer's product cannot satisfy the applicable AMSE code, it is at a great disadvantage in the marketplace.

456 U.S. at 559, 102 S. Ct. at 1938-39. Similarly, the violation in *Silver, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389*, was based upon the power granted by law to the New York Stock Exchange to act as a gatekeeper for the financial markets. *See Northwest Wholesale Stationers*, 472 U.S. at 293, 105 S. Ct. at 2619. Here, API's codes have no such legal force.

[44] *See* Stigler, The Economics of Information, 69 J. Pol. Econ. 213 (1961); Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q.J. Econ. 488 (1970).

[45] *See* Barzel, Measurement Cost and the Organization of Markets, 25 J.L. & Econ. 27, 27 (1982).

[46] Because product information reduces uncertainty, it both increases consumer demand for the product and encourages producers to improve their products. *See id.* at 29-31, explaining how competition can force sellers to provide accurate quality information to consumers. These are benefits that the antitrust laws should not discourage. *See Eliason, 614 F.2d at 129-30*; *Hatley, 552 F.2d at 653-54*; ***Structural Laminates, 261 F. Supp. at 159***; *Roofire Alarm, 202 F. Supp. at 169*. *Cf. BMI*, 441 U.S. at 18-23, 99 S. Ct. at 1561-64, and *NCAA*, 468 U.S. at 103, 104 S. Ct. at 2961, both discussing "output enhancement" as an indicator of the usefulness of a challenged practice.

[47] Economists also acknowledge that the problem is different when quality standards have the force of law. *See, e.g.*, Leland, Quacks, Lemons, and Licensing: A theory of Minimum Quality Standards, 87 J. Pol. Econ. 1328 (1979), arguing that if minimum quality standards can be enforced effectively, they will be too high if set by the industry itself.

[48] *See* Akerlof, 84 Q.J.Econ. at 499-500, discussing various means of assuring consumers of product quality; Barzel, 25 J.L. & Econ. at 32-42, doing the same. *See also* Grossman, The Informational Role of Warranties and Private Disclosure about Product Quality, 24 J.L. & Econ. 461 (1981), arguing that consumer expectations force makers of new products to provide reliable information about product quality.

rod producers. But even if it did, absent evidence of anticompetitive animus or buyer coercion by API, there is no reason to believe that it was due to anything other than customer dissatisfaction. [49]

[42]** C.

In sum, ***HN25***[] it is not enough to meet the plaintiff's burden under the rule of reason that the plaintiff was harmed because the defendant refused without justification to promote, approve, or buy the plaintiff's product. Neither anticompetitive animus nor the other elements of a *section 1* claim can be inferred solely from the incorrectness of a single business decision by a standard-setting trade association. The "reasonableness" of a restraint is judged by its general effect on the market, not by the circumstances of a particular application. An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a sound basis for antitrust liability. [50]

Were this not so, the **[**43]** federal courts would become boards of automatic review for trade association standards committees, product testing services, and countless other business transactions. Not only would this tax the abilities of the federal courts, but fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards. [51] Under such a regime, the antitrust laws would stifle, not protect, the competitive market.

IV.

Because Consolidated presents no genuine dispute of facts material to its *section 1* claim under either the rule of reason or the *per se* rule, the judgment of the district court is AFFIRMED.

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[49] We note that the closing sentences of Consolidated's own statement of the facts on appeal state:

> During the two year period that Consolidated waited to obtain a monogram from API, the oil boom collapsed and the market for sucker rods dried up. *Unable to sell even monogrammed sucker rods*, Consolidated went into receivership.

Appellant's Brief at 12 (emphasis added). This plainly suggests that the lack of the API monogram was far from the principal source of Consolidated's business problems.

[50] *See* *United States Gypsum, 438 U.S. at 441-42, 98 S. Ct. at 2875-76*. *See also* 2 P. Areeda & D. Turner, ***Antitrust Law*** 29 (1978); R. Bork, The Antitrust Paradox 78 (1978).

[51] *See* *Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 946-47 (2d Cir.)*, *cert. granted*, ***484 U.S. 814, 108 S. Ct. 65, 98 L. Ed. 2d 29 (1987)***.

Ferguson v. Greater Pocatello Chamber of Commerce, Inc.

United States Court of Appeals for the Ninth Circuit

March 3, 1987, Argued and Submitted ; June 6, 1988, Filed

No. 86-3722

Reporter

848 F.2d 976 *; 1988 U.S. App. LEXIS 7554 **; 1988-1 Trade Cas. (CCH) P68,070

Gerald R. & Helen Ferguson, Husband and Wife, both individually and d/b/a; Roveck Productions, Plaintiffs-Appellants, v. Greater Pocatello Chamber of Commerce, Inc.; The Idaho State Journal, Inc.; The Idaho State University, Defendants-Appellees

Prior History: **[**1]** Appeal from the United States District Court for the District of Idaho, D.C. No. CV-84-4112-MJC, Marion J. Callister, Chief District Judge, Presiding.

Core Terms

trade show, spring, lease, bid, district court, summary judgment, Sherman Act, interstate commerce, competitors, subject matter jurisdiction, court of appeals, trial court, conspiracy, commerce, parties, merits, monopolist, nexus, courts, majority opinion, lower court, antitrust, six-year, genuine, cases

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if the moving party presents evidence that shows that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Once the moving party has met this initial burden, the nonmoving party has the subsequent burden of presenting significant probative evidence tending to support its claim that material, triable issues of fact remain.

Antitrust & Trade Law > Sherman Act > Claims

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[] **Sherman Act, Claims**

The Sherman Act prohibits only restraints or monopolization of trade or commerce among the several States. The Sherman Act interstate commerce requirement is both a substantive element of a statutory violation and a prerequisite for federal court jurisdiction.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3[] **Defenses, Demurrers & Objections, Motions to Dismiss**

The United States Supreme Court has created a three-tier approach for assessing motions to dismiss asserting that defects in the substantive allegations of a complaint have jurisdictional consequences. Under this approach, a court may find the claims raised in the complaint (1) "immaterial" or "wholly insubstantial," (2) "not immaterial," or (3) substantial. Dismissal for lack of jurisdiction is proper only if the claim falls into the first category.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN4[] **Appeals, Reviewability of Lower Court Decisions**

The appellate court sometimes requires a trial in the face of uncertain subject matter jurisdiction. And where appropriate, the appellate court disposes of substantive issues on appeal in the absence of an unequivocal determination that lower court jurisdiction exists.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

It is relatively common for courts to render decisions on the merits in antitrust cases notwithstanding uncertain jurisdiction.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

In addition to the commerce element, plaintiffs must establish the following in order to prevail on their *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, claims : (1) a contract, combination, or conspiracy (2) between two or more separate persons or entities (3) which has an unreasonable restraint on trade activities.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

The United States Supreme Court has held that in order to establish a claim of a conspiracy in restraint of trade, a plaintiff must provide evidence that tends to exclude the possibility that the defendants were acting independently. The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

Injury to the antitrust plaintiff alone is not sufficient to prove injury to competition. In the absence of evidence of injury to competition, the plaintiff's claim would not survive a motion for summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

The "essential facilities" doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis. In order to prevail on such a claim, the plaintiff must establish (1) that the defendant is a monopolist in control of the essential facility, (2) that competitors of the monopolist are unable to duplicate the facility, (3) that the monopolist has refused to provide the competitors access to the facility, and (4) that it is feasible for the monopolist to do so.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Regulated Practices, Price Fixing & Restraints of Trade**

The grant of an exclusive lease to one lessee does not constitute an illegal contract in restraint of trade merely because it excludes other lessees from the facility. The plaintiffs must additionally establish a conspiracy to restrain competition between the defendants.

Counsel: Jeffrey E. Rolig, Hepworth, Nungester & Felton, Twin Falls, Idaho, for the Plaintiffs-Appellants.

Robert L. Berlin, Eberle, Berlin, Kading, Turnbow & Gillespie, Boise, Idaho, for the Defendants-Appellees Chamber and Journal.

J. Kelley Wiltbank, Idaho State University, Pocatello, Idaho, for the Defendant-Appellee ISU.

Judges: Joseph T. Sneed and Cynthia Holcomb Hall, Circuit Judges, and Albert Lee Stephens, Jr., * District Court Judge. Stephens, District Judge, dissenting.

Opinion by: HALL

Opinion

[*978] HALL, Circuit Judge:

Gerald and Helen Ferguson timely appeal from the district court's grant of summary judgment disposing of their claims against The Greater Pocatello Chamber of Commerce, Inc. (Chamber), The Idaho State Journal, Inc. (Journal), and The Idaho State University (ISU) for treble damages and injunctive relief under *sections 1* and *2* of the Sherman Act. *15 U.S.C. §§ 1* **[**2]** & *2 (1982)*, *647 F. Supp. 190 (1985)*. We affirm.

I.

ISU owns and operates the Minidome, a large, covered, multipurpose stadium located on the ISU campus. For over a decade, ISU has leased the Minidome to businesses that wished to hold general interest consumer trade shows during the spring of each year. In 1979, the Fergusons purchased Roveck Productions and produced their first trade show in the Minidome. The Fergusons also produced trade shows during the first week of April for the years 1980 through 1982. In those same years, Chamber and Journal jointly produced a similar trade show in the Minidome, approximately one month after the Fergusons' show.

In 1980, Chamber and Journal determined that the Fergusons' trade show was significantly more profitable than theirs because it was the first trade show of the season. They therefore asked ISU to grant them the first time slot in 1981. ISU refused, stating that the Fergusons already had a lease for that time slot. In 1981, Chamber and Journal requested the first trade show slot for 1982. They also asked ISU if they could alternate on a yearly basis with the Fergusons for the first trade show each spring. Again, ISU **[**3]** refused.

In 1982, ISU asked Chamber and Journal if they intended to produce a trade show in 1983. Chamber and Journal apparently did not inform ISU of their decision in a timely manner. ISU therefore gave the Fergusons the sole contract for the 1983 spring trade show season. However, in September of 1982, ISU met with Chamber and Journal to discuss ISU's policies regarding the spring trade shows. Chamber and Journal apparently expressed continued interest in producing a springtime trade show, *provided* they could at least alternate **[*979]** with the Fergusons for the first trade show time slot each spring. Sometime after this meeting, ISU changed its policy regarding the spring trade shows. ISU decided that it would lease the Minidome for only one trade show during the spring of the years 1984 through 1989. ISU further decided to allow all interested parties to bid for the exclusive right to produce the 1984-89 spring trade shows.

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* Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

In 1983, ISU prepared identical "bid packets" for the 1984 spring show. ISU sent these packets to the Fergusons, Chamber and Journal, and another interested promoter, Craig Ellis. The bid packet contained the following terms and conditions: (1) **[**4]** the minimum acceptable bid for each year was $ 6,000, (2) ISU would also consider the bidder's projected revenue share for the Minidome and its demonstrated ability to produce a trade show as well as its experience, management, and financial solvency, (3) the successful bidder would have the exclusive right to produce the springtime trade show for 1984, and (4) the lease would be renewable upon mutual consent for five additional one-year terms.

The Fergusons bid the minimum amount: $ 6,000. Craig Ellis bid $ 12,000. Chamber and Journal bid $ 20,101 and received the exclusive right to produce the 1984 spring trade show. When awarding the contract, ISU stated that it gave the contract to Chamber and Journal because they had demonstrated the ability to produce profitable trade shows in the past and because their bid was substantially higher than the two other bids. Chamber and Journal have produced the subsequent trade shows and have paid ISU the contract price of $ 20,101 each year.

The Fergusons have not attempted to conduct their trade show elsewhere during the spring of those years, nor have they asked ISU for a contract to produce a trade show at any other time of the year. The **[**5]** Fergusons maintain that the Minidome is the only suitable location for a trade show in the area. The Fergusons therefore contend that the defendants' conduct and the six-year lease agreement between ISU and Chamber and Journal violates *sections 1* and *2* of the Sherman Act.

II.

We review de novo a grant of summary judgment. *Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)*. ***HN1***[] Summary judgment is appropriate if the moving party presents evidence that shows that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Id.* Once the moving party has met this initial burden, the nonmoving party has the subsequent burden of presenting significant probative evidence tending to support its claim that material, triable issues of fact remain. *Id.*

> In the context of the case before us, the substantive law is the law of antitrust, and if the claim makes no economic sense, a speculative inference from the jury will not help it. In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim. *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986)*. **[**6]**

Richards, 810 F.2d at 902.

III.

HN2[] The Sherman Act prohibits only restraints or monopolization of "trade or commerce among the several States." The Sherman Act interstate commerce requirement is both a substantive element of a statutory violation and a prerequisite for federal court jurisdiction. The somewhat conclusory allegations of the Fergusons' complaint might not satisfy the commerce requirement, and in its present condition the record fails to indicate whether additional proceedings will reveal that jurisdiction is proper. [1] Here, we address our authority **[*980]** to pass on the merits of the complaint despite the potential jurisdictional defect.

[1] Assuming that the Fergusons' complaint improperly alleged interstate commerce, we should not dismiss this case "for lack of jurisdiction without giving the plaintiff an opportunity to be heard unless it is clear the deficiency cannot be overcome by amendment." *May Dept. Store v. Graphic Process Co., 637 F.2d 1211, 1216 (9th Cir. 1980)* (citation omitted); *see Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 602 (9th Cir. 1977)*. The record shows that the Fergusons welcomed exhibitors and products from out of state, which were discouraged by Chamber. Although sparse, these indications of interstate commerce are not so deficient and clearly incurable as to warrant sua sponte dismissal for lack of subject matter jurisdiction at this stage of the proceedings. We reach this conclusion in the context of the minimal showing

[7]** ***HN3***[] The Supreme Court in *Bell v. Hood, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773 (1946)*, created a three-tier approach for assessing motions to dismiss asserting that defects in the substantive allegations of a complaint have jurisdictional consequences. *See Yazoo County Indus. Dev. Corp. v. Suthoff, 454 U.S. 1157, 1160, 71 L. Ed. 2d 316, 102 S. Ct. 1032 (1982)* (Rehnquist, J., dissenting from denial of cert.). Under this approach, a court may find the claims raised in the complaint (1) "immaterial" or "wholly insubstantial," (2) "not immaterial," or (3) substantial. *See* *Bell, 327 U.S. at 681-83*. Dismissal for lack of jurisdiction is proper only if the claim falls into the first category. *Id.* The second (and perhaps even the third) tier of *Bell* contemplates judicial proceedings on the merits under circumstances in which the existence of federal subject matter jurisdiction is open to question. *See id.; Yazoo County, 454 U.S. at 1160* (Rehnquist, J., dissenting from denial of cert.).

The commerce element of the Fergusons' complaint exemplifies the type of allegation courts should address through the three-tier **[**8]** structure of *Bell*. "The interstate commerce requirement is tied to the merits as well as to the jurisdictional aspects of an antitrust case. . . ." *Thornhill Publishing Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 735 (9th Cir. 1979)*; *accord* *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 602 (9th Cir. 1977)*. As such, it is distinguishable from "lack of diversity or amount in controversy, or other more traditional jurisdictional defects," with respect to which the *Bell* approach might speak with less force. *See Yazoo County, 454 U.S. at 1161* n.* (Rehnquist, J., dissenting from denial of cert.).

We hold that the commerce allegations in the Fergusons' complaint are neither "immaterial" nor "wholly insubstantial" within the meaning of *Bell*. Accordingly, *Bell* authorizes us to conduct further proceedings and, if warranted, to dismiss for failure to state a claim even though we are unable at this point to determine conclusively that subject matter jurisdiction exists.

In following this procedure we act in conformity with our longstanding practice. ***HN4***[] We sometimes require a *trial* **[**9]** in the face of uncertain subject matter jurisdiction. *See, e.g.,* *Rosales v. United States, 824 F.2d 799, 803 (9th Cir. 1987)*. And where appropriate, we dispose of substantive issues on appeal in the absence of an unequivocal determination that lower court jurisdiction exists. Our recent opinion in *Kerr Center Parents Ass'n v. Charles, 842 F.2d 1052 (9th Cir. 1988)*, is an example of such a case.

Among the district court's rulings in *Kerr Center* was a decision that the *eleventh amendment* did not bar the plaintiffs' claims. *See id.*, slip op. at 2988. After the district court entered judgment, however, we handed down an opinion in a different case contrary to the district court's *eleventh amendment* ruling. *See id.*, slip op. at 2990. Consequently, in *Kerr Center* we stated that the district court's *eleventh amendment* determination (a jurisdictional question) "may be open for consideration," and remanded to the district court for a ruling on that issue. *See id.* Nevertheless, observing that they had "been fully briefed to us and considered by the district court," *id. at* ***[*981]*** *1059*, we decided additional, nonjurisdictional **[**10]** matters in *Kerr Center*, including the substantive merits of the claims and the relief ordered. *See id.*, slip op. at 2993-98.

To similar effect is *Kern Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730 (9th Cir. 1988)*. In *Kern Oil* the district court entered its findings of fact and conclusions of law several days after the entry of judgment and after the appellant had filed its notice of appeal. Appellant argued that the district court lacked jurisdiction to enter its findings of fact and conclusions of law because "filing a notice of appeal usually divests the district court of jurisdiction over the matters appealed." *Id. at 734*. Nevertheless, we refused to apply this judge-made doctrine because deciding that the district court lacked jurisdiction "would 'induce needless paper shuffling.'" *Id.* As in *Kern Oil*, a remand of the

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demanded of the Fergusons. The scope of the Sherman Act is coextensive with the breadth of Congress' power to legislate; the Fergusons meet their burden if they can satisfy the very generous "affecting interstate commerce" standard.

We also decline to remand to the district court for further proceedings on jurisdiction. Such a remand would be an exercise in futility because we hold that the Fergusons' complaint should be dismissed for failure to state a claim upon which relief can be granted. *See* *Kern Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730, 734 (9th Cir. 1988)*.

Fergusons' appeal to the district court would result in "needless paper shuffling"; we refuse to indulge in such a pointless exercise. [2]

[11]** IV.

HN6[] In addition to the commerce element, the Fergusons must establish the following in order to prevail on their *section 1* claims: (1) a contract, combination, or conspiracy (2) between two or more separate persons or entities (3) which has an unreasonable restraint on trade activities. *See T. W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 632-33 (9th Cir. 1987)*.

A.

In *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, ***HN7***[] the Supreme Court held that in order to establish a claim of a conspiracy in restraint of trade a plaintiff must provide "evidence that tends to exclude the possibility" that the defendants "were acting independently." According to *Monsanto*, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* (citation omitted); *cf. Richards, 810 F.2d at 902*.

In support of their motion for summary judgment, the defendants "offered understandable and legitimate **[**12]** business reasons for their conduct." *Souza v. Estate of Bishop, 821 F.2d 1332, 1335 (9th Cir. 1987)*. ISU presented evidence of facially valid institutional and business reasons for its decision to limit the spring trade shows to one per year. ISU apparently determined that it was preferable to limit the trade shows to one each spring both from a revenue generating standpoint and in the interest of maintaining a more diversified program at the Minidome. Chamber and Journal presented evidence that they took no part in ISU's decision-making process and that they were willing to accept a contract that merely ensured that they would have the first trade show every other year. The defendants therefore met their "burden by proffering a 'plausible and justifiable' alternative interpretation of [their] conduct that rebuts the plaintiff[s'] allegation of conspiracy." *T. W. Electrical Service, 809 F.2d at 632* (citations omitted); *see also Souza, 821 F.2d at 1335*; *Richards, 810 F.2d at 902*.

The Fergusons therefore were required to provide evidence of "specific facts" that undercut the defendants' responses. *T. W. Electrical Service, 809 F.2d at 631, 632*. **[**13]** This they failed to do: They have presented no probative evidence of any illegal concerted activity. In particular, the Fergusons did not offer any evidence that rebuts the defendants' evidence (1) that ISU unilaterally **[*982]** made a legitimate business decision to hold one spring trade show in the Minidome and to put out bids for the right to produce that show; (2) that ISU drafted bid specifications without input from any outside parties; (3) that the bidding procedures were fair and entirely anonymous; (4) that the renewable term of the lease was a standard clause in ISU contracts of this type, and (5) that there was no prior agreement to reject the Fergusons' bid.

Applying the rule of *Monsanto*, we therefore hold that, based on the record before the district court, the defendants' actions were completely independent and cannot amount to a conspiracy in restraint of trade.

B.

Recognizing the lack of sufficient probative evidence of a conspiracy between the defendants, the Fergusons contend that the lease between ISU and Chamber and Journal is itself a "contract" which violates *section 1* even if

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[2] ***HN5***[] It is relatively common for courts to render decisions on the merits in antitrust cases notwithstanding uncertain jurisdiction. *See generally, e.g., McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 245-47, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)*; *Ronwin v. State Bar, 686 F.2d 692, 698-99 (9th Cir. 1981)* (explicitly stating that the plaintiff had failed to establish jurisdiction but addressing other grounds), *rev'd*, *466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed. 2d 590* (decision on merits); *Timberlane, 549 F.2d at 602-03* (defense attacking commerce allegations is not jurisdictional, but on merits).

there was no "conspiracy" to eliminate competition. The district court **[**14]** did not specifically rule on this issue; however, it did hold that the Fergusons failed to establish a genuine question of material fact on whether the six-year exclusive lease between ISU and Chamber and Journal constituted an *unreasonable* restraint of trade. In order to survive a summary judgment motion on their "contract" claim, the Fergusons had to establish genuine questions of material fact on whether the lease between ISU and Chamber and Journal (1) constituted an unreasonable restraint of trade, and (2) caused injury to competition in the relevant market. *See, e.g.,* *Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1296* (9th Cir.), *cert. denied*, *464 U.S. 916, 78 L. Ed. 2d 259, 104 S. Ct. 279, 104 S. Ct. 280 (1983)*. [3] We hold that they have failed to establish the presence of either question.

[15]** The Fergusons -- and all other interested producers of spring trade shows in the area -- had an equal opportunity to bid on the lease for the 1984-1989 spring trade shows. Such an opportunity for free competition shall presumably arise again at the end of the six-year lease. ISU's decision to limit the spring season to one show therefore did not foreclose competition in the market in which the Fergusons compete. The Fergusons have presented no evidence that ISU would not have given the lease to them -- or any other qualified competitor of Chamber and Journal -- if they had been the highest bidder. As it turned out, the Fergusons' bid was only half as large as that of the second highest bidder, Craig Ellis, and less than one-third of the prevailing bid of Chamber and Journal. The Fergusons therefore provided insufficient evidence of the lease's unreasonableness.

Secondly, while the exclusive nature of the lease does preclude the Fergusons from producing a spring trade show in the Minidome, ***HN8***[] "'injury to the antitrust plaintiff alone is not sufficient to prove injury to competition.' In the absence of evidence of injury to competition, [the Fergusons'] claim . . . would not survive **[**16]** a motion for summary judgment." *T. W. Electrical Service, 809 F.2d at 635* (citations omitted). The Fergusons have failed to present such evidence. Nor have they presented any evidence that ISU's lease harms consumers of the trade shows. *See* 1 P. Areeda & D. Turner, ***Antitrust Law*** paras. 103-13 (1980).

ISU presented evidence that it did not destroy competition for the spring trade show; it merely forced the competitors to bid against one another for the one show ISU was willing to house. Such competition, we presume, will take place at six-year intervals. We find nothing inherently unreasonable about such a restraint on the competition for the spring trade shows.

V.

The Fergusons primary contention on appeal is that ISU could not limit **[*983]** use of its "essential facility" (the Minidome) to one springtime show per year without running afoul of the Sherman Act. ***HN9***[] The "essential facilities" doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis. *Fishman v. Estate of Wirtz, 807 F.2d 520, 539-41 (7th Cir. 1986)*; **[**17]** *see* *Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9, 12 (1st Cir. 1987)*. In order to prevail on such a claim, the plaintiffs must establish (1) that the defendant is a monopolist in control of the essential facility, (2) that competitors of the monopolist are unable to duplicate the facility, (3) that the monopolist has refused to provide the competitors access to the facility, and (4) that it is feasible for the monopolist to do so. *MCI Communications v. AT&T, 708 F.2d 1081, 1132-33* (7th Cir.), *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*. *See generally* *Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992-93 (D.C. Cir. 1977)*, *cert. denied*, *436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978)*; *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519-21 (10th Cir. 1984)*, *aff'd on other grounds*, *472 U.S. 585, 600-02* & n.27, *86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*.

As applied to the facts of this case, the Fergusons claim is without merit. First, the Fergusons appear to be arguing that, **[**18]** in leasing the Minidome to Chamber and Journal for an exclusive six-year term, ISU has refused to

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[3] We agree with the Fergusons that the "rule of reason" analysis applies to the facts of this case and that they need not show specific intent under *section 1*. *See* *Cascade Cabinet Co. v. Western Cabinet & Millwork Inc., 710 F.2d 1366, 1370-73 (9th Cir. 1983)*; *United States v. Champion Internat'l Corp., 557 F.2d 1270, 1274 (9th Cir. 1977)*, *cert. denied*, ***434 U.S. 938, 98 S. Ct. 428, 54 L. Ed. 2d 298 (1977)***.

deal with them. But even assuming that ISU is a monopolist and that its Minidome is an essential facility, the Fergusons are not in competition with ISU. Thus, ISU has not refused to deal with a competitor.

> [The Fergusons'] view of the essential facilities doctrine . . . considerably overstates its scope. The doctrine aims to prevent a firm with monopoly power from extending that market power. . . It is difficult to see how denying a facility to one who, like [the Fergusons], is not an actual or potential competitor [of ISU] could enhance or reinforce [ISU's] power. See P. Areeda & H. Hovenkamp, ***Antitrust Law*** paras. 736.2d, 736.2e (Supp. 1986). If this is so in the case of a private monopolist, it is still more certain when the monopolist is a public agency [like ISU], for the agency has neither the motive nor the need to solidify its monopoly position.

Interface Group, 816 F.2d at 12; *cf.* *Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 822* (9th Cir.), *cert. denied*, *456 U.S. 1011, 102 S. Ct. 2308, 73 L. Ed. 2d 1308 (1982)* **[**19]** ("the sharing of an essential facility by two or more competitors *accompanied by the exclusion of all other competitors* may amount to a violation of the Sherman Act" (emphasis added)). Moreover, ISU has not refused to deal with anyone. It has merely refused to house more than one trade show per spring, and it has decided that that show will be given to the producer who makes the best bid. The Fergusons simply failed to outbid *their* competitors.

Second, the Fergusons presented insufficient evidence that (1) the Minidome, which is a state-owned facility, is the type of "essential facility" protected by the Sherman Act, (2) that the Fergusons were not able to produce reasonably comparable trade shows *in the Minidome* at another time of the year, and (3) that a competitor *of ISU* could not construct another, equally adequate, facility in the area. *Cf.* *Fishman, 807 F.2d at 539-41*; *id. at 563-75* (Easterbrook, J., dissenting in part); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 376-80 (7th Cir. 1986)*, *cert. denied*, *480 U.S. 934, 107 S. Ct. 1574, 94 L. Ed. 2d 765 (1987)*. See **[**20]** *generally* *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*; *United States v. Terminal R.R. Assoc., 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912)*.

Third, ***HN10***[] the grant of an exclusive lease to one lessee does not constitute a illegal contract in restraint of trade merely because it excludes other lessees from the facility. The plaintiffs must additionally establish a conspiracy to restrain competition between the defendants. *See* *United States v. Yellow Cab Co., 332 U.S. 218, 229,* ***[*984]*** *91 L. Ed. 2010, 67 S. Ct. 1560 (1947)* (exclusive lease contracts do not violate Sherman Act unless a conspiracy to obtain them is shown) (citing *Donovan v. Pennsylvania Co., 199 U.S. 279, 50 L. Ed. 192, 26 S. Ct. 91 (1905)*); *Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251, 252-53 (6th Cir. 1970)* (same) (citing cases), *cert. denied*, *400 U.S. 1000, 27 L. Ed. 2d 451, 91 S. Ct. 460 (1971)*; *Parmelee Transp. Co. v. Keeshin, 292 F.2d 794, 803-04* (7th Cir.) (exclusive contract does not violate Sherman Act if it is obtained **[**21]** by competitive bids), *cert. denied*, *368 U.S. 944, 7 L. Ed. 2d 340, 82 S. Ct. 376 (1961)*. As detailed above, *see* Part III. B., the Fergusons failed to establish a genuine question of fact regarding any conspiracy between the defendants.

Finally, even if the Fergusons could establish that they could not conduct their trade show in any facility other than ISU's Minidome, ISU was free to lease a portion of that location's available time to one entity and exclude others without violating the Sherman Act. *Export Liquor, 426 F.2d at 252* (lessor who had control over a unique location essential to the conduct of a certain kind of business could nevertheless lease part of facility to single lessee); *see* *Interface Group, 816 F.2d at 11-12*; *cf.* *Sakamoto v. Duty Free Shoppers, 613 F. Supp. 381, 388-91 (D. Guam 1983)* (exclusive concession, open and fair bidding, reasonable as a matter of law), *aff'd on other grounds*, *764 F.2d 1285 (9th Cir. 1985)*, *cert. denied*, *475 U.S. 1081, 89 L. Ed. 2d 715, 106 S. Ct. 1457 (1986)*. [4]

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[4] *See also* *BusTop Shelters, Inc. v. Convenience & Safety Corp., 521 F. Supp. 989, 997 (S.D.N.Y. 1981)* ("Ironically, one of the principal acts [the plaintiff] complains of was the opening of the bidding on the franchise and the receipt of competing bids. It is hard to see how that conduct can be called anticompetitive."); *Murdock v. City of Jacksonville, Florida, 361 F. Supp. 1083, 1088-89 (M.D. Fla. 1973)* (exclusive lease, open bidding, no Sherman Act violation).

[22]** VI.

The Fergusons also failed to establish a cause of action under *section 2* of the Sherman Act. The district court applied the appropriate tests for the Fergusons' monopolization and attempt to monopolize claims. *See Drinkwine v. Federated Publications, Inc., 780 F.2d 735, 738-41 (9th Cir. 1985)*, *cert. denied*, *475 U.S. 1087, 89 L. Ed. 2d 727, 106 S. Ct. 1471 (1986)*. The Fergusons do not seriously question the district court's holdings on appeal. We therefore affirm the district court's grant of summary judgment on the Fergusons' *section 2* claims.

VII.

All of the issues involved were properly "taken from the jury" because "the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict." *California Steel and Tube v. Kaiser Steel Corp., 650 F.2d 1001, 1004 (9th Cir. 1981)* (citation omitted). On the record before the district court, none of the defendants could be held to have violated either *section 1* or *section 2* of the Sherman Act. The Fergusons' claims make no economic sense, and speculative inferences from the jury can not help them. "In such an **[**23]** instance, the record on summary judgment must contain further persuasive evidence if it is to support the[ir] claim[s]." *Richards, 810 F.2d at 902* (citing *Matsushita Electric, 106 S. Ct. at 1356-57*). Since the record does not contain such evidence, summary judgment was appropriate. [5] The **[*985]** district court's grant of summary judgment therefore is AFFIRMED.

[24]**

Dissent by: STEPHENS

Dissent

STEPHENS, District Judge, dissenting:

I dissent from the majority opinion on two grounds: because neither the district court nor the Court of Appeals have subject matter jurisdiction in this case. And, second, because the district court improvidently granted summary judgment despite an unresolved material issue of fact as to whether a nexus with interstate commerce existed.

These reasons are the result of the lack of any consideration by the district court of the need for a nexus with interstate commerce as the foundation for jurisdiction and as an element of the claim itself.

This means that the commerce element of a Sherman Act claim as identified in the first paragraph of part III of the majority opinion is lacking. It is similarly dispositive of the issue of subject matter jurisdiction which briefly stated requires that the dispute be in or affect interstate commerce since the right of Congress to legislate in this field depends upon the *commerce clause of the Constitution*. This case came from the district court in the form of a summary judgment. The facts were presented to the trial court by affidavit. On this record which is before us, there

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[5] Because we hold that plaintiffs have failed to present any material issue of fact on the merits of their antitrust claims against all defendants, we do not address whether any of the defendants were entitled to summary judgment under the *eleventh amendment to the United States Constitution*, the *Noerr-Pennington* doctrine, or *Parker* "state action" immunity. *See Edelman v. Jordan, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)* (in private suits against state or its agencies, *eleventh amendment* bars recovery from state treasury); *Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* (concerted efforts to influence government do not violate antitrust laws); *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* (same); *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* (anticompetitive actions taken pursuant to program administered in detail by state are immune from antitrust laws).

is no **[**25]** indication that the alleged violations of the Sherman Act by the defendants were in or had any affect on interstate commerce.

The district judge issued a Memorandum Decision which pointed out that the suit was for damages and injunctive relief under *sections 1* and *2* of the Sherman Act. It contained a statement of undisputed facts in substantial detail and recognized that summary judgment may be granted only where the movant is entitled to judgment as a matter of law and where there is no genuine dispute as to any material fact. The decision acknowledges that summary judgment must be used sparingly in antitrust cases where motive and interest play a key role, citing *Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 680 (9th Cir. 1985)*. Without one word concerning the need for a showing of a nexus with interstate commerce, summary judgment issued.

Every court of limited jurisdiction has one first and inescapable duty. This duty is without exception. The court must satisfy itself that it has jurisdiction over the cause before it. The court can not escape this duty on the grounds that the parties did not raise the issue, that the parties stipulated that the court has jurisdiction, **[**26]** or that the defendant failed to deny the plaintiff's averments that the court has jurisdiction. The jurisdictional issue must be adjudicated. At this point in the judicial process we have little concern about the averments of the complaint. The averments of the complaint are of no assistance in a summary judgment proceeding which requires affidavits of witnesses, affidavits which are only available to the court of appeals if they are in the record on appeal.

The Supreme Court recently addressed this subject in *Bender v. Williamsport School Dist., 475 U.S. 534, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)* as follows:

> Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See, *e.g., Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 173-180, 2 L. Ed. 60 (1803)*. For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer, 293 U.S. 237, 244, 79 L. Ed. 338, 55 S. Ct. 162 (1934)*. **[**27]** See *Juidice v. Vail, 430 U.S. 327, 331-332, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977)* (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick, 298 U.S. 435, 440, **[*986]** 80 L. Ed. 1263, 56 S. Ct. 829 (1936)* (footnotes omitted).

Id. at 541 (footnote omitted).

Although the focus in *Bender* is on standing, the basic issue is jurisdiction. The Court continues:

> Mr. Youngman's status as an aggrieved parent, however, like any other kindred fact showing the existence of a justiciable "case" or "controversy" under Article III, must affirmatively appear in the record. As the first Justice Harlan observed, "the presumption . . . is that the court below was without jurisdiction" unless "the contrary appears affirmatively from the record." *King Bridge Co. v. Otoe County, 120 U.S. 225, 226, 30 L. Ed. 623, 7 S. Ct. 552 (1887)*. **[**28]** Accord, *Thomas v. Board of Trustees, 195 U.S. 207, 210, 49 L. Ed. 160, 25 S. Ct. 24 (1904)*; *Minnesota v. Northern Securities Co., 194 U.S. 48, 62-63, 48 L. Ed. 870, 24 S. Ct. 598 (1904)*. That lack of standing was not noticed by either party matters not, for as we said in *Mansfield C. & L.M. R. Co. v. Swan, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884)*:
>
>> "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and

answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Accord, **[**29]** *Chicago, B. & Q. R. Co. v. Willard, 220 U.S. 413, 419, 55 L. Ed. 521, 31 S. Ct. 460 (1911)*; *Kentucky v. Powers, 201 U.S. 1, 35-36, 50 L. Ed. 633, 26 S. Ct. 387 (1906)*; *Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453, 44 L. Ed. 842, 20 S. Ct. 690 (1900)*. See *Thomson v. Gaskill, 315 U.S. 442, 446, 86 L. Ed. 951, 62 S. Ct. 673 (1942)*. Moreover, because it is not "sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings," *Grace v. American Central Ins. Co., 109 U.S. 278, 284, 3 S. Ct. 207, 27 L. Ed. 932 (1883)*; *Thomas v. Board of Trustees, 195 U.S., at 210*, it follows that the necessary factual predicate may not be gleaned from the briefs and arguments themselves. This "first principle of federal jurisdiction" applies "whether the case is at the trial stage or the appellate stage." P. Bator, P. Mishkin, D. Shapiro, & H Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 835-836 (2d ed. 1973).

Id. at 546-47 (footnote omitted).

The *Bender* opinion concludes on page 549:

> We therefore hold **[**30]** that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction.

The Ninth Circuit is up to date as of March 22, 1988 when it decided *Latch v. United States, 842 F.2d 1031 (9th Cir. 1988)*, holding:

> The issue of subject matter jurisdiction presents a legal question, which we review de novo. *Peter Starr Production Co. v. Twin Continental Films, Inc., 783 F.2d 1440, 1442 (9th Cir. 1986)*. Furthermore, "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender v. Williamsport Area School District, 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326* ***[*987]*** *(1986)* (quoting *Mitchell v. Maurer, 293 U.S. 237, 244, 79 L. Ed. 338, 55 S. Ct. 162 (1934))*.
>
> As a general rule, if a district court has wrongfully exercised subject **[**31]** matter jurisdiction over a dispute, the appellate court must vacate the district court's decision, including any award of attorney's fees.

Latch v. United States, at 1032-33.

In some cases where the issue of jurisdiction is in doubt, the facts needed to establish subject matter jurisdiction are intertwined with the substantive facts in such a way that the most direct and economical way to proceed may be to proceed with trial until the jurisdictional facts can be sorted out. In doing so, the trial court is viewing the issue prospectively, looking forward as the facts unfold, not knowing the answer to the jurisdictional issue until the facts accumulate in the record. Even in the process of considering summary judgment, the trial court has the power to call for affidavits germane to jurisdiction. On the other hand, the court of appeals has an entirely different role. The record on appeal is presented for review of what has already transpired. It is complete as filed. The court of appeals has no means to add testimony by affidavit or otherwise. If it appears from this record that the trial court did not have subject matter jurisdiction, the court of appeals must correct **[**32]** the trial court's error of proceeding to judgment.

The court of appeals has no reason whatsoever for deferring this jurisdictional issue and no way to escape deciding it. No case cited by the majority as precedent holds to the contrary. [1] The trial court has options, but the court of appeals has none save to vacate the trial court decision and return the case to the trial court. In this case the trial court did not consider the relationship between the plaintiff's claims and interstate commerce, but granted summary **[*988]** judgment, disposing of the case by noting an absence of substantive merit. The majority on the appellate court follows the same course, bypassing the question of jurisdiction and the commerce element of the claim to examine the "conspiracy and contract claims." In the majority opinion, the relationship between the plaintiff's claim and interstate commerce is never resolved.

[33]** I oppose this decision because it is against the law as articulated in 1986 by the Supreme Court in *Bender* and by the Ninth Circuit in *Latch* in March of this year. As a Ninth Circuit precedent it will invite argument that Sherman Act civil cases do not require proof of a nexus with interstate commerce. We have in the majority opinion a ruling which ignores the need to establish a nexus between the claimed wrong and interstate commerce in a Sherman Act case both as an element of the claimed wrong and as a key to establishing or rejecting subject matter jurisdiction.

The facts necessary to establish jurisdiction and the commerce element necessary to state a claim under the Sherman Act for monetary damages or for injunctive relief are the same. From the point of view of stating and proving a claim, the commerce element is on the same level as any other element of a claim. Failure to establish a nexus with interstate commerce is sufficient to defeat the claim. On the otherhand, from the point of view of jurisdiction of Sherman Act claims, when the facts presented in the trial court do not establish a nexus with

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[1] None of the cases that the majority opinion cites decided that a panel of the court of appeals may proceed to a decision on the merits after noting lack of subject matter jurisdiction. *Bender* has overruled all previously decided cases to the extent of any conflict existed, and all subsequently decided court of appeals cases in conflict with *Bender* are against the law as articulated by the Supreme Court and are not valid precedents. Cases containing appellate observations as to what are proper district court procedures to resolve jurisdictional problems in complicated cases do not constitute precedent as to what is appropriate procedure in the court of appeals.

Two Ninth Circuit cases that the majority cites, *Kern Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730, 734 (9th Cir. 1988)*, and *Kerr Center Parents Ass'n v. Charles, 842 F.2d 1052 (9th Cir. 1988)*, have been decided since *Bender*. To the extent they are viewed as applicable to this situation, they can not undercut the authoritative value of *Bender*. This has been recognized within the Ninth Circuit since both cases were decided before this circuit decided *Latch*. Moreover, neither *Kerr Center* nor *Kern Oil* involved the issue of subject matter jurisdiction. *Kerr Center* involved state immunity under the *eleventh amendment*, a defense which is not a jurisdictional bar. *Kern Oil* involved the district court's loss of jurisdiction upon the filing of the notice of appeal. The court noted that the doctrine was a judicial creation. *840 F.2d at 734*. As I have heretofore noted, the need to establish a nexus with interstate commerce is a constitutional necessity.

It is also important to note that the majority's reliance on *McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)*, is misplaced. In *McLain* the Court articulated a very specific standard for determining the sufficiency of the nexus to interstate commerce in Sherman Act cases at different stages of the proceedings:

> Jurisdiction may not be invoked under [the Sherman Act] unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.

444 U.S. at 242.

Moreover, under *McLain*, the Fergusons had the burden of "demonstrat[ing] a substantial effect on interstate commerce." *Id. See also* *Turf Paradise Inc. v. Arizona Downs, 670 F.2d 813, 818-19 (9th Cir. 1982)*. In *McLain* the Court allowed the plaintiffs-petitioners to proceed to trial only because they had met the strict requirements of the *McLain* test.

interstate commerce, the federal courts are without authority to **[**34]** decide the merits, and the Court of Appeals has jurisdiction on appeal, not on the merits but merely for the purposes of correcting the error of the trial court in entertaining the suit.

In this case the trial court failed its special obligation to satisfy itself of its own jurisdiction and the same may be said of the Court of Appeals. In my opinion the district court produced a void judgment which is approved by the majority opinion. [2] The appeal should be dismissed for want of jurisdiction and the district court judgment should be vacated.

[35]**

End of Document

[2] Dismissing the appeal for lack of subject matter jurisdiction would not be "an exercise in futility." The Fergusons would then lose only the right to rely on the Sherman Act. The Idaho courts remain open to them to pursue their claims under the anti-trust statutes of Idaho. For this reason the majority decision on the substantive issues is highly prejudicial to the Fergusons who might present a very different case in the state courts if allowed to proceed to trial.

C & W Constr. Co. v. Brotherhood of Carpenters & Joiners, Local 745

United States District Court for the District of Hawaii

June 7, 1988, Decided ; June 7, 1988, Filed

Civil No. 83-0710

Reporter

687 F. Supp. 1453 *; 1988 U.S. Dist. LEXIS 5400 **; 128 L.R.R.M. 2677; 113 Lab. Cas. (CCH) P11,763; 1988-2 Trade Cas. (CCH) P68,172

C & W Construction Company, a sole proprietorship, Cher Mungovan, and Walter Mungovan, Plaintiffs, v. Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO; Walter H. Kupau; William O. Nishibayashi; Ralph Torres; and Steven Suyat, Defendants

Core Terms

plaintiffs', suppliers, perjury, defendants', antitrust, exemption, enterprise, predicate act, allegations, picketing, preempted, conspiracy, induced, statute of limitations, federal labor, employees, violence, coerced, restraint of trade, Hobbs Act, antitrust claim, anti trust law, extortion, parties, mail, tortious interference, motion to dismiss, summary judgment motion, individual defendant, reasonable inference

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

Under the standards for a motion under *Fed. R. Civ. P. 12(b)(6)*, the trial court presumes all factual allegations of the nonmoving party to be true, and it draws all reasonable inferences from them in his favor.

Antitrust & Trade Law > Clayton Act > Scope

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

The four year statute of limitations applicable to Clayton Act civil enforcement actions, *15 U.S.C.S. § 15(b)*, applies to RICO civil enforcement actions.

Governments > Legislation > Statute of Limitations > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Arbitration Coverage Limits

HN3[] **Legislation, Statute of Limitations**

The Labor Management Relations Act does not provide a limitations period.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Arbitration Coverage Limits

Governments > Legislation > Statute of Limitations > General Overview

HN4[] **Statute of Limitations, Time Limitations**

Haw. Rev. Stat. § 657-11 is the most closely analogous Hawaii statute of limitations for a Labor Management Relations Act claim, which consists of an earlier one-year period or its amended two-year period.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Arbitration Coverage Limits

HN5[] **Statute of Limitations, Time Limitations**

See *Haw. Rev. Stat. § 657-7*.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Statutory Construction

Governments > Legislation > Statute of Limitations > General Overview

Labor & Employment Law > ... > Civil Actions > Time Limitations > General Overview

HN6[] **Statute of Limitations, Statutory Construction**

Hawaii has not recognized the equitable tolling doctrine, but it has construed statutes of limitations very strictly.

Governments > Legislation > Statute of Limitations > Tolling

Governments > Legislation > Statute of Limitations > General Overview

HN7[] **Statute of Limitations, Tolling**

Mere commencement of an action in one state or federal jurisdiction generally does not toll the statute of limitations against an action for the same cause and between the same parties in another state or federal jurisdiction.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN8[] **Exemptions & Immunities, Labor**

Before the court considers a defendants' labor exemption arguments, i.e., which would make them immune from antitrust attack, it must determine if the plaintiffs have pled a viable federal antitrust violation.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To bring the unreasonable restraint of trade within *15 U.S.C.S. § 1*; i.e., the trial court must determine if the misconduct was, in fact, conspiratorial, and not unilateral by a union.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

To plead a viable violation of *15 U.S.C.S. § 1*, the plaintiff must allege two factors: (1) plurality of actors and (2) concerted action.

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**

To establish concerted action, a plaintiff must plead facts (and, of course, subsequently prove facts) that would allow the reasonable inference that plaintiff's suppliers had a conscious commitment to a common scheme to effect an unreasonable restraint of trade, as willing or unwilling participants.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Antitrust & Trade Law, Sherman Act

Acquiescence by an unwilling party does not prevent it from being a co-conspirator for purposes of 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Antitrust & Trade Law, Sherman Act

Even if an inference of coercion was reasonable, this alone would not support a finding of conspiracy. The plaintiff also would have to allege facts allowing a jury to infer reasonably that the coerced and complying party who refused to deal knew that the purpose of the coercion was to pursue an end that violated antitrust laws.

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN15[] Antitrust & Trade Law, Clayton Act

The Clayton Act, 15 U.S.C.S. § 17, 29 U.S.C.S. § 52, and the Norris LaGuardia Act, 29 U.S.C.S. §§ 104, 105, 113, declare that labor unions are not in themselves combinations or conspiracies in trade, and exempt many of their activities from the operation of antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN16[] Exemptions & Immunities, Labor

Unilateral union activity having a labor objective is exempt so long as a union acts in its own self-interest and does not combine with non-labor groups. That is, the union activities must be unilateral, not conspiratorial.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN17[] Exemptions & Immunities, Labor

The exemption statutes are inapplicable to concerted action or agreements between unions and non-labor parties affecting matters outside of the parties collective bargaining relationship.

Antitrust & Trade Law > Clayton Act > General Overview

HN18[] Antitrust & Trade Law, Clayton Act

Section 6 of the Clayton Act merely states that the labor organizations may lawfully carry out their legitimate objectives.

Antitrust & Trade Law > Clayton Act > General Overview

HN19[ ] Antitrust & Trade Law, Clayton Act

Section 20 of the Clayton Act exempts peaceful labor activity including communications aimed at persuading individuals to cease working for or patronizing particular employers.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Contracts Law > Contract Conditions & Provisions > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN20[ ] Labor, Nonstatutory Exemptions

The nonstatutory exemption may be invoked in cases involving valid collective bargaining agreements between unions and employers on wages or working conditions.

Admiralty & Maritime Law > Maritime Personal Injuries > General Overview

Business & Corporate Law > ... > Establishment > Elements > Application of Agency Law Principles

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Liability of Agents

Torts > Vicarious Liability > Agency Relationships > General Overview

HN21[ ] Admiralty & Maritime Law, Maritime Personal Injuries

An agent is individually liable for torts committed by him pursuant to his agency. An antitrust action is, or is in the nature of, a tort action. This agency principle applies in the antitrust context.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN22[ ] Private Actions, Racketeer Influenced & Corrupt Organizations

A violation of *18 U.S.C.S. § 1962(c)* requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN23[] Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1961(3) defines a "person" as any individual or entity capable of holding a legal or beneficial interest in property.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > General Overview

HN24[] Private Actions, Racketeer Influenced & Corrupt Organizations

The more reasoned rule would allow perjury to be a predicate act under 18 U.S.C.S. § 1961(1), through 18 U.S.C.S. § 1503, where a plaintiffs alleges that the perjury was part of the pattern of a racketeering activity.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN25[] Wire Fraud, Elements

Mail and wire fraud are the two predicate acts most frequently used to establish "racketeering activity" under RICO. The statutes proscribe use of mails, 18 U.S.C.S. § 1341, and use of interstate electronic media, 18 U.S.C.S. § 1343, to further schemes to defraud. Both statutes are broad and simple, requiring three elements: (1) devising a scheme to defraud, (2) using the mails or wires to further the fraud, (3) with the specific intent to deceive or defraud.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN26[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) requires that in all averments of fraud, the circumstances constituting fraud shall be stated with particularity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN27[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A RICO suit alleging fraud as a pattern of racketeering activity must therefore comply with *Fed. R. Civ. P. 9(b)*.

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN28[] **Hobbs Act, Elements**

The Hobbs Act prohibits interference with commerce by extortion, defined as the obtaining the property of another, with his consent, induced by wrongful use of actual or threatened force, violence or fear. *18 U.S.C.S. § 1951(b)(2)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN29[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The pattern of racketeering activity requires at least two acts of racketeering activity. *18 U.S.C.S. § 1961(5)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN30[] **Collective Bargaining & Labor Relations, Federal Preemption**

Federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the National Labor Relations Act.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN31[] **Collective Bargaining & Labor Relations, Federal Preemption**

See *Haw. Rev. Stat. § 480-10*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN32[] **Collective Bargaining & Labor Relations, Federal Preemption**

When conduct at issue is arguably prohibited or protected by the National Labor Relations Act, otherwise applicable state law is generally preempted. The United States Supreme Court has recognized exemptions to this rule, identifying specifically the exception to preemption for violence.

Torts > Procedural Matters > Preemption > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN33[] **Procedural Matters, Preemption**

The state law claims for intentional interference with contractual relations are not preempted.

Contracts Law > Breach > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Contracts Law > Third Parties > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN34[] **Contracts Law, Breach**

The essential elements of a tortious interference with contract claim under Hawaii law are: (1) contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional inducement of the third party to breach the contract, (4) absence of justification on the defendant's part, (5) the subsequent breach of the contract by the third party, and (6) damages to the plaintiff.

Counsel: [1]** Charles Hurd, Honolulu, Hawaii, for Plaintiff.

Attorneys for Defendants: Pyun, Okimoto & Thomason, Matthew Pyun, Jr., Honolulu, Hawaii, Attorney for Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO, and Walter H. Kupau.

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Judges: Martin Pence, Senior United States District Judge.

Opinion by: PENCE

Opinion

[*1456] ORDER CONCERNING PARTIES' DISPOSITIVE MOTIONS

MARTIN PENCE, SENIOR UNITED STATES DISTRICT JUDGE.

On May 16, 1988, the court heard the defendants' motion to dismiss and the plaintiffs' motion for summary judgment. Matt Pyun appeared for the defendants, and Charles Hurd appeared for the plaintiffs. The court has considered the materials on file and arguments of counsel. For reasons discussed below, the court dismisses all of the plaintiffs' claims except the federal antitrust and the state interference with economic advantage/inducement to breach contract claims; it dismisses the plaintiffs' civil RICO claim with leave to amend the complaint; **[**2]** and it denies the plaintiffs' motion for summary judgment.

I. BACKGROUND.

This suit involves the defendant union's alleged attempt to force the plaintiff construction company to recognize or bargain with the defendant union as the representative of the plaintiff's employees.

A. Parties.

Plaintiff C & W Construction Co. ("C & W") was a sole proprietorship of Walter Mungovan with its principal place of business located at Kihei, Maui. C & W was a **[*1457]** general contractor in the residential building and construction industry. Mungovan's wife, Cher, was an employee of C & W.

Defendant Brotherhood of Carpenters and Joiners of America, Local 745 AFL-CIO ("union") is an unincorporated association and labor organization within the meaning of the National Labor Relations Act (NLRA), *29 U.S.C. § 152(5)*. It has its principal office in Honolulu. It represents employees in an industry affecting commerce within the meaning of section 303 of the Labor Management Relations Act (LMRA), *29 U.S.C. § 187*.

Defendants Walter Kupau, William Nishibayashi, Ralph Torres, and Steven Suyat are agents of the union.

B. Facts.

The following "facts" represent only the plaintiffs' allegations. The court **[**3]** will examine the defendants' motion to dismiss first. ***HN1***[] Under the standards for a motion under *Fed. R. Civ. P. 12(b)(6)*, the court presumes all factual allegations of the nonmoving party to be true, and it draws all reasonable inferences from them in his favor. Moreover, the court has, by Order of December 5, 1985, ruled that the defendants cannot submit evidence on many or most of the issues implicated in their motion, as discussed below. *108 F.R.D. 389*.

1. *Plaintiffs' Allegations*.

In 1979, Cher and Walter Mungovan founded C & W. C & W specialized in building custom homes on Maui. Before the defendants began their alleged misconduct in 1980, C & W had a gross income exceeding $ 500,000.

In December 1980, defendant Nishibayashi informed Walter Mungovan that the union would target C & W for an organizational campaign to obtain a union contract. Nishibayashi threatened Mungovan with violence if C & W did not sign a union contract. He also threatened to picket C & W job sites if it did not sign the contract. Defendant Torres and other union agents made other and similar demands to C & W for the union contract. Mungovan refused, stating C & W was already paying union scale wages. He explained he **[**4]** would negotiate a union contract when C & W had developed to a larger scale.

On January 6, 1981, at the direction of union president Kupau, Nishibayashi, Suyat, Torres, and other union agents, union members began picketing three C & W job sites. C & W requested that for the first week of picketing its employees not work. C & W then asked its employees if they wanted to work. The employees agreed to work and crossed the picket lines.

On February 9, 1981, the National Labor Relations Board ("NLRB") held a representation election at C & W's request. C & W's employees voted unanimously to reject the union as their representative. The NLRB regional director issued complaints alleging that the union's pickets at C & W's job sites were illegal. The NLRB brought suit in this court to enjoin the pickets.

On February 27, 1981, Kupau told Mungovan that a contract must be executed to end the picketing at C & W's job sites. Mungovan refused. The union continued to picket C & W's job sites. Altogether the union picketed C & W job sites for more than three months. The picketing ended April 16, 1981.

C & W had entered into contracts with various materials suppliers; e.g., concrete block, cement, crushed **[**5]** rock, glass, and lumber. Union agents wrongfully influenced these suppliers not to deliver materials to C & W's job sites. Union agents also influenced, contacted, or coerced others obligated to perform contractual services for C & W not to cross the union's picket line. Those parties then failed to deliver materials or otherwise do business with C & W.

In the NLRB proceedings, Nishibayashi and Torres lied in affidavits submitted to this court. They were later convicted of perjury for such statements.

The union's misconduct caused C & W to suffer injuries including: delay in completing jobs, higher costs, termination of a job in progress, lost opportunities for other jobs, damage to business reputation, loss of employees, higher interest rates on financing, and lost profits. Both Cher and Walter **[*1458]** Mungovan suffered emotional distress and damage to their reputations.

On July 15, 1983, the plaintiffs filed suit against the defendants. The complaint was amended on September 1, 1988. The complaint contained eleven claims for relief:

(1) Federal antitrust (*15 U.S.C. § 1*)

(2) Unfair labor practice (*29 U.S.C. § 187(b)*)

(3) Civil RICO (*18 U.S.C. § 1964*)

(4) State antitrust: conspiracy **[**6]** in restraint of trade (*Haw. Rev. Stat. § 480-4*)

(5) State antitrust: unfair trade practice (*Haw. Rev. Stat. § 480-2*)

(6) State antitrust: refusal to deal (*Haw. Rev. Stat. § 480-6*)
(7) Interference with Economic Advantage and/or Inducement to Breach of Contract
(8) Negligent Infliction of Emotional Distress (Cher Mungovan)
(9) Negligent Infliction of Emotional Distress (Walter Mungovan)
(10) Intentional Infliction of Emotional Distress (Cher Mungovan)
(11) Intentional Infliction of Emotional Distress (Walter Mungovan)

II. DISCUSSION.

The court will first examine the defendants' motion to dismiss all eleven of the plaintiffs' claims and begins with the defendants' statute of limitations arguments. It will then proceed to the defendants' arguments against the plaintiffs' remaining claims. Thereafter, it will address the plaintiffs' motion for partial summary judgment on four of its claims.

A. Defendants' Motion to Dismiss.

1. *Defendants' Motion in a Nutshell*.

The defendants move the court to dismiss the plaintiffs' complaint as follows: First, the antitrust claim is barred by the statutory or nonstatutory labor exemption to the Sherman Act *§ 1*. Second, the **[**7]** state antitrust claims (based on Haw. Rev. Stat. chapter 480) are preempted by federal labor law. Third, the RICO claim is barred either by the statute of limitations, preempted by federal labor law, or void for failure to establish a violation of the RICO Act. Fourth, the state tort claims are barred by the statute of limitations or preempted by federal labor law. Fifth, that leaves only the plaintiffs' claim under the LMRA, *29 U.S.C. section 187(b)*, for a violation of *29 U.S.C. 158(b)(4)*, which defendants argue is barred by the statute of limitations.

2. *Standards for Motion to Dismiss*.

While the defendants have brought their motion under both Fed. *Rule 12(b)(6)* and *56*, the standards for *Rule 12(b)(6)* apply. By Pretrial Order No. 4, January 27, 1988, this court ordered the parties to file "dispositive motions not requiring further discovery and supporting pleadings." By its order of December 5, 1985, this court sanctioned the defendants for stonewalling during discovery. The Order affects all or most of the factual issues implicated in their motion to dismiss. In essence (but without limitation), the union is precluded from offering any evidence, direct or inferential, regarding **[**8]** plaintiffs' allegations of secondary boycott; conspiracy to restrain trade; unfair trade practice and refusal to deal; scheme to defraud or extort; inducement to breach of contract and interference with prospective economic advantage; and infliction of emotional distress. Also, the defendants Nishibayashi, Torres, and Suyat will not be permitted to testify except as to matters outside those included in the Order.

At this time, the court is not considering matters external to the pleading, and will consider the motions under *Rule 12(b)(6)*.

This court is familiar with the standards for a motion to dismiss under that Rule. [1]

[*1459] 3. *Defendants' Statute of Limitations Arguments*.

a. Plaintiffs' RICO Action.

The plaintiffs' third claim for relief is brought under *18 U.S.C. § 1964* for violations of *18 U.S.C.* ***[**9]*** *§ 1962 (c)*, *(d)* (i.e., RICO). The plaintiffs base the predicate acts of *18 U.S.C. § 1962*, i.e., certain racketeering activities in violations of *18 U.S.C. §§ 1341*, *1342* and *18 U.S.C. § 1503*, on alleged events that occurred more than two years before they filed suit in this court. Picketing by Local 745 ended on April 16, 1981; this suit was filed on July 15, 1983.

The Supreme Court has held that ***HN2***[] the four year statute of limitations applicable to Clayton Act civil enforcement actions, *15 U.S.C. § 15(b)*, applies to RICO civil enforcement actions. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 107 S. Ct. 2759, 2767, 97 L. Ed. 2d 121 (1987)*. The plaintiffs brought their RICO claim within four years of the defendants' last alleged predicate act. Under *Agency Holding*, their claim was timely brought. Accordingly, the court disregards the defendants' statute of limitations argument on the plaintiffs' RICO claim.

The court will consider the remaining issues of the defendants' motion to dismiss the RICO claim after it addresses the defendants' statute of limitations arguments concerning other claims.

b. Plaintiffs' LMRA Claim.

Plaintiffs' second claim for relief is brought under *29 U.S.C. §* ***[**10]*** *187(b)*, for the defendants' alleged "unfair labor practices" as specified in *29 U.S.C. § 158(b)(4)*. Again, the alleged activities supporting this claim occurred more than two years before the plaintiffs filed suit in this court.

HN3[] The Labor Management Relations Act (LMRA) does not provide a limitations period. The court must therefore look to Hawaii law for the most analogous state statute. *Agency Holding, 107 S. Ct. at 2762* (citations omitted). The defendants argue the most analogous state statute is *Hawaii Rev. Stat. § 657-11*, citing *Int'l Ass'n of Machinists v. Aloha Airlines, 790 F.2d 727 (9th Cir. 1986)*, *cert. denied*, *479 U.S. 931, 107 S. Ct. 400, 93 L. Ed. 2d 354 (1986)*. In *Aloha*, the Ninth Circuit ruled that for actions filed after *Aloha* (February 6, 1986), the Ninth Circuit would apply the rule of *DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 76 L. Ed. 2d 476, 103 S. Ct. 2281*

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[1] *See* *Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987)* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957))*; *Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980)*; *California ex rel. Younger v. Mead, 618 F.2d 618, 620 (9th Cir. 1980)*; *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*, and *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*.

(1983), to Railway Labor Act (RLA) actions. In *DelCostello*, the Supreme Court applied the six month limitations rule of NLRA § 10(b), 29 U.S.C. § 160(b), to fill a statute of limitations "gap" in the LMRA.

The *Aloha* panel declined to apply the *DelCostello* holding retroactively. It determined that for actions filed before *Aloha*, **[**11]** the most closely analogous state statute covering the RLA would apply. For Hawaii, the most closely analogous statute was § 657-11, which at that time "established a one year limitation period for a 'liability . . . impose(d)' by federal statute." Duncan v. Southwest Airlines, 838 F.2d 1504, 1508 (9th Cir. 1987).

The plaintiffs argue that *Aloha* is distinguishable from this action because it involved the RLA and not the LMRA. The plaintiffs argue that the RLA action in *Aloha* was more akin to an action under the NLRA for breach of contract, 29 U.S.C. § 185. This argument fails. Section 657-11 by its terms covers "liability. . . impose[d]" by federal statute, which would apply equally to an RLA action or an LMRA action. *See also* Duncan, 838 F.2d at 1507 (dicta).

Moreover, in *DelCostello*, the Supreme Court intended the six month limitation period of NLRA § 10(b), 29 U.S.C. § 160(b), to apply to unfair labor practices. 462 U.S. at 170. The Supreme Court cited specifically LMRA § 8(b)(1) and (2), which is 29 U.S.C. § 158(b)(1) & (2). This case involves unfair labor practices claim brought under LMRA § 8(b)(4), which is 29 U.S.C. § 158(b)(4). The *DelCostello* holding **[**12]** would apply equally to LMRA § 8(b)(4) as to § 8(b)(1) & (2), both in terms of its six month rule and the reasoning behind the rule.

[*1460] ***HN4***[] Section 657-11 is the most closely analogous Hawaii statute of limitations for the LMRA claim, which, under its earlier one-year period or its amended two-year period, bars this claim. This conclusion comports with the procedure outlined in *Agency Holding*, and the *Aloha*'s ruling regarding the retroactive application of *DelCostello*. The LMRA claim is DISMISSED as time barred under § 657-11.

c. Plaintiffs' State Tort Claims.

HN5[] Haw. Rev. Stat. § 657-7 provides in pertinent part: "Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action occurred, and not after . . . ." The emotional distress claims fall within the coverage of this statute. The plaintiffs filed their complaint more than two years after the final alleged tortious acts of the defendants. These claims are DISMISSED as time barred under Haw. Rev. Stat. § 657-7.

d. The Plaintiffs' Equitable Tolling Defense.

The plaintiffs argue the court should apply the doctrine of equitable tolling to **[**13]** the statutes of limitations. To understand their argument requires some additional facts. The alleged misconduct ended April 16, 1981. Kupau and Torres filed a state suit against Walter Mungovan on May 6, 1981, to which Mungovan filed a counterclaim. That court granted Mungovan's motion for summary judgment on Kupau's and Torres' complaint. On January 6, 1983, the Mungovans filed a separate state court action against the union, Torres, and Nishibayashi. This action was later consolidated with the earlier action originated by Kupau and Torres.

The plaintiffs move the court to have their federal action relate back to the filing of Kupau's and Torres' original complaint of May, 1981, based on the doctrine of equitable tolling.

Hawaii has never adopted the doctrine of equitable tolling. Contrary to plaintiffs' argument, this court never adopted the equitable tolling doctrine in Charley's Tour & Transp., Inc. v. InterIsland Resorts, Ltd. 618 F. Supp. 84 (D. Haw. 1985) (King, J.).

The plaintiffs also cite Oahu Gas Service, Inc. v. Pacific Resources, 473 F. Supp. 1296 (D. Haw. 1979) (King, J.). *Oahu Gas* is likewise unpersuasive. In *Oahu Gas*, the complaint and counterclaims **[**14]** were both filed in this (federal) court. In the instant case, the defendants Kupau and Torres first filed in state court, where the plaintiffs counterclaimed and then filed a separate state action. Only after these state actions had begun and after the limitations period had run on their unfair labor practices claim and pendent emotional distress claims did the plaintiffs file suit in federal court.

The plaintiffs, nevertheless, argue that their federal action relates back not just to their filing of the state complaint in January 1983, but to May 1981 when Kupau and Torres filed their original action against Walter Mungovan (dba C & W). ***HN6***[] Hawaii has not recognized the equitable tolling doctrine, but it also has construed statutes of limitations very strictly. *See* *Yoshizaki v. Hilo Hosp., 50 Haw. 150, 154, 433 P.2d 220 (1967)* ("The basic policy underlying statutes of limitation is to require prompt assertion of claims."). The Hawaii Supreme Court has characterized statutes of limitations as inflexible. *See* *Adair v. Hustace, 64 Haw. 314, 321, 640 P.2d 294 (1982)*.

Addison v. California, 21 Cal. 3d 313, 146 Cal. Rptr. 224, 578 P.2d 941 (1978), is inapposite. The *Addison* court stated that the purpose **[**15]** of the doctrine was "to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." *578 P.2d at 942*. *Addison* outlined the very specific steps a plaintiff had to take under the California Tort Claims Act. *Id*. This matter, conversely, does not involve any technical rules or detailed regulatory scheme. (*Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1050 (9th Cir. 1987)*, *cert. denied*, *484 U.S. 986, 108 S. Ct. 504, 98 L. Ed. 2d 502 (1987)*, *Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981))*.

[*1461] ***HN7***[] Mere commencement of an action in one state or federal jurisdiction generally does not toll the statute of limitations against an action for the same cause and between the same parties in another state or federal jurisdiction. *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 240 (9th Cir. 1987)* ("Prior judicial actions, however, 'do not toll the statute of limitations, no matter how close their relationship to the one at bar.'") (*quoting* *Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315, 319 (1st Cir. 1978))* (citing *UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 16 L. Ed. 2d 192, 86 S. Ct. 1107 (1965))*, *cited with approval in,* *Mir* ***[**16]*** *v. Little Company of Mary Hosp., 844 F.2d 646 (9th Cir. 1988)*; *see generally* 54 C.J.S. *Limitations of Actions* § 129, at 172 (1987).

Accordingly, the applicable statutes of limitations BAR the plaintiffs' labor claim and pendent state emotional distress claims.

This leaves the following claims:

(1) Federal antitrust (*15 U.S.C. section 1*)

(2) Civil RICO (*18 U.S.C. section 1964*)

(3) State antitrust: conspiracy in restraint of trade (*Haw. Rev. Stat. § 480-4*)

(4) State antitrust: unfair trade practice (*Haw. Rev. Stat. § 480-2*)

(5) State antitrust: refusal to deal (*Haw. Rev. Stat. § 480-6*)

(6) Interference with Economic Advantage and/or Inducement to Breach of Contract

The defendants' arguments to dismiss these remaining six claims are discussed in the order set out directly above.

4. *Plaintiffs' Antitrust Claim (Sherman* *§ 1*).

The plaintiffs allege that the union through its agents made C & W the object of a secondary boycott. A secondary boycott is a combination with the purpose and effect to coerce customers, patrons, or suppliers, through fear of loss or bodily harm, to withhold or withdraw their business relations from an **[**17]** employer who is under attack. *Altemose Constr. Co. v. Atlantic, Cape May, Etc., 493 F. Supp. 1181, 1187 n.6 (D.N.J. 1980)* (citing *Black's Law Dictionary* 1212 (5th ed. 1979)). Specifically, the plaintiffs allege the union induced C & W's materials suppliers and others, obligated under contract to C & W to perform services, not to deal with C & W (henceforth collectively as "suppliers"). They allege this concerted refusal to do business with C & W violated *§ 1* of the Sherman Act, *15 U.S.C. § 1*. *See* First Amended Complaint paras. 32, 33 (set out below).

The defendants counter that the plaintiffs cannot recover under Sherman *§ 1*, because of the statutory and nonstatutory labor exemptions to ***antitrust law***.

a. Have plaintiffs pled a viable antitrust violation?

HN8[] Before the court considers the defendants' labor exemption arguments, i.e., which would make them immune from antitrust attack, it must determine if the plaintiffs have pled a viable federal antitrust violation. ***HN9***[] *Section 1* of the Sherman Act provides in pertinent part: "Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared **[**18]** illegal." *15 U.S.C. § 1*.

The plaintiffs allege in their complaint:

> The defendants in this action together with others, have entered into an anti-competitive scheme, combination, conspiracy and contract in restraint of trade to prevent C & W from competing in the construction industry and to restrain competition in the construction industry in Maui, Hawaii, and *to induce suppliers of goods to C & W and others not to deal with C & W such as to constitute a concerted refusal to do business with C & W in violation of § 1 of the Sherman Act* (*15 U.S.C. § 1*).

First Amended Complaint, at 13 (emphasis added).

More specifically, the plaintiffs allege agents of the union "wrongfully influenced the materials suppliers for C & W to not deliver various supplies to C & W's jobsites [sic]." *Id*. at 10, para. 23. The suppliers then **[*1462]** allegedly failed or refused to deliver the various materials, including concrete, crushed rock, lumber, and glass, or otherwise to deal with C & W. *Id*. para. 24. The union also allegedly influenced, contacted, or coerced others who were obligated to perform contractual services for C & W not to cross the union's picket lines against C & W. *Id*. para. 25.

[19]** The case of *Altemose Constr. Co. v. Atlantic, Cape May, Etc., 493 F. Supp. 1181 (D. N.J. 1980)* is on point. In *Altemose*, that court dismissed the defendants unions' motion to dismiss a complaint that alleged the defendants had threatened or coerced certain *suppliers* of the plaintiff (a nonunion general contractor who was attempting to build a raquetball club) to cease doing business with the plaintiff and entered into a similar agreement with other suppliers. The court held that these allegations sufficed to overcome the assertion that the defendants unions' activities were within the labor exemptions to the antitrust laws.

The *Altemose* court stated specifically regarding the alleged unlawful combination and conspiracy between the unions and the plaintiff's supplier:

> The allegations in the complaint reveal that Altemose's construction work has been impeded by activities engaged in on behalf of the union defendants. Significant impediments include vandalism at the job site in question, violence and threats of violence directed to Altemose employees and those who would provide services to Altemose, and threats to suppliers of Altemose if the suppliers dealt with the plaintiff **[**20]** [Altemose]. In consequence of the alleged unlawful acts, the plaintiff has sustained substantial difficulty and additional costs in obtaining concrete required to complete the raquetball club as well as other damages already discussed. These allegations facially disclose an unreasonable restraint of trade under *Section 1* of the Sherman Act.

493 F. Supp. at 1190.

Before the court follows *Altemose* and conclude the plaintiffs have pled a viable antitrust violation by the union under Sherman *§ 1*, however, it must determine whether the allegations support the required concerted action between the union and C & W's suppliers ***HN10***[] to bring the unreasonable restraint of trade within Sherman *§ 1*; i.e., that the misconduct was, in fact, conspiratorial, and not unilateral by the union. [2]

HN11[] To plead a viable violation of Sherman *§ 1*, the plaintiff must allege two factors: (1) plurality of actors and (2) concerted action. *See* 2 Von Kalinowski, ***Antitrust Law*** *and Trade Regulation* § 6.01[1] (1981). Here, C & W

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[2] The *Altemose* court did not address this issue.

has alleged a plurality of actors: the union and its agents on the one hand, and C & W's suppliers on the other, and has met **[**21]** the plurality of actors requirement. As to the concerted action requirement, ***HN12***[] to establish concerted action C & W must plead facts (and, of course, subsequently prove facts) that would allow the reasonable inference that C & W's suppliers had a conscious commitment to a common scheme to effect an unreasonable restraint of trade, as willing or *unwilling* participants.

The plaintiffs allege that the union contacted, influenced, or coerced the C & W suppliers to refuse to deal with C & W; they also allege the suppliers thereafter refused to deal with C & W.

It is no excuse that the suppliers were threatened and thus were apparently unwilling participants. In a different type of Sherman *§ 1* case, the Ninth Circuit held that ***HN13***[] acquiescence by an unwilling party does not prevent it from being a co-conspirator for purposes of Sherman *§ 1*. *See* *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1266* (9th Cir.), *cert. dismissed*, *464 U.S. 956, 78 L. Ed. 2d 331, 104 S. Ct. 385 (1983)*. *See also* *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*: "acquiescence by a retailer makes it the second party to the conspiracy." *709 F.2d at 1266* (other citations omitted), and *also* *United States v. Parke Davis & Co.,* ***[*1463]*** *362 U.S. 29,* ***[**22]*** *46-47, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*.

While *Filco, Albrecht*, and *Parke Davis* are obviously factually distinct from the instant case, they nonetheless hold that acquiescence by a party to restrain trade may make it privy to a combination or conspiracy in violation of the Sherman Act.

Here, the plaintiffs have alleged facts from which a trier of fact could reasonably infer that the union contacted, influenced, or coerced C & W's suppliers to refuse to deal with C & W, and that the suppliers then did refuse to deal with C & W. The plaintiffs allege they were injured by this refusal to deal, which supports the reasonable inference of an unreasonable restraint on trade.

The analysis, however, requires one additional step. In *Harlem River Constr. Co-op v. Associated Grocers of Harlem, Inc., 408 F. Supp. 1251 (S.D.N.Y. 1976)*, a cooperative grocery store sued various suppliers and a food store association, among others. One of the claims was that the defendant food store association had coerced suppliers not to deal with the plaintiff to force it to accept a contract from the defendant association. One of the salient issues was whether the plaintiff had alleged facts to permit a jury to find that **[**23]** suppliers were involved in conspiracy to violate antitrust laws. The court stated that ***HN14***[] even if an inference of coercion was reasonable, this alone would not support a finding of conspiracy. The plaintiff also would have to allege facts allowing a jury to infer reasonably that the coerced and complying party who refused to deal knew that the purpose of the coercion was to pursue an end that violated antitrust laws. *408 F. Supp. at 1280*.

In this case, then, the court must also determine whether the plaintiffs' allegations support the reasonable inference that the C & W suppliers knew the purpose of the union's coercion was to restrain trade unreasonably, i.e., to "bust" C & W. The plaintiffs allege that the union threatened the C & W suppliers. While they present no direct evidence that the allegedly coerced suppliers knew the purpose of the union's threats was to break C & W, circumstantial evidence supports the reasonable inference that the suppliers must have known that if C & W could not get supplies and necessary services, it would be forced out of business or to capitulate to the union's demands.

This conclusion is consistent with the Ninth Circuit's approach for alleging a conspiracy **[**24]** in antitrust cases. *See* *Zoslaw v, MCA Distributing Corp., 693 F.2d 870 at 889 (9th Cir. 1982)* (determination of conspiracy in Sherman *§ 1* claim is inappropriate for summary judgment where there is a material issue of fact regarding the unlawful intent or anticompetitive effect based on a refusal to deal) (citations omitted). *See also* *Richards v. Nielsen Freight Lines, 810 F.2d 898 at 902 (9th Cir. 1987)*.

The court disregards the defendants' attempt to show it had a plausible and justifiable reason for its conduct consistent with proper business practice. Such evidence falls within the preclusive ambit of the court's December 5, 1985 Order on discovery sanctions.

The plaintiffs have alleged a viable violation of Sherman *§ 1*. The court now addresses the defendants' labor exemption arguments.

b. The Labor Exemptions.

Organized labor enjoys two types of exemptions from federal antitrust laws: statutory and nonstatutory. *Granddad Bread, Inc. v. Continental Baking Co., 612 F.2d 1105, 1109 (9th Cir. 1979)*, *cert. denied*, *449 U.S. 1076, 66 L. Ed. 2d 798, 101 S. Ct. 854 (1981)*.

i. *The Statutory Exemption*.

The sources of the statutory exemption include ***HN15***[] the Clayton Act, *15 U.S.C. § 17 (1982)*, *29 U.S.C. § 52*, and the Norris LaGuardia Act, *29 U.S.C. §§ 104*, *105*, *113*. These statutes declare that **[**25]** labor unions are not in themselves combinations or conspiracies in trade, and exempt many of their activities from the operation of antitrust laws.

Interpreting these interrelated statutes, The Court has concluded that ***HN16***[] unilateral union activity having a labor objective is **[*1464]** exempt "so long as a union acts in its own self-interest and does not combine with non-labor groups." *United States v. Hutcheson, 312 U.S. 219, 232, 85 L. Ed. 788, 61 S. Ct. 463 (1941)*. That is, the union activities must be unilateral, not conspiratorial.

The Court has interpreted ***HN17***[] the exemption statutes as inapplicable to concerted action or agreements between unions and non-labor parties affecting matters outside of the parties collective bargaining relationship. *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626 85 S. Ct. 1585 (1965)*. The Court, in *Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 at 621-22, 85 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)* held, "[The statutes] do not exempt concerted action or agreements between unions and nonlabor parties." *Id. at 622*.

The statutory exemption, then, does not apply here. At least for purposes of determining this motion, it inferentially appears that there was a "concerted action or agreement" between the union and **[**26]** nonlabor parties, i.e., C & W's suppliers.

Moreover, ***HN18***[] section 6 of the Clayton Act, *15 U.S.C. § 17*, merely states that the labor organizations may *lawfully* carry out their legitimate objectives. *Altemose, 493 F. Supp. at 1191*. ***HN19***[] Section 20 of the Clayton Act, *29 U.S.C. § 52*, exempts *peaceful* labor activity including communications aimed at persuading individuals to cease working for or patronizing particular employers. *Altemose, 493 F. Supp. at 1191*. In this case, the plaintiffs allege threats of violence made to prevent C & W from obtaining necessary building materials or services. Although it may have been in the defendants' interest to ensure that the terms under which its employees worked met area standards for its workers, this union did not pursue this objective via peaceful authorized methods. The plaintiffs also allege facts supporting the reasonable inference that the union's primary purpose in picketing C & W was to coerce the execution of a collective bargaining agreement, not to protest substandard wages. *Cf. Altemose, 493 F. Supp. at 1191* (applying these statutes on very similar facts, held that there was no exemption given the union defendants' violent **[**27]** tactics). Accordingly, the statutory labor exemption does not apply.

ii. *Nonstatutory Exemption*.

The Ninth Circuit has recently described the scope of the nonstatutory exemption:

> The Supreme Court has recognized a limited nonstatutory exemption which "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." [*Connell, 421 U.S. at 621-22*] Thus some union-employer agreements are exempt from antitrust sanctions as part of the "proper accommodation between the congressional policy favoring free competition in business markets." *Id*. ***HN20***[] The nonstatutory exemption, then, may be invoked in cases involving valid collective bargaining agreements between unions and employers on wages or working conditions.

Sun-Land Nurseries, Inc. v. Southern California Dist. Council of Laborers, Etc., 793 F.2d 1110, 1115 (9th Cir. 1986) (en banc), *cert. denied*, *479 U.S. 1090, 107 S. Ct. 1299, 94 L. Ed. 2d 155 (1987)*.

The plaintiffs allege the union coerced or influenced the suppliers to refuse to deal with C & W, which action was outside any collective bargaining agreement. *Cf.* *Altemose, 493 F. Supp. at 1191*. (There was no valid collective **[**28]** bargaining agreement; C & W's employees rejected representation by the union unanimously in an NLRB authorized election.)

The plaintiffs have alleged facts sufficient to overcome the defendants' assertions that they are immune from antitrust liability under the nonstatutory exemption.

c. Liability of the individual defendants as the union's Agents.

The individual defendants Kupau, Nishibayashi, Torres, and Suyat claim that they cannot be held liable under the antitrust laws because they were acting entirely **[*1465]** within the scope of their authority as agents. This argument ignores basic precepts of agency law.

The defendants rely principally on the case of *Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313 (9th Cir. 1986)*. In *Pink Supply*, that panel stated that Sherman *§ 1* prohibits only restraints of trade effected by contract, combination, or conspiracy between separate entities. *Id. at 1315-16* (quoting *Fisher v. City of Berkeley, [475 U.S. 260,] 106 S. Ct. 1045, 1049, 89 L. Ed. 2d 206 (1986)*; *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984))*. Defendants argue they are not separate entities, because of their agency status with the union.

The defendants cite no authority **[**29]** to support their theory that agency status insulates them from antitrust liability. This would contravene well established law that ***HN21***[] an agent is individually liable for torts committed by him pursuant to his agency. *Cf*. *Restatement (Second) of Agency § 343* (1957). An antitrust action is, or is in the nature of, a tort action. This agency principle applies in the antitrust context. *E.g., Murphy Tugboat Co. v. Shipowners & Merchants Tugboat Co., Ltd., 467 F. Supp. 841, 851-52 (N.D. Cal. 1979)*, *affirmed*, *658 F.2d 1256* (9th Cir.), *cert. denied*, *455 U.S. 1018, 72 L. Ed. 2d 135, 102 S. Ct. 1713 (1982)*; *Deaktor v. Fox Grocery Co., 332 F. Supp. 536, 542 (W.D. Pa. 1971)*, *affirmed*, *475 F.2d 1112* (3rd Cir.), *cert. denied*, *414 U.S. 867, 38 L. Ed. 2d 86, 94 S. Ct. 65 (1973)*.

In *Murphy Tugboat*, that court stated that an individual through whom a corporation acts and who shapes corporate intentions can be held liable for antitrust violations. *467 F. Supp. at 852*. The corporate executive must participate in the tort, and his personal liability would be limited to participation in inherently wrongful conduct. *Id. at 852-53*.

This case is analogous to *Murphy Tugboat*. In this case, the plaintiffs allege the union acted through **[**30]** the individual defendants, who participated in the alleged restraint of trade by coercing suppliers not to deal with C & W. The individual defendants would be jointly and severally liable with the union for any antitrust liability C & W proves.

d. Conclusion.

The plaintiffs have alleged a viable antitrust claim. The defendants are not immune from the plaintiffs' federal antitrust claim under the labor exemptions. The individual defendants may be liable with the union for antitrust liability.

5. *Plaintiffs' RICO Claim*.

This court has heretofore ruled that the plaintiffs' civil RICO claim was not barred by the applicable statute of limitations. The defendants present other arguments why the court should dismiss the plaintiffs' RICO claim.

a. Defendants' argument that RICO claims fail to state a claim upon which relief can be granted.

Plaintiffs allege that conduct of the defendants violated *18 U.S.C. §§ 1962(c)* and *(d)* of RICO. They seek treble damages under ***HN22***[] *18 U.S.C. § 1964(c)*. A violation of *§ 1962(c)* requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiffs must allege these elements to state a claim. *Sedima, S.P.R.L. v. Imrex Co., 473* ***[**31]*** *U.S. 479 at 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*; *United Energy Owners v. United Energy Mgmt., 837 F.2d 356, 362 (1988)*. More specifically, a plaintiff suing under civil RICO must allege:

1. The defendant ("person" in terms of RICO)
2. through the commission of two or more timely acts (i.e., within 10 years)
3. constituting a "pattern"
4. of "racketeering activity"
5. directly or indirectly invests in, maintains and interest in, or participates in
6. an "enterprise"
7. the activities of which affect interstate (or foreign) commerce,
8. "by reason of" which the plaintiff was injured in his business or property.

[*1466] *Cf.* *Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17, 20-23 (2d Cir. 1983)*, *cert. denied*, *465 U.S. 1025, 79 L. Ed. 2d 684, 104 S. Ct. 1280 (1984)*.

For discussion, these eight elements are here organized as: (i) persons liable, (ii) predicate acts, (iii) pattern of racketeering activity, (iv) affected enterprise, (v) prohibited activities, (vi) resultant injury.

(i) Persons liable.

HN23[] *Section 1961(3)* defines a "person" as "any individual or entity capable of holding a legal or beneficial interest in property." There is no problem with the person requirement. There would be a problem if the plaintiffs name the union as both "person," i.e. **[**32]** defendant, and "enterprise" in a RICO *§ 1962(c)* claim. *United Energy Owners, 837 F.2d at 364*. The plaintiffs indicated at the hearing, however, that the intended affected "enterprise" is C & W and its material suppliers, not the union. This issue discussed in the affected "enterprise" section below.

(ii) Predicate acts ("racketeering activity").

The defendants argue the plaintiffs have not alleged sufficient predicate acts to support their RICO claim. The plaintiffs base their predicate acts on alleged violations of the following federal statutes:

(a) obstruction of justice, *18 U.S.C. § 1503*.

(b) mail and wire fraud, *18 U.S.C. §§ 1341*, *1343*.

(c) Hobbs Act (interference with commerce by threats or violence, *18 U.S.C. § 1951*).

The court must determine whether these predicate acts as pled support the RICO claim.

(ii)(a) Obstruction of justice, *18 U.S.C. § 1503*.

The plaintiffs allege that certain individual defendants lied in affidavits submitted to the district court in an NLRB lawsuit or elsewhere and were thereafter convicted for perjury. First Amended Complaint paras. 46, 47. The defendants argue that perjury alone does not violate *18 U.S.C. § 1503*, citing *United* ***[**33]*** *States v. Essex, 407 F.2d 214, 218 (6th Cir. 1969)* (one must allege that defendant has impeded the court in the conduct of its business or an attempt to do so beyond the mere rendering of false testimony).

In *Essex*, however, the court stated that the defendant was charged with perjury and nothing more; although the defendant may have perjured herself, she did not try to interfere with the officers, jurors, or witnesses within the meaning of *18 U.S.C. § 1503*. *Id. at 218*. *Essex* is not on all fours with this case. Here, the plaintiffs have alleged more than perjury to support their RICO claim. They argue that the perjury was part of a pattern of racketeering, which also included extortion and wire and mail fraud. *See* Amended Complaint, at 18 para. 49 (set out below).

Perjury, per se, has been held bysome courts not to be a RICO predicate act. *See* *Rand v. Anaconda-Ericsson, Inc., 623 F. Supp. 176, 182 (E.D.N.Y. 1985)*, *affirmed*, *794 F.2d 843, 849 (2d Cir. 1986)*, *cert. denied*, *479 U.S. 987, 107 S. Ct. 579, 93 L. Ed. 2d 582 (1986)*; *Sellers v. General Motors Corp., 590 F. Supp. 502, 507 (E.D. Pa. 1984)*.

Other authority indicates the exception to this rule. *von Bulow by Auersperg v. von* ***[**34]*** *Bulow, 657 F. Supp. 1134, 1145 (S.D.N.Y. 1987)* (While the court in *Sellers v. General Motors*, cited directly above, dismissed a RICO claim where perjury alone was alleged as a predicate act, the court stated, in dicta, that the result might have been different had the perjury been the element of a larger conspiracy to defraud.); *accord* *Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1269 (3rd Cir. 1987)* (suggests in dicta that perjury could be found to establish continued existence of a RICO enterprise and to be part of the pattern of racketeering activity).

The Court has stated that "RICO is to be read broadly." *Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987)* (quoting *Sedima, 473 U.S. 479, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985))*. It has also cautioned against a narrow interpretation of predicate acts defined in *18 U.S.C. § 1961(1)*, which includes *18 U.S.C.* ***[*1467]*** *§ 1503* (obstruction of justice). *Cf.* *United States v. Turkette, 452 U.S. 576, 586-87, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*.

The court will not conclude absolutely that perjury can never be a predicate act for RICO purposes. ***HN24***[] The more reasoned rule would allow perjury to be a predicate act under *18 U.S.C. § 1961(1), through 18* **[**35]** U.S.C. *§ 1503*, where the plaintiffs allege that the perjury was part of the pattern of a racketeering activity.

The plaintiffs allege specifically:

> 26. In the NLRB proceedings, Nishibayashi and Torres and others lied on affidavits submitted to the United States Court for the District of Hawaii, in order to further their illegal and wrongful purposes and to the damage of C & W.
>
> 27. Subsequent to the NLRB proceeding alleged above, Nishibayashi and Torres were each indicted and convicted of four counts of perjury and false statement [sic] in the United States District Court of the State of Hawaii. Kupau and Suyat were indicted on seven counts of perjury relating to sworn statements on testimony in four different proceedings.
>
> . . . .
>
> 46. By the acts alleged in paragraphs 26 and 27 hereinabove, Defendants have corruptly and/or by threats or force endeavored to influence, obstruct and/or impede the due administration of justice, in violation of *18 U.S.C. § 1503*.
>
> . . . .
>
> 49. By engaging in the acts alleged hereinabove, Defendants, and each of them, established a pattern of racketeering activity, as defined by *18 U.S.C. 1961(1)(B)*, consisting of violations of *18 U.S.C. §§ 1341*, *1343*, **[**36]** *1503*, and *1951(b)(2)*.

First Amended Complaint, at 11, 17, 18.

These allegations suffice to overcome the defendants' arguments that perjury cannot be a predicate act supporting the plaintiffs' RICO claim. The plaintiffs allege the perjury was part of a pattern of racketeering. [3]

(ii)(b) Mail and wire fraud, *18 U.S.C. §§ 1341*, *1343*.

HN25[] Mail and wire fraud are the two predicate acts most frequently used to establish "racketeering activity" under RICO. *Agency Holding, 107 S. Ct. at 2763*. The statutes proscribe use of mails, *§ 1341*, and use of interstate

[3] The court has ordered dispositive motions, realizing that discovery is not complete. At a later stage of the proceedings, the court may disregard the perjury as predicate acts if the plaintiffs do not show that the perjury was part of the pattern of racketeering. Moreover, if the plaintiffs fail in their proof at trial, the court can direct a verdict before submitting the case to the jury.

electronic media, § 1343, to further schemes to defraud. Both statutes are broad and simple, requiring three elements: (1) devising a scheme to defraud, (2) using the mails or wires to further the fraud, (3) with the specific intent to **[**37]** deceive or defraud. Sun Savings, 825 F.2d at 195; *accord* White v. Beer, 679 F. Supp. 207, 211 (E.D.N.Y. 1988) (citations omitted).

The plaintiffs allege:

> 45. In furtherance of Defendants' scheme to defraud Plaintiffs, Defendants have used the United States mail and have placed interstate telephone calls in violation of 18 U.S.C. §§ 1341 and 1343, as follows:
> (a) The illegal picketing and other acts were conducted by members and Business Agents of the island of Maui, pursuant to instructions and/or with concurrence by leaders of the Hawaii carpenters union located in Honolulu;
> (b) Honolulu-based leaders of the Hawaii carpenters Union used interstate telephones to attempt to negotiate with Walter Mungovan to end their illegal campaign, in exchange for C & W signing upon a union contract;
> (c) Leaders of the Hawaii Carpenters Union used the U.S. mails to send letters requesting pay records for C & W employees and threatening to picket C & W unless Plaintiffs prove that they were paying prevailing wages and that working conditions were good.

First Amended Complaint, at 16-17.

These allegations do not satisfy the *Sun Savings* requirement (3), "specific intent to **[*1468]** defraud." **[**38]** There is no direct or indirect reference to a misrepresentation. The allegations essentially state that the defendants used the mails and telephone wires to threaten C & W to force it to sign a contract with the union. While courts have read these statutes broadly, allowing such threats to form the basis of a scheme to defraud would give the statute too broad a reading. If anything, the defendants apparently were candid about their concerns and demands in threatening C & W.

HN26[] Fed. R. Civ. P. 9(b) requires that "in all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity." **HN27**[] A RICO suit alleging fraud as a pattern of racketeering activity must therefore comply with Rule 9(b). Failure to do so may result in dismissal. A number of courts have so held. *E.g.,* White v. Beer, 679 F. Supp. at 211-12 (citations omitted); Caliber Partners Ltd. v. Affeld, 583 F. Supp. 1308, 1313 (N.D. Ill. 1984).

The plaintiffs have not alleged facts supporting violations of 18 U.S.C. §§ 1341, 1343. They have not alleged the specific intent to defraud inherent in the mail and wire fraud statutes. *Sun Savings*. They have not pled fraud properly under **[**39]** Fed. R. Civ. P. 9(b). The alleged violations of these statutes as pled do not constitute predicate acts that support the plaintiffs' RICO claim.

(ii)(c) Hobbs Act.

The defendants argue that the Hobbs Act cannot form the basis of a RICO count against the defendants in the context of a collective bargaining dispute, citing United States v. Enmons, 410 U.S. 396, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973). In *Enmons*, the defendants were striking union members charged with using violence to secure a new collective bargaining agreement with the Gulf States Utilities Company ("company") in violation of the Hobbs Act, 18 U.S.C. § 1951. The acts included firing high-powered rifles at the company's transformers, blowing up a transformer substation, and draining oil from a company transformer. Id. at 398. The issue was whether acts of violence committed during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective bargaining demands constiuted extortion, which the Hobbs Act defines as "the obtaining of property of another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2).

In interpreting the Hobbs Act, the Court **[**40]** focused on the word "wrongful," and reasoned that because it would be redundant to speak of "wrongful violence" or "wrongful force," Congress must have intended "wrongful" to limit the Act's coverage to "those instances where the obtaining of the property would itself be 'wrongful' because the extortionist has no lawful claim to the property." 410 U.S. at 400. The Court therefore held that violence to achieve legitimate union objectives was not within the Hobbs Act's prohibition because there is no "wrongful" taking of the employer's property when union members receive wages and benefits in exchange for genuine services bargained for by the employer. *United States v. Thordarson, 646 F.2d 1323, 1326 (9th Cir. 1981)*, *cert. denied*, *454 U.S. 1055, 70 L. Ed. 2d 591, 102 S. Ct. 601 (1981)*.

The *Enmons* Court was concerned that if the Hobbs Act could support a RICO suit, it would "put the Federal Government in the business of policing the orderly conduct of strikes." *410 U.S. at 411*. The Ninth Circuit has explained: "In *Enmons*, the Court focused on the special characteristics of the crime of extortion which embraces *any* act or threat of violence, however, [sic] minor, used to obtain the property of **[**41]** another. The underlying concern was that to apply a federal extortion statute in the context of the collective bargaining process would change minor acts of labor violence punishable by state law into felonies, thus placing the federal government in the business of policing the routine conduct of strike activity." *Thordarson, 646 F.2d at 1329*. The Ninth Circuit has read *Enmons* as holding only that the use of violence to secure legitimate collective bargaining objectives is beyond **[*1469]** the reach of the Hobbs Acts. *Thordarson, 646 F.2d at 1327*.

Here, assuming the plaintiffs' allegations to be true, for this motion, the union's threatened violence against C & W and its employees was not to secure legitimate collective bargaining objectives. Unlike the union in *Enmons*, the union in this case did not have a contract with C & W. Moreover, the union here was not on strike against C & W. The boycott was secondary, not primary. Thus, under *Rule 12(b)(6)* standards, the union's activities did not entail "legitimate collective bargaining objectives." Plaintiffs' allegations support the reasonable inference that the defendants engaged in an illegal secondary boycott, *29 U.S.C. §§ 158(b)(4)*, **[**42]** *187(b)*. *Enmons* is clearly distinguishable from the case at bar. Plaintiffs' alleged violations of the Hobbs Act constitute predicate acts supporting the plaintiffs' RICO claim.

Thordarson supports this conclusion. In *Thordarson*, employees of a moving and storage company elected Teamster Local 186 as their bargaining agent. The company refused to recognize Local 186. Local 186 and another Teamsters union, Local 389, then called a violent strike against the company. During the strike, union members destroyed the company's trucks.

A ten count indictment, including RICO counts, was filed in district court against certain officers or employees of Locals 186 and 389. The indictment charged that the defendants had conspired to destroy the company's trucks to coerce the company to recognize Local 186. *Id. at 1325*. The district court dismissed all ten counts of the indictment. The RICO counts were dismissed on authority of *Emmons*, which the district court read as precluding federal prosecution for violent activity that occurs during a legitimate labor dispute absent specific authorization from Congress. *Id. at 1326* (citing *United States v. Thordarson, 487 F. Supp. 991, 995* ***[**43]*** *(C.D. Cal. 1980))*.

The Ninth Circuit reversed the district court on its broad reading of *Enmons*. The Ninth Circuit held that it read *Enmons* as holding only that the use of violence to secure legitimate collective bargaining objectives is beyond the reach of the Hobbs Act, *18 U.S.C. § 1951*. As stated above, ***HN28***[] the Hobbs Act prohibits interference with commerce by extortion, defined as "the obtaining the property of another, with his consent, induced by wrongful use of actual or threatened force, violence or fear." *18 U.S.C. § 1951(b)(2)*. The Ninth Circuit held that *Enmons* did not apply in this case, because RICO explicitly prohibits arson. *Id. at 1329*; *see* *18 U.S.C. § 1961(1)*.

Even if the Hobbs Act did not support the plaintiffs' RICO claim, the court could, upon proper application after hearing, allow the plaintiffs to amend their complaint under *Fed. R. Civ. P. 15(a)* to plead violations of state extortion law. The plaintiffs could plead violations of *Haw. Rev. Stat. § 707-764* (1985) as a predicate act under *18 U.S.C. § 1961(1)*, which explicitly includes "extortion . . . chargeable under State law." *Haw. Rev. Stat. § 707-764* is broad enough to include the plaintiffs' **[**44]** allegations. *Cf.* *Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639, 268 U.S. App. D.C. 103, 839 F.2d 782, 789 (D.C. Cir. 1988)* (Plaintiff employer sued union under RICO for damages suffered during a recognition strike; plaintiff did not base predicate acts of extortion on the Hobbs Act, but D.C. and Maryland statutes).

(iii) Pattern of racketeering activity.

HN29[] The pattern of racketeering activity requires at least two acts of racketeering activity, *18 U.S.C. § 1961(5)*. As The Court said in *Sedima, 473 U.S. at 496 n.14*, "'Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" (quoting 18 U.S.C. § 3575(e), a later provision of the RICO bill that the Court said "may be useful in interpreting other sections of the [RICO] Act."). *See also I* *United Energy Owners, 837 F.2d at 362* (describing requirements for a pattern of racketeering, citing *United States v. Turkette, 452 U.S. 576, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981))*.

[*1470] The above discussion of predicate acts indicates that the plaintiffs may not rely on the alleged **[**45]** violation of *18 U.S.C. §§ 1341*, *1343* to support their RICO claim, and that the perjury may be a predicate act only if it is part of a larger pattern of racketeering activity. Thus, everything really hinges on whether the defendants may proceed on their extortion claims. The Hobbs Act supports their RICO claim. For this motion, the alleged acts of extortion and the perjury support the pattern of racketeering requirement. The pattern of racketeering requirement therefore is met.

(iv) Affected "enterprise."

The defendants argue the plaintiffs have not satisfied the "enterprise" requirement because they do not identify the affected "enterprise." They argue this omission defeats the plaintiffs' RICO claim. *Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984)*; *White v. Beer, 679 F. Supp. at 210-11* (RICO count deficient because plaintiff did not plead adequately the existence of an enterprise; to survive *Rule 12(b)(6)* or *56* motion, plaintiff must allege that the "enterprise" is a continuing operation and that the acts are related to a common purpose; plaintiff did not describe the structure of the enterprise, its purpose, or that it had no obvious terminating goal or date) (citing **[**46]** *United States v. Ianniello, 483 U.S. 1006, 107 S. Ct. 3230, 97 L. Ed. 2d 736 (1987))*.

The plaintiffs do not identify the "enterprise." At the hearing, the plaintiffs stated the affected "enterprise" was C & W and its materials suppliers. They conceded that they did not properly plead the "enterprise" requirement in their complaint. The court will determine the sufficiency of plaintiffs' characterization of C & W and its suppliers as the affected "enterprise" if and after the plaintiffs have filed a motion for leave to amend.

(v). Prohibited activities

The plaintiffs allege that the activities affect interstate commerce. This satisfies the prohibited activities requirement.

(vi.) Resultant injury

The plaintiffs allege resultant injury. This satisfies the resultant injury requirement.

b. Conclusion.

The plaintiffs have not yet alleged a viable RICO claim. The alleged violations of the wire and mail fraud statutes as plead cannot support the RICO claim. Their allegations of an affected "enterprise" are deficient. The court *dismisses* the RICO claim *with leave to file a motion to amend*. *Rule 15(a)*; *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)*.

c. Defendants' claim that plaintiffs' RICO claims are **[**47]** preempted by federal labor law.

The defendants argue that the plaintiffs' RICO claims are preempted by federal labor law. They cite no case authority for this proposition. The court disregards it. *See* *Thordarson, 646 F.2d at 1330-31*; *cf.* *MHC Inc. v. Mine Workers, UMW, 685 F. Supp. 1370 (E.D. Ky. 1988)*, Civil RICO Report No. 45, at 1-3.

d. Defendants' claim that the plaintiffs have not satisfied the conspiracy requirement of *18 U.S.C. § 1962(d)*.

While the plaintiffs may have more artfully pled their RICO claim, the court must assume the veracity of plaintiffs' allegations that the defendants conspired to commit the above described predicate acts. It may reasonably infer from such allegations that the defendants also conspired to conduct the affairs of an enterprise through such acts.

6. Plaintiffs' State Antitrust Claims.

The plaintiffs bring three claims under Hawaii's antitrust laws: *Haw. Rev. Stat. § 480-4* (conspiracy in restraint of trade), *Haw. Rev. Stat. § 480-2* (unfair trade practice), and *Haw. Rev. Stat. § 480-6* (refusal to deal). The defendants argue the state antitrust claims are preempted by federal labor law and by the specific exclusion of *Haw. Rev.* **[**48]** *Stat. § 480-10*. The defendants rely principally on *Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1974)* to support their federal preemption argument.

[*1471] The Supreme Court stated regarding the preemption of state antitrust claims:

> Although we hold that the union's agreement with Connell is subject to the federal antitrust laws, it does not follow that state ***antitrust law*** may apply as well. The Court has held repeatedly that ***HN30***[] federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA. [citations omitted] The use of state ***antitrust law*** to regulate union activities in aid of organization must be preempted because it creates a substantial risk of conflict with the policies central to federal labor law.
>
> . . . .
>
> Because employee organization is central to federal labor policy and regulation of organization procedures is comprehensive, federal law does not admit the use of state ***antitrust law*** to regulate union activity that is closely related to organizational goals. Of course, other agreements between unions and nonlabor parties may be subject to state antitrust laws. *See Teamsters v. Oliver,* ***[**49]*** *[358 U.S. 283] supra, at 295-97* [*3 L. Ed. 2d 312, 79 S. Ct. 297]* [(1959)]. The governing factor is the risk of conflict with the NLRA or with federal labor policy.

Connell, 421 U.S. at 635-37.

This suit implicates federal labor regulation. Plaintiffs' second claim is for the defendants' alleged secondary boycott of C & W in violation of *29 U.S.C. § 187(b)*, and *§ 158(b)(4)*.

Indeed, the case is a classic secondary boycott case, whereby the union allegedly attempted to force C & W to sign a contract with it. This characterization of the case, then, brings its state antitrust claims within the preemptive ambit of *Connell*.

The Ninth Circuit, in *California State Council of Carpenters v. Associated General Contractors of California, Inc., 404 F. Supp. 1067* (N.D. Cal.) (Peckam, J.), *rev'd on other grounds*, *648 F.2d 527, 540 (9th Cir. 1980)*, *reversed*, *459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1982)*, has followed *Connell*. Judge Peckam stated:

> While the Supreme Court in *Connell, supra*, was bitterly split, 5-4, over whether the plaintiffs there could state a cause of action against the union under the federal antitrust laws, *421 U.S. at 636*, . . ., the dissenters explicitly noted their agreement with the conclusion **[**50]** of the majority that the application of the state antitrust laws was pre-empted by federal labor and antitrust policies. *See Connell, supra, 421 U.S. at 654* . . . n.13.

404 F. Supp. at 1072.

Moreover, ***HN31***[] *Haw. Rev. Stat. § 480-10* provides:

> This chapter [480] shall not apply to the conduct or activities of labor organizations or their members which conduct or activities are regulated by federal or state legislation . . . .

The alleged misconduct of the union and its members is regulated by federal labor law specifically in *29 U.S.C. § 187* and *158*, as discussed above. The plaintiffs claims have sued under Haw. Rev. Stat. chapter 480, which is entitled "Monopolies; Restraint of Trade." Part I of Chapter 480 contains the antitrust provisions, which includes the statutes under which the plaintiffs sue, *§§ 480-2*, *480-4*, *480-6*. *See* 9 Haw. Rev. Stat., at 24-25 (table of contents).

This brings the plaintiffs' Chapter 480 claims within the preclusive ambit of *Connell* and *§ 480-10*. Plaintiffs' state antitrust claims are DISMISSED.

7. *Plaintiffs' Interference with Economic Advantage and/or Inducement to Breach of Contract*.

The plaintiffs allege the defendants interfered with **[**51]** the prospective economic advantage of C & W and/or induced others to breach their contract(s) with C & W. The defendants argue this claim is preempted by federal law, citing principally, *San Diego Building Trades Counsel v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959)*; *Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669, 75 L. Ed. 2d 368, 103 S. Ct. 1453 (1983)*; *Local 20, Teamsters Union v. Morton, 377 U.S. 252, 12 L. Ed. 2d 280, 84 S. Ct. 1253* ***[*1472]*** *(1964)*; and *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978)*.

Judge Pfaelzer, in *Adolph Coors Co. v. Sickler, 608 F. Supp. 1417 (C.D. Cal. 1985)*, has most lucidly analyzed the problem. In *Adolph Coors*, the plaintiff beer company entered into a contract with a public television station regarding the station's annual auction. The beer company would provide financial support and manpower, and the station would promote its auction as "Coors Day." An agent of the local AFL-CIO -- which had organized a boycott of the beer company -- allegedly threatened the station's president and employees with violence concerning the station's "Coor's Day" arrangement with the beer company. The agent also threatened mass picketing of the auction and jamming of its phone **[**52]** lines during the auction. The plaintiff beer company claimed these alleged threats induced the television to breach its contract with the beer company. The plaintiff sued the defendant for intentional interference with contractual relations. It also sued the defendant for secondary boycott under *29 U.S.C. § 187(b)*. The defendant moved to dismiss, arguing that the state claim claim was preempted by federal labor law. *Id. at 1419-21*.

Judge Pfaelzer examined the preemption argument in light of relevant Supreme Court authority, and concluded that ***HN32***[] when conduct at issue is arguably prohibited or protected by the NLRA, otherwise applicable state law is generally preempted. *Id. at 1422* (citing *Farmer v. United Bhd. of Carpenters & Joiners, 430 U.S. 290, 296, 51 L. Ed. 2d 338, 97 S. Ct. 1056 (1977))*. She noted that the Supreme Court has recognized exemptions to this rule, identifying specifically the exception to preemption for violence. *Id. at 1422* (citing *UAW v. Russell, 356 U.S. 634, 2 L. Ed. 2d 1030, 78 S. Ct. 932 (1958))*; *United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 98 L. Ed. 1025, 74 S. Ct. 833 (1954)*. *Accord* *Sears, Roebuck, 436 U.S. at 204* & n.25 ("This Court has held that state jurisdiction to enforce its laws prohibiting violence . . . **[**53]** is not pre-empted by the NLRA.") (citing *Youngdahl v. Rainfair, Inc., 355 U.S. 131, 2 L. Ed. 2d 151, 78 S. Ct. 206 (1957)*; *Laburnum*)).

Judge Pfaelzer then decided that ***HN33***[] the state law claims for intentional interference with contractual relations were not preempted. She applied the *Farmer* three part preemption test, paying special attention to the salient factor that a state law claim is not preempted if it is *either* unrelated to the federal claim *or* a function of the particularly abusive manner in which the federally prohibited conduct is accomplished. *Id. at 1424*. She determined that the *Farmer* test was satisfied as to this factor, and overall, because of the manner in which the tort was perpetrated, i.e., through threats of violence. *Id*. Her analysis is convincing, as is the rest of her analysis supporting her conclusion that the state claim at issue in that case was not displaced by federal labor law; e.g., analysis and application of *Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669, 75 L. Ed. 2d 368, 103 S. Ct. 1453 (1983)* ("same in fundamental respect" standard for preemption).

Adolph Coors is on all fours with this case. Both cases involved allegations of threatened violence by **[**54]** defendants that induced a secondary party to breach its contract with the plaintiffs. Both involved companion claims of secondary boycott brought under *29 U.S.C. § 187(b)*, and defendants' preemption arguments against the state tortious interference with contract claim. The reasoning of *Adolph Coors* is compelling; this court follows it. *Cf.* *Rainbow Tours, Inc. v. Hawaii Joint Council of Teamsters, 704 F.2d 1443, 1447 (9th Cir. 1983)* (state tort for interference with contractual relations based on unlawful mass picketing not preempted by *29 U.S.C. § 187*) (citing *Russell; Laburnum*).

The plaintiffs' interference with economic advantage and/or inducement to breach contract claim is not preempted by federal labor law.

B. Plaintiffs' Motion for Summary Judgment on Four Claims.

1. *Plaintiffs' Remaining Claims*.

The plaintiffs move for summary judgment on four of their claims based on **[*1473]** the doctrine of offensive collateral estoppel. *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1978)*; *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)*. They argue the perjury convictions of certain individual defendants collaterally estop **[**55]** the defendants regarding liability on these claims. The claims are: (1) federal antitrust, *15 U.S.C. § 1*, *(2)* state antitrust, *Haw. Rev. Stat. § 480-4*, *(3)* federal labor law, *29 U.S.C. § 187(b)*, and *(4)* tortious interference with contractual relations.

As discussed above, the unfair labor practices claim is barred by the statute of limitations.

As discussed above, genuine issues of material fact remain regarding whether the suppliers had the requisite conspiratorial intent to restrain trade. The perjury testimony cannot establish the conspiratorial intent of the suppliers.

As discussed, the state antitrust claims brought under Haw. Rev. Stat. § 480 are preempted by federal labor law under the authority of *Connell*.

The court does not address the application of offensive collateral estoppel to those claims.

As discussed above, the tortious interference with contractual relations is a viable claim. The court examines the plaintiffs' collateral estoppel argument concerning this claim.

While the court considered the defendants' motion under *Rule 12(b)(6)* standards, the court considers the plaintiffs' motion under *Rule 56* standards. This court must consider materials external to the **[**56]** pleadings to resolve this issue, which is appropriate only for motion brought under *Rule 56*, not *Rule 12*. *Rosales v. United States, 824 F.2d 799 at 802 (9th Cir. 1987)*.

This court is familiar with the standards for summary judgment.

This court is aware of the standards for collateral estoppel. *Davis & Cox v. Summa Corp., 751 F.2d 1507, 1518 (9th Cir. 1985)* (citing *Montana v. United States, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979)*; *United States v. Geophysical Corp., 732 F.2d 693, 697 (9th Cir. 1984)*; *In re Gottheiner, 703 F.2d 1136, 1139 (9th Cir. 1983))*; *Hernandez v. City of Los Angeles, 624 F.2d 935, 937 (9th Cir. 1980))*.

2. *Elements of the Alleged Tort*.

HN34[] The essential elements of a tortious interference with contract claim under Hawaii law are: (1) contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional inducement of the third party to breach the contract, (4) absence of justification on the defendant's part, (5) the subsequent breach of the contract by the third party, and (6) damages to the plaintiff. *Burgess v. Arita, 5 Haw. App. 581, 594, 704 P.2d 930 (1984)* (citing 3 J. Dooley, *Modern Tort Law-Liability & Litigation* § 44.02 (B. Lindahl **[**57]** rev. 1984); *Bendix Corp. v. Adams, 610 P.2d 24 (Alaska 1980))*. *See also* *Restatement (Second) of Torts § 766*, at 7 (1977) (intentional interference with the performance of contract by third person); *see generally* W. Keeton, *Prosser and Keeton on Torts* § 129 (5th ed. 1984) (interference with contractual relations); *id*. § 130 (interference with prospective advantage).

The plaintiffs submit the perjury indictments and convictions of the individual defendants and an employee of one of C & W's materials suppliers. The latter perjury conviction is irrelevant to the instant motion; that employee is not a party to this action.

The perjured statements of Nishibayashi do not relate to C & W's suppliers or others under contract with C & W. *United States v. Torres and Nishibayashi*, Cr. No. 82-01795, Superseding Indictment, at 1-4 (D. Haw. Feb. 4, 1983) (perjury counts one through four of Nishibayashi). Likewise, the perjured statements of Kupau do not relate to C & W's suppliers or others under contract with C & W. *United States v. Kupau*, Indictment, at 1-10, Cr. No. 83-01721 (D. Haw. Aug. 18, 1983).

[*1474] The only relevant perjured testimony the plaintiffs submit is that **[**58]** of Torres. The jury determined that Torres perjured himself when he swore in an affidavit:

> To the best of my knowledge, I am not aware of any person related to Local 745 that has forced or asked any individual or employer to refuse to work for C & W construction.
>
> I expressly deny that I have at any time contacted any employee or employer to force or encourage an employee or employer to refuse to perform any work relating to C & W Construction.

United States v. Torres and Nishibayashi, Cr. No. 82-01795, Superseding Indictment, at 6-7 (D. Haw. Feb. 4, 1983).

The converse of these statements can be paraphrased:

> I know some person(s) related to Local 745 who has/have forced or asked some individual(s) or employer(s) to refuse to work for C & W construction.
>
> I admit that I contacted some employee(s) or employer(s) to force or encourage him/them to refuse to perform work relating to C & W Construction.

Torres is collaterally estopped concerning the issues implicated in those statements. The issues were actually litigated and necessarily determined by a court. *Davis & Cox*. The plaintiffs have borne their burden of pleading and proving what issues were decided in their favor in the **[**59]** previous action, i.e., that Torres lied concerning coercion of parties under contract with C & W. *Davis & Cox; Hernandez*.

The court made specific findings concerning Torres's perjury counts; the plaintiffs need not provide a record sufficient to reveal the controlling facts and identify the exact issues litigated in the prior action. *Davis & Cox*. The court will give *necessary inferences* from the judgment preclusive effect. *Id*. Thus, there is no doubt concerning the import of Torres's perjury conviction as it relates to coercing *some* third parties not to deal with C & W. *Id.; Harris v. Jacobs*.

Application of offensive collateral estoppel is proper. There was a "full and fair" opportunity in the perjury trial for Torres to litigate the issue for which collateral estoppel is sought, *Parklane Hosiery, 439 U.S. at 326-33*; *Blonder-Tongue, 402 U.S. at 332-33*. The plaintiff could not have joined in the earlier action, as it was a criminal case; such application would not be unfair to defendant Torres. He had a full and fair opportunity to litigate this issue. *Parklane Hosiery, 439 U.S. at 331*.

This leaves two questions. First, is the testimony sufficient **[**60]** to meet the plaintiffs' burden of showing an absence of material fact concerning the tortious interference claims? Second, can the perjury of Torres also estop the union and other individual defendants on the tortious interference claim? The court will not address the second question, as the first question is dispositive of the overall issue of whether to grant the plaintiffs' motion for summary judgment.

Torres' perjured statements in themselves cannot substantiate the plaintiffs' motion for summary judgment. His statements do not identify any particular third party or parties with whom C & W had contracts. C & W apparently had contracts with numerous materials suppliers (e.g., glass, concrete block, cement, crushed rock, and lumber) and others providing services for C & W. Torres' statements do not establish a nexus between the misconduct inferable from the perjury and any particular supplier or other person under contract with C & W. While the statements represent cogent evidence supporting the plaintiffs' tortious interference with contract claim, they are not sufficient in themselves to substantiate the plaintiffs' summary judgment motion. *T.W. Elec. Serv. v. Pacific Elec. Contrs. Assn., 809 F.2d 626 at 630 (9th Cir. 1987)*. **[**61]** Specifically, Torres's statements do not meet the plaintiffs' initial burden of showing an absence of material fact concerning the plaintiffs' tortious interference with contract claim, which necessarily relates to specific entities concerning specific contracts.

If the statements did permit the plaintiffs to meet their initial burden, the plaintiffs **[*1475]** would be entitled to summary judgment, because the defendants would be precluded from meeting their counterburden by the Court's December 5, 1985 Order. The Order explicitly bars the defendants from submitting evidence on the plaintiffs' "inducement to breach of contract and interference with prospective economic advantage " claim. Order, at 11.

The court applies the doctrine of offensive collateral estoppel to Torres' statements. Nevertheless, the statements do not satisfy the plaintiffs' initial burden for a summary judgment motion under the *T.W. Elec*. standard. The plaintiffs' motion for summary judgment on the state tortious interference claims is DENIED.

III. CONCLUSION.

The following claims are dismissed:

1. Second Claim, *29 U.S.C. § 187(b)*: statute of limitations.

2. Fourth, Fifth, and Sixth Claims, *Haw. Rev. Stat. §§ 480-4*, **[**62]** *480-2*, *480-6*: preemption by federal labor law under *Connell*.

3. Eighth, Ninth, Tenth, and Eleventh Claims, negligent and intentional infliction of emotional distress: statute of limitations under *Haw. Rev. Stat. § 657-7*.

The court also dismisses the plaintiffs' civil RICO claim, with leave to file a motion to amend their complaint to plead the "enterprise" requirement. The court does not dismiss the plaintiffs' federal antitrust and state interference with economic advantage/inducement to breach contract claims.

The court denies the plaintiffs summary judgment on all four of its claims.

After today, *two* claims remain before the court: federal antitrust and state tortious interference with contract. The civil RICO claim may yet be viable, if the plaintiffs amend their complaint to plead properly the "enterprise" requirement.

IT IS SO ORDERED.

Fischer v. NWA, Inc.

United States District Court for the District of Minnesota, Third Division

June 9, 1988, Decided and Filed

No. 3-87 CIV 106

Reporter

1988 U.S. Dist. LEXIS 12590 *

WILLIAM R. FISCHER, The Estate of BETTY L. FISCHER, MONTFORD R. FISCHER and BONITA G. FISCHER, Plaintiffs, v. NWA, INC.; NORTHWEST AIRLINES, INC; and SIMMONS AIRLINES, INC., Defendants

Core Terms

arbitration, plaintiffs', airline, terminate, acquisition, routes, regional, conspiracy, arbitration clause, antitrust, summary judgment, carriers, mutually, item of evidence, amicably, concerted activity, obligations, unilateral, conspired, asserts, numbers, exclusivity provision, independent action, restraint of trade, termination notice, veto power, transportation, manufacturer, inducement, monopolize

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Trials, Judgment as Matter of Law**

A genuine issue of material fact does not exist if it would be unreasonable for a jury, construing the evidence in a light most favorable to the non-moving party, to find for the non-moving party on the disputed factual issue.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] Discovery, Methods of Discovery

Under *Fed. R. Civ. P. 56(c)*, the district court should grant summary judgment only if the pleadings, depositions and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN3[] Summary Judgment, Entitlement as Matter of Law

A non-moving party in a summary judgment motion has an affirmative obligation to make a showing sufficient to establish the existence of each essential element to that party's case on which that party will bear the burden of proof at trial, if the existence of that element is brought into issue by the moving party. The district court is required to give the non-moving party the benefit of all reasonable inferences that can be drawn from the underlying facts.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] Regulated Practices, Price Fixing & Restraints of Trade

49 U.S.C.S. § 1378(b) (1) mandates rejection of the transaction (A) if it would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of air transportation in any region of the United States; or (B) the effect of which in any region of the United States may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the board finds that the anticompetitive effects of the proposed transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public, and unless it finds that such significant transportation conveniences and needs may not be satisfied by a reasonably available alternative having materially less anticompetitive effects.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > US Civil Aeronautics Board

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Transportation Law > ... > US Federal Aviation Administration > Notices & Orders > Judicial Review

HN5[] **Jurisdiction, Exclusive Jurisdiction**

The Department of Transportation's approval of an acquisition is subject to review by the United States Court of Appeals for the District of Columbia, upon the appeal by any person with a substantial interest in the approval. 49 U.S.C.S. app. § 1486(a). The Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the determination of the Civil Aeronautics Board or the Department of Transportation. 49 U.S.C.S. app. § 1486(d).

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

The burden antitrust plaintiffs must bear to establish concerted activity is that there must be evidence that tends to exclude the possibility that the manufacturer and the non-terminated distributors were acting independently. In addition, plaintiffs should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN7[] **Summary Judgment, Opposing Materials**

Although on summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion the ***antitrust law*** limits the range of permissible inferences from ambiguous evidence so that conduct consistent with permissible competition as well as illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Instead, a plaintiff must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed the plaintiff. When plaintiffs' claim makes no economic sense, plaintiffs must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

HN8[] **Fraud & Misrepresentation, Negligent Misrepresentation**

Normally, the knowing false representation must be of a past or present material fact. Consequently, a representation as to a future act is an insufficient basis to support an action for fraud merely because the represented act or event does not take place. It is true, however, that a misrepresentation of a present intent to perform a specific act in the future could amount to fraud. Plaintiffs must show that the promisor had no intention to perform at the time the promise was made.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN9[] **Alternative Dispute Resolution, Mandatory ADR**

The Arbitration Act establishes that a court must apply federal law to resolve the issue of whether the question of fraud in the inducement is itself an arbitrable controversy.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

HN10[] **Contract Conditions & Provisions, Arbitration Clauses**

The federal law principles governing the arbitrability of fraud in the inducement claim are well settled. If the claim is fraud in the inducement of the arbitration clause itself, an issue which goes to the making of the agreement to arbitrate, the federal court may proceed to adjudicate it. The language and policy of the Arbitration Act, however, requires that allegations of fraud in the inducement of the entire contract be considered arbitrable. Since plaintiffs' claim is directed at fraud in the inducement as the entire contract, this claim is subject to the arbitration clause.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

HN11[] **Arbitration, Arbitrability**

Whether the parties agreed to arbitrate is determined by applying federal substantive law of arbitrability. Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability.

Counsel: **[*1]** Gray, Plant, Mooty, Mooty & Bennett, P.A., by DANIEL R. SHULMAN of Minneapolis, Minnesota, and Alioto & Alioto by JOSEPH M. ALIOTO of San Francisco, California, appeared on behalf of plaintiffs.

Zuckert, Scoutt, Rasenberger & Johnson by FRANK J. COSTELLO and JAYME I. RIZZOLO of Washington, D.C., and Corporate Counsel for Northwest Airlines, Inc., by PAUL L. DINGER of Eagan, Minnesota, appeared on behalf of defendants NWA, Inc., and Northwest Airlines, Inc.

Winston and Strawn by DAN K. WEBB and ROBERT G. FOSTER of Chicago, Illinois, and Robins, Zelle, Larson & Kaplan by ELLIOT S. KAPLAN of Minneapolis, Minnesota, appeared on behalf of defendant Simmons Airlines, Inc.

Opinion by: ALSOP

Opinion

ORDER

DONALD D. ALSOP, CHIEF U. S. DISTRICT JUDGE

The above entitled matter came on for hearing on April 14, 1988, upon the motions of defendants NWA, Inc., and Northwest Airlines, Inc. (hereinafter referred to collectively as NW), and defendant Simmons Airlines, Inc. ("Simmons") for summary judgment.

I. BACKGROUND.

On December 23, 1985, plaintiffs [1] entered into a regional airline service agreement with NW. Pursuant to the agreement, FBA would provide regional air service at Detroit for NW as **[*2]** a NW Airlink beginning in February, 1986. The agreement further provided that FBA would be the exclusive regional airline for NW at Detroit unless FBA chose not to service a particular route. Either party could terminate the agreement without cause upon six months' notice. In addition, the agreement contained a mandatory arbitration clause.

Prior to the execution of the regional airline agreement with FBA, NW had been exploring the possible acquisition of Republic Airlines, Inc. ("Republic"). There were several meetings in December, 1985, between NW and Republic executives regarding possible acquisition. There is no evidence in the record, however, that NW and Republic had reached even a tentative agreement concerning the acquisition prior to December 23, 1985. On January 23, 1986, NW and Republic publicly announced their agreement to a proposed acquisition of Republic by NW subject to approval by the Department of Transportation ("DOT")

The proposed acquisition, if approved, created a dilemma **[*3]** for NW regarding regional airline service at Detroit. This is so because Republic had a regional airline agreement with Simmons at Detroit. The agreement was executed on December 26, 1984, and could not be terminated by either party until October 29, 1988. Similar to the

[1] Remaining plaintiffs are former owners of Fischer Brothers Aviation, Inc. See the court's order dated October 20, 1987. Plaintiffs will be hereinafter referred to collectively as FBA.

NW agreement with FBA, the Republic/Simmons agreement granted Simmons the right to be the exclusive regional airline for Republic at Detroit unless Simmons chose not to service a particular route. [2]

Between the public announcement of the proposed acquisition and the DOT approval which occurred on August 12, 1986, NW did not make any expressed commitments to the NW/Republic regional airlines, although it indicated to both FBA and Simmons that if the acquisition was approved, NW was hopeful that there would be a role for all regional airlines. Following DOT approval of the acquisition, both Simmons and FBA notified NW in writing that they intended to enforce the exclusive rights provision contained in their respective contracts. Shortly **[*4]** thereafter NW requested that the four regional airlines at Detroit and Minneapolis/St. Paul attend a meeting on August 19, 1986, in Minneapolis, to discuss the status of NW/Republic regional airlines.

At the August 19 meeting Mr. Magary of NW informed the representatives of the regional airlines that NW wanted the carriers to mutually agree on the division of routes at Detroit and Minneapolis/St. Paul. Mr. Magary further stated that NW did not want to be directly involved in the negotiations between the two sets of airlines but would do what it could indirectly to facilitate the division. Magary said that NW would not get involved in secret proposals and private discussions with individual airlines.

During the meeting NW distributed a proposed route division for the Detroit and Minneapolis/St. Paul markets. Simmons, FBA and Mesaba verbally objected to the proposal at the meeting. Later in the month of August Mesaba and Express mutually agreed to a division of the routes at Minneapolis/St. Paul.

Immediately after the meeting, Mr. Murray and Mr. Piper, representatives of Simmons, met privately with Magary and Mr. Abbott, another representative of NW. According to participants' recollections, **[*5]** first Murray indicated that Simmons expected to be compensated for any routes it gave up to FBA. After Magary rejected any such payment, Murray then asked Abbott if NW would have any objection to Simmons attempting to acquire FBA, to which Abbott had no objection.

Between the August 19 meeting and when NW sent FBA notice of termination on September 24, 1986, there were numerous meetings, telephone conversations and written correspondences between FBA, Simmons and/or NW. The interactions proceeded along two lines, sometimes simultaneously, one concerning dividing the routes at Detroit and the other involving the sale of FBA to Simmons. Instead of reciting every alleged interaction between FBA, Simmons and/or NW and each party's sometimes diverging interpretation of what took place during the interactions, or indeed whether the interaction occurred at all, the court will address with specificity in the discussion portion of this order the factual issues that, according to the plaintiffs, preclude summary judgment on the plaintiffs' various legal claims.

Ultimately, FBA and Simmons did not mutually agree on either the division of routes or the sale of FBA to Simmons. Following a September **[*6]** 22-23, 1986, meeting held in Chicago and attended by representatives of Simmons and FBA [3], NW sent a written notice of termination to FBA on September 24 and Simmons revoked its offer to purchase FBA for approximately 3.3 million dollars on the same day.

Following the notice of termination, NW informed FBA that although NW was still interested in reaching an Airlink agreement with FBA, Simmons would have the right of first refusal on any routes at Detroit. Consequently, NW determined which Detroit routes Simmons did not want to service, and offered those routes to FBA. The other significant item of negotiation was the prorate formula for dividing fares between NW and Simmons.

The negotiations continued over several months but ultimately NW and FBA did not enter into a new regional airline service agreement, and on February 4, 1987, NW discontinued the negotiations when it saw no hope in resolving their differences and it learned that FBA had retained an attorney to sue NW. FBA terminated its operations as a

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[2] NW was confronted with essentially the same problem at Minneapolis/St. Paul. NW had a pre-existing contract with Mesaba while Republic had a pre-existing contract with Express.

[3] Mr. Rasmusson, a representative of NW, also attended portions of this meeting.

regional airline for NW on March 24, 1987, six months following the notice of termination. **[*7]** On May 26, 1987, FBA was sold to Midway Airline for 2.235 million dollars.

II. DISCUSSION.

Plaintiffs assert nine different statutory or common law claims against one or both defendants. Because defendants' motions for summary judgment raise issues unique to many of the claims, each claim will be discussed separately.

Although the textual standard for granting summary judgment has remained unchanged for many years, [4] two recent Supreme Court cases interpreting *Rule 56* have refined its application. In *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986)*, the Supreme Court equated the standard for granting summary judgment to the standard for granting a directed verdict, noting that the difference is primarily the time when the respective motions are made. *Id. at 2513*. Consequently, ***HN1***[] a genuine issue of material fact does not exist if it would be unreasonable for a jury, construing the evidence in a light most favorable to the non-moving party, to find for the non-moving party on the disputed factual issue.

[*8] In *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986)*, the Supreme Court indicated that ***HN3***[] a non-moving party in a summary judgment motion has an affirmative obligation to make a showing sufficient to establish the existence of each essential element to that party's case on which that party will bear the burden of proof at trial, if the existence of that element is brought into issue by the moving party. *Id. at 2548*. In neither of these cases did the Supreme Court modify the longstanding requirement that the district court give the non-moving party the benefit of all reasonable inferences that can be drawn from the underlying facts. See *Trnka v. Elanco Products Co., 709 F.2d 1223, 1225 (8th Cir. 1983)*.

A. Antitrust Claims.

Plaintiffs, in essence, assert four separate antitrust claims. They claim the acquisition of Republic by NW constitutes an unlawful contract or combination that restrains trade in violation of Section 1 of the Sherman Act and attempts to or does create a monopoly in violation of Section 2 of the Sherman Act. Next, plaintiffs claim that NW and Simmons conspired to restrain trade in violation of Section 1 and conspired to monopolize or **[*9]** attempt to monopolize the Detroit regional airline market in violation of Section 2.

1. Northwest's Acquisition of Republic.

In response to plaintiffs' claims that the acquisition of Republic by NW violated Section 1 and 2, NW argues that plaintiffs are precluded from collaterally attacking the lawfulness of the Republic acquisition because the acquisition was subject to mandatory administrative review from which appeal could have been taken to the United States Court of Appeals for the District of Columbia. 49 U.S.C. app. § 1378 (1982 & Supp. 1985). The Federal Aviation Act requires DOT approval of acquisitions similar to that proposed by NW. ***HN4***[] Section 1378(b) (1) mandates rejection of the transaction:

(A) if it would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of air transportation in any region of the United States; or

(B) the effect of which in any region of the United States may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the anticompetitive effects of the proposed **[*10]** transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public, and unless it finds that such significant transportation conveniences and needs may not be satisfied by a reasonably available alternative having materially less anticompetitive effects.

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[4] ***HN2***[] Under *Fed. R. Civ. P. 56(c)*, the district court should grant summary judgment only "if the pleadings, depositions and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

In addition, approval of the transaction should be denied if it would not be consistent with the public interest.

All interested persons can participate in the approval process, including the hearing before the Civil Aeronautics Board ("CAB"). In the instant case, participants included eight other airlines, the Minneapolis/St. Paul Metropolitan Airport Commission, the Michigan Department of Transportation, and the Antitrust Division of the United States Department of Justice. The Justice Department opposed the acquisition. ***HN5***[] The DOT approval of the acquisition is subject to review by the United States Court of Appeals for the District of Columbia, upon the appeal by any person with a "substantial interest" in the approval. 49 U.S.C. app. § 1486(a). The Court of Appeals for the District of Columbia shall have "exclusive jurisdiction" **[*11]** to review the determination of the CAB or the DOT. 49 U.S.C. app. § 1486(d).

Relying on Supreme Court and Court of Appeals decisions interpreting statutory procedures similar to the above-mentioned procedures, NW asserts that FBA had the opportunity to challenge the acquisition and is precluded from relitigating identical issues in a second forum.

The seminal case in this area of law is *City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1957)*. In City of Tacoma, the City applied for a license under the Federal Powers Act to construct and operate a hydro-electric power plant by damming the Cowlitz River. The project necessarily involved the condemning of a fish hatchery owned by the state of Washington. The State objected to the issuance of the license, and following an administrative hearing conducted by the Federal Power Commission, the City was awarded the license. The State appealed the decision, but the Court of Appeals affirmed. Subsequently the City commenced a state action for a judgment declaring valid a bond issue to finance the project, and the state court enjoined the City. The Washington Supreme Court affirmed on the grounds that the City was not authorized to **[*12]** condemn state-owned property.

The Supreme Court reversed, noting that the language of the Federal Powers Act, which is essentially the same language as that contained in the Federal Aviation Act, vested exclusive review of the Commission's decision in the Court of Appeals. Consequently, the Court reasoned that the parties were precluded from relitigating all issues "inhering in the controversy," which included the issue before the Washington state courts.

In a more recent case, the Supreme Court broadened the holding of City of Tacoma to preclude relitigation, not only by persons who participated in the administrative proceeding and appeal therefrom, but also persons whose interests were at stake and had an opportunity to participate in the administrative proceeding and seek appeal therefrom. *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 72 (1970)*. See also *North American Savings Ass'n. v. Federal Home Loan Bank Board, 755 F.2d 122 (8th Cir. 1985)*.

Plaintiffs' claims challenging the lawfulness of the Republic acquisition on antitrust grounds are essentially the same issues resolved by the CAB in the administrative proceeding from **[*13]** which appeal was not taken. Certainly, FBA had a "substantial interest" in the approval within the meaning of the Act. Accordingly, the holding of City of Tacoma and Marine Terminal encompass the facts of the present case and preclude the plaintiffs from collaterally attacking the acquisition. This is so, despite the fact that plaintiffs chose not to participate in the administrative proceeding. [5]

[*14] 2. Conspiracy to Violate Section 1 and Section 2.

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[5] The court recognizes and is troubled by the dilemma imposed upon a person in the plaintiffs' position as a result of the court's ruling. FBA was in the awkward position of having to choose between risking its present and future business relationship with NW by opposing the acquisition in the administrative proceeding or be precluded from relitigating the antitrust issues at a future date. Nevertheless, the court feels constrained to abide by the precedent established by the Supreme Court and the Eighth Circuit. Moreover, the court appreciates the countervailing economic and societal benefits derived from attaching finality to issues resolved by administrative agencies and Courts of Appeals.

An additional aside concerns the failure of the DOT to grant NW immunity pursuant to 49 U.S.C. § 1384. Statutory immunity, however, is a separate and distinct issue from the preclusion issue raised by NW.

In response to plaintiffs' claims that NW and Simmons conspired to violate Section 1 and Section 2, both defendants seem to focus their argument on plaintiffs' alleged failure to proffer sufficient evidence of concerted activity, although each defendant raises alternative grounds for rejecting plaintiffs' claims, such as the restraint of trade was reasonable or that there was no antitrust injury. The court agrees that plaintiffs have not provided sufficient evidence of a conspiracy to violate Section 1 and Section 2 that injured FBA. The court will not rule on defendants' alternative arguments for rejecting plaintiffs' antitrust claims, other than to note that upon cursory review of these alternative arguments, the court is skeptical that any of these grounds could support a motion for summary judgment.

Any discussion regarding concerted activity in the context of Section 1 and 2 of the Sherman Act should begin with *Monsanto Co. v. Spray-Right Service Corp., 465 U.S. 752 (1983)*. In Monsanto the defendant, a manufacturer of agricultural chemicals, refused to renew plaintiff's distributorship because, according to defendant, **[*15]** plaintiff failed to adequately train its salesmen and promote sales to customers. Plaintiff argued and the Court of Appeals agreed that evidence of numerous complaints to defendant by competing distributors about plaintiff's price-cutting practices was sufficient evidence to establish a conspiracy to set prices.

First, the Supreme Court emphasized that in distributor termination cases a manufacturer "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Id. at 760-61*. This is so, despite the fact that in many cases unilateral nonprice restrictions are inherently anticompetitive and restrain trade, although the focus of the restraint is on intrabrand competition. Then the court expressed concern that the positive economic benefits of nonprice restrictions would be seriously eroded if ambiguous evidence such as normal and indeed necessary distributor/manufacturer communications is allowed to create an inference of concerted activity. To protect against such erosion, the Monsanto Court ***HN6***[] elevated the burden antitrust plaintiffs must bear to establish concerted activity. The Court stated that "[t]here must be evidence that **[*16]** tends to exclude the possibility that the manufacturer and the non-terminated distributors were acting independently." *Id. at 764*. In addition, "plaintiffs should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" [6] Id.

More recently the Supreme Court has reaffirmed the elevated evidentiary standard adopted in Monsanto, in *Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 588 (1985)*. In Matsushita, the plaintiffs alleged that defendants conspired to monopolize a particular market through predatory pricing. The Court stated that ***HN7***[] although "'on summary judgment, the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion . . .' [the] ***antitrust law*** limits the range of permissible inferences from ambiguous evidence . . . so **[*17]** that conduct consistent with permissible competition as well as illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id. at 587-88* (citations omitted). Instead, a plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed [the plaintiff]. *Id. at 588*. Moreover, the Court stated that when plaintiffs' claim makes no economic sense, plaintiffs "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id. at 587*.

It is in the shadow of Monsanto and Matsushita that the court reviews the plaintiffs' alleged inferences. [7] In their memorandum, plaintiffs seem to offer two alternative arguments in support of finding concerted activity. [8] First,

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[6] "A common scheme" requires that evidence "be presented both that the distributor communicated its acquiesence or agreement, and that this was sought by the manufacturer." *Monsanto, 465 U.S. at 764 n. 9*.

[7] The United States Court of Appeals for the Eighth Circuit has followed the holding of Monsanto. See, e.g. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 589 (8th Cir. 1987)*; *Famous Brands, Inc. v. David Sherman Corp., 814 F.2d 517, 523 (8th Cir. 1987)*; *Pumps & Power Co. v. Southern States Industries Inc., 787 F.2d 1252, 1256-57 (8th Cir. 1986)*.

[8] Plaintiffs' second argument is addressed in footnote 13.

plaintiffs argue that NW and Simmons conspired to terminate FBA if FBA did not consent to the market division demanded by Simmons. In their memorandum, plaintiffs list 16 "items of evidence" that they allege establishes the existence of the conspiracy. Upon careful review of the 16 "items of evidence," however, the court concludes **[*18]** that the proffered "evidence" does not establish a reasonable inference of conspiracy in light of the competing inference of independent action.

While the court intends to review plaintiffs' list of "evidence" in some detail, the "evidence" contained in numbers 1, 3, 4, 5 and 16 will not be discussed because the facts or conduct described in these numbered items are consistent with a unilateral decision by NW to terminate FBA. [9] **[*19]** Moreover, the "evidence" contained in numbers 8 and 14 are not sufficiently specific to allow a response. [10] The record is too voluminous to locate inconsistencies other than those referred to in the plaintiffs' memorandum.

Plaintiffs' "item of evidence" number 2 refers to "Simmons' admission that it demanded certain markets exclusively, with the knowledge that the result of its demand would be the exclusion of Fischer Brothers." Simmons' demand of exclusivity, standing alone, does not evidence conspiracy. Indeed, FBA admits to making a similar demand. Moreover, plaintiffs' statement regarding Simmons' state of knowledge is not evidence but merely a conclusory allegation.

Plaintiffs' "item of evidence" number 7 refers to a "secret" meeting between NW and Simmons that was held after the September 12 meeting in Minneapolis and before the September 22-23 meeting. The purpose of the meeting was to define the scope of the Detroit market, and reach a proposed agreement between Simmons and NW on dividing the market. Plaintiffs argue that this meeting shows NW and Simmons agreed that **[*20]** FBA was going to be terminated. Viewed in context, however, the meeting shows nothing of the sort.

As stated above, the "secret" meeting occurred after the September 12 meeting wherein FBA agreed in principle to sell its airline to Simmons but before the September 22-23 meeting. Moreover, the NW memo dated September 22 that summarized the discussions at the "secret" meeting stated, "[t]he outcome of the meeting seems to be that Simmons will acquire Fischer Brothers and use their airplanes for expansion." Brewer deposition at 46-47 (emphases added). Accordingly, the meeting and particularly the memorandum summarizing the meeting is inconsistent with or at least neutral concerning plaintiffs' allegation of conspiratorial termination.

In "item of evidence" numbers 10 and 12 plaintiffs state that NW's conduct in light of its opinion that it had no contractual duties or obligations to Simmons provides evidence of a conspiracy to terminate FBA. To support this conclusion plaintiffs relied on the deposition of Terry L. Hall, corporate counsel for NW. In his deposition, Hall states that prior to actual merger, NW did not have any contractual duties or obligations to Simmons or Express. **[*21]** Hall went on to indicate, however, that it was his opinion that when the acquisition was completed, NW would be contractually obligated to Simmons and Express. Accordingly, item numbers 10 and 12 misrepresent NW's position regarding NW's contractual obligations to Simmons, and provides no support to plaintiffs' claim of conspiratorial termination.

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[9] Plaintiffs' "item of evidence" numbers 1, 3, 4, 5 and 16 read as follows:

1. Northwest's admission that it terminated Fischer Bros. for failure to reach an agreement with Simmons;

3. Northwest's financial interest in Simmons, and its desire to sell its interest at a profit;

4. the personal relationship between Rasmusson and the principals of Simmons;

5. the presence of Rasmusson at the September 22-23 meetings in Chicago; and

16. the filing of Simmons' cross-claim against Northwest as a "friendly lawsuit."

[10] Plaintiffs' "item of evidence" numbers 8 and 14 read as follows:

8. the inconsistency between the testimony of Rasmusson and the Simmons' principals; and

14. the credibility problems and discrepancies in testimony of major witnesses in this case, including Rasmusson, Magary, Hall, Rothmeier, Abbott, Murray, and Piper.

Plaintiffs "item of evidence" number 11 refers to NW's "admission that it permitted Simmons to exercise veto power over any route to be given to FBA prior to the September 24 cancellation." Essentially, both Simmons and FBA had veto power over any proposed route division offered by the other because NW stated the division of routes should be mutually agreeable to both the regional carriers in the particular market. Second, NW denies that prior to September 24, Simmons had the type of one-sided "veto power" plaintiffs suggest. Consequently, the only evidence regarding such "veto power" is the testimony of FBA officials. This testimony, however, is contradicted somewhat by the telephone conversations surreptitiously taped by plaintiffs which do not suggest NW believed Simmons had the type of one-sided "veto power" plaintiffs are intimating.

[*22] Plaintiffs' strongest "evidence" of concerted activity is contained in item numbers 6, 13 and 15. Construing the information contained in item numbers 6, 13 and 15 in a light most favorable to plaintiffs, plaintiffs have established that after Simmons and FBA failed to reach a specific agreement concerning the sale of FBA, Simmons contacted NW, NW sent a notice of termination to FBA, and Simmons revoked its offer to purchase FBA. [11]

Standing alone, this evidence might allow a fact finder to draw the inference that NW agreed to terminate FBA at Simmons' urging. NW asserts and the court agrees, however, that the inference of conspiracy suggested by plaintiffs is unreasonable in light of the competing inference of independent action suggested by NW. NW's claim of independent action is also responsive to plaintiffs' sole remaining "item of evidence," item number 9. **[*23]** [12]

NW asserts that following the acquisition of Republic, it was confronted with the undesirable, from its perspective, situation of having two regional carriers serving overlapping routes at Detroit and Minneapolis/St. Paul. NW had several options available to remedy the situation. First, NW could have terminated the contract of one of the two carriers, either lawfully by satisfying the notice requirement if such a provision existed, or by breaching the contract, hence subjecting itself to a breach of contract action. Second, NW could have unilaterally decided how the routes were to be divided among the carriers, and impose this division upon the carriers, again exposing itself to a breach of contract action given the exclusivity provisions contained in most if not all of the contracts. Third, NW could have requested that the carriers mutually agree to divide the routes between themselves, with the implicit understanding that if no mutual agreement was reached, then Northwest would be forced to **[*24]** choose one of the two previously mentioned methods of resolving the situation. [13] NW claims that it chose to implement the third option. As evidence of this choice, NW notes that Mesaba and Express mutually agree on a division of the routes at Minneapolis/St. Paul.

[*25] NW further asserts that it became evident following the September 22-23 meeting in Chicago that FBA and Simmons were not going to mutually agree upon either the division of routes or the sale of FBA to Simmons. Consequently, NW was forced to decide whether to divide the routes itself and impose this division upon FBA and Simmons or terminate FBA. [14] Unilaterally imposing a route division on FBA and Simmons would have exposed

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[11] Both defendants refute the contentions in plaintiffs' items 6, 13, and 15. NW argues that it was one of the Fischer brothers who contacted Rasmusson following the breakdown in negotiations, while Simmons argues that it did not find out about the notice of termination until several weeks following the actual notice.

[12] Plaintiffs "item of evidence" number 9 reads as follows:

9. the inability of Northwest to present a coherent, consistent explanation of the decision to terminate Fischer Bros.;

[13] As the court interprets the plaintiffs' memorandum, FBA argues that this third alternative also constitutes concerted activity. In other words, plaintiffs seem to argue that by requesting FBA and Simmons to divide the Detroit routes and by terminating FBA because a mutually agreeable division was not accomplished, the request and the termination, even if the termination was unilateral, constitutes a conspiracy. The court disagrees.

While it might be that if Simmons and FBA agreed to divide routes, such conduct might establish concerted activity in a suit brought by a passenger alleging increased fares as a result of the territorial allocations, FBA's alleged injury does not flow from the attempted agreement to divide the Detroit routes. *Matsushita, 475 U.S. at 586* (conspiracy must have caused plaintiffs to suffer an antitrust injury); *Brunswick Corp. v. Pueblo Bowl-o-Mat Inc., 429 U.S. 477, 489 (1977)*. Instead, the alleged injury was caused by the termination, and if such termination was the result of a unilateral decision by Northwest, then there is no concerted activity for which FBA has an injury.

NW to a breach of contract action by both carriers because of the exclusivity provisions contained in their respective contracts. Accordingly, NW argues that the language of the respective contracts explains and justifies its unilateral decision to terminate FBA.

In sum, plaintiffs have failed to provide evidence that tends to exclude the possibility that NW acted independently when terminating FBA. Consequently, plaintiffs' inference of conspiracy is unreasonable **[*26]** in light of the competing inference of independent action. Moreover, plaintiffs have not provided sufficient direct and circumstantial evidence that reasonably tends to prove that NW and Simmons had a conscious commitment to a common scheme to terminate FBA.

B. Claims for Interference with Prospective Advantage and Interference with Contract.

In their first amended complaint, plaintiffs allege that Simmons intentionally "enticed" NW to breach its contract with FBA. In addition, plaintiffs allege that both defendants conspired to interfere with FBA's "prospective advantage." With regard to plaintiffs' claim of interference with prospective advantage, [15] both defendants erroneously assumed plaintiffs' claim was directed at FBA's business relationship with NW. Instead, plaintiffs' counsel informed the court at oral argument [16] that the claim was directed at defendants' alleged interference with FBA's business relationships with its future customers.

[*27] Both of the above tort claims are based upon an alleged agreement between NW and Simmons to terminate FBA. Plaintiffs, however, have simply failed to create a factual issue regarding the existence of an agreement to terminate FBA. The court concurs with Simmons' suggestion that the disposition of plaintiffs' tort claims should follow the disposition of plaintiffs' antitrust claims. Without a conspiracy to terminate FBA, NW had legal justification to invoke the termination provision of the contract, [17] and Simmons can rely on *Restatement (Second) of Torts § 768(1)* (1979).

C. Fraud Claim.

Plaintiffs **[*28]** allege that NW fraudulently misrepresented its intention to perform under the FBA contract. ***HN8***[] Normally, the knowing false representation must be of a past or present material fact. See *Florenzano v. Olson, 387 N.W.2d 168, 174 n. 4 (Minn. 1986)*. Consequently, a representation "as to a future act is an insufficient basis to support an action for fraud merely because the represented act or event does not take place." *Vandeputte v. Soderholm, 216 N.W.2d 144, 147 (Minn. 1974)*. It is true, however, that a misrepresentation of a present intent to perform a specific act in the future could amount to fraud. Id. Plaintiffs must show that the promisor (NW) had no intention to perform at the time the promise was made. Id.

Based upon the record before the court, plaintiffs have failed to show that at the time NW entered into the contract with FBA it had no intention to comply with the terms of the contract, including the exclusivity provision. NW and Republic had yet to reach an agreement concerning acquisition. Moreover, any such agreement would be subject to DOT approval. These contingencies prevented any certainty concerning the inability of NW to comply with the

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[14] NW did not consider terminating Simmons because, unlike the FBA contract, the Simmons contract did not allow for termination without cause upon giving six months' notice. Instead, the Simmons contract could not be terminated until October 29, 1988, without breaching the terms of the contract.

[15] Interference with prospective advantage is also known as wrongful interference with business relationships and interference with contractual relations. See ***Wild v. Rarig, 234 N.W.2d 775, 790-91 n. 16 (Minn. 1975)***.

[16] For some unknown reason, plaintiffs' memorandum did not address the issue of interference with prospective advantage.

[17] In addition, plaintiffs' tort claim against Northwest is subject to mandatory arbitration which is now time-barred. The "arising out of or relates to" language of the arbitration clause includes tort, as well as contract claims, which involve a significant aspect of the contractual relationship. Cf. *Morgan v. Smith, Barney, Harris, Upham & Co., 729 F.2d 1163, 1167 (8th Cir. 1984)*. Plaintiffs' claim that Northwest interfered with FBA's prospective advantage by terminating the FBA contract pursuant to a conspiracy is a dispute that arises out of or relates to the contract.

exclusivity **[*29]** provision. Perhaps more important, NW could have complied fully with the exclusivity provision, if following DOT approval but prior to integration with Republic, it would have unilaterally terminated FBA's contract pursuant to the termination provision contained in the contract.

In addition, plaintiffs' fraud claim is subject to mandatory arbitration which is now time-barred. Contrary to plaintiffs' assertions otherwise, ***HN9***[] the Arbitration Act establishes that a court must apply federal law to resolve the issue of whether the question of fraud in the inducement is itself an arbitrable controversy. *Moses H. Cone Hospital v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983)*; *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-404 (1967)*.

HN10[] The federal law principles governing the arbitrability of fraud in the inducement claim are well settled. If the claim is fraud in the inducement of the arbitration clause itself--an issue which goes to the "making" of the agreement to arbitrate--the federal court may proceed to adjudicate it. *Prima Paint, 388 U.S. at 403-404*. The language and policy of the Arbitration Act, however, requires that allegations of fraud in the inducement **[*30]** of the entire contract be considered arbitrable. E.g. *Moses H. Cone, 460 U.S. at 24*; *Prima Paint, 388 U.S. at 404*. Since plaintiffs' claim is directed at fraud in the inducement as the entire contract, this claim is subject to the arbitration clause.

D. Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing.

In their first amended complaint, plaintiffs allege NW breached the FBA contract by failing to comply with the exclusivity and expansion provisions. In addition, plaintiffs allege NW's conduct constituted a breach of the covenant of good faith and fair dealing implied by the contract. NW argues that these claims are subject to mandatory arbitration which is now time-barred. [18] Plaintiffs argue that FBA was not required to arbitrate its contract claims.

[*31] The court must determine whether the parties agreed to arbitrate their dispute. *Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1984)*. As indicated above, ***HN11***[] whether the parties agreed to arbitrate is determined by applying "federal substantive law of arbitrability. . ." *Moses H. Cone, 460 U.S. at 24*. That body of law counsels:

That questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability.

Moses H. Cone, 460 U.S. at 24-25.

Plaintiffs offer three arguments against enforcement of the arbitration clause. First, plaintiffs assert that the language of the arbitration clause itself make arbitration inapplicable given the facts of this case. Specifically, plaintiffs emphasize the language that "[a]ny dispute . . . which cannot be resolved amicably by the Parties shall be referred to arbitration within **[*32]** 120 days of the date of the alleged breach." Plaintiffs argue that after NW's various breaches of the expressed and implied terms of the contract, NW deceitfully led FBA to believe that their dispute could be resolved amicably. Plaintiffs further argue that when they discovered NW did not intend to resolve the dispute amicably, 120 days had lapsed since the date of the various breaches. Accordingly, plaintiffs contend the "resolved amicably" language makes the arbitration clause inapplicable in the present case.

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[18] The arbitration clause reads, in part, as follows:

(a) Any dispute, controversy or claim between the Parties, as to which there are no other necessary or indispensable parties, arising out of or relating to this Agreement, including its breach, or the transactions contemplated by this Agreement, which cannot be resolved amicably by the Parties, shall be referred to arbitration within 120 days of the date of the alleged breach occurred.

While the court is somewhat troubled by the ambiguous "resolved amicably" language contained in the arbitration clause, as indicated, federal policy regarding arbitration requires resolving any close question in favor of arbitrability. With that federal policy in mind, the court rejects the plaintiffs' interpretation of the arbitration clause in question. The court finds either of two alternative interpretations of the arbitration clause more reasonable given the language of the arbitration provision and the federal policy underlying arbitration.

First, the language could be interpreted to require plaintiffs to request arbitration within 120 days of the breach if not resolved **[*33]** by then, even though the parties are continuing their effort to resolve the dispute amicably. Second, the language could be interpreted to require plaintiffs to request arbitration within 120 days after it became apparent that the dispute would not be resolved amicably. Based on either interpretation, plaintiffs have failed to comply with the arbitration provision.

Next, plaintiffs argue that Simmons is a necessary and indispensable party to the breach of contract claims. In response, NW refers the court's attention to *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc., 564 F.2d 816 (8th Cir. 1977)*, a decision authored by this court while sitting by designation with the United States Court of Appeals for the Eighth Circuit. Upon reviewing Helzberg, the court finds it on all fours with the instant case. In Helzberg the court held that "a person does not become indispensable to an action to determine rights or obligations under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action." *Id. at 820*.

Finally, plaintiffs argue that NW waived its right to arbitration **[*34]** and is estopped from asserting arbitration as a defense to FBA's contract claims. The typical waiver case involves a litigant attempting to rely on an arbitration clause in the eleventh hour of the litigation process. See, e.g. *National Foundation for Cancer Research v. A. G. Edwards & Son Inc., 821 F.2d 772 (D.C. Cir. 1987)*; *Price v. Drexall Burnan Lambert Inc., 791 F.2d 1156 (5th Cir 1986)*; *Reid Burton Const. v. Carpenters Dist. Council, 614 F.2d 698 (10th Cir. 1980)*. A court must consider whether the conduct of the party invoking the arbitration clause was clearly inconsistent with that party's intent to arbitrate.

In the present case, NW's conduct is perfectly consistent with its right to invoke the arbitration clause as a bar to plaintiffs' contract claims. Contrary to plaintiffs' intimations otherwise, NW had no obligation to seek arbitration within the 120-day time limitation. It is FBA who is the alleged aggrieved party, not NW. NW expressly asserted its arbitration defense in its answer to plaintiffs' complaint, and its participation in the lawsuit does not amount to a waiver of this defense.

Based upon the file as presently constituted and the foregoing discussion,

[*35] *IT IS ORDERED* That defendants' motions for summary judgment are granted.

IT IS FURTHER ORDERED That the Clerk enter judgment as follows:

JUDGMENT

IT IS ORDERED, AJUDGED AND DECREED That plaintiffs William R. Fischer, The Estate of Betty L. Fischer, Montford R. Fischer and Bonita G. Fischer have and recover nothing on their claims against defendants NWA, Inc, Northwest Airlines, Inc., and Simmons Airlines, Inc., and their claims shall be dismissed with prejudice.

DATED: June 9, 1988.

Telerate Sys., Inc. v. Caro

United States District Court for the Southern District of New York

June 10, 1988, Decided

No. 85 Civ. 9132 (DNE)

Reporter

689 F. Supp. 221 *; 1988 U.S. Dist. LEXIS 5445 **; 8 U.S.P.Q.2D (BNA) 1740 ***; Copy. L. Rep. (CCH) P26,292; 64 Rad. Reg. 2d (P & F) 1491

Telerate Systems, Inc., Plaintiff, v. Marshall Caro and Programit, Inc., Defendants

Core Terms

terminal, database, subscribers, customers, Defendants', monopoly power, trade secret, monopolization, copying, users, market power, fair use, protocol, infringement, likelihood of success, relevant market, merits, registration certificate, software, preliminary injunction, tying arrangement, monopoly, products, specific intent, interchangeability, interception, unauthorized, connected, display, network

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

The standard for the issuance of a preliminary injunction is a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious question 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 injunctive relief.

Evidence > Burdens of Proof > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN2[] **Evidence, Burdens of Proof**

To establish tortious interference with contract under New York law, a plaintiff must prove that: 1) there is a valid contract between the plaintiff and a third party; 2) the defendant knew of the contract; 3) the defendant intentionally and improperly procured the breach of that contract; and 4) damages resulted therefrom.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > Contract Interpretation > General Overview

HN3[] **Defenses, Ambiguities & Mistakes**

Where two parties disagree as to the meaning of a contract term does not necessarily establish that the contract is ambiguous.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

HN4[] **Civil Infringement Actions, Burdens of Proof**

A plaintiff in a copyright case must prove two elements: (1) ownership of the copyright; and (2) infringement by the defendant.

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Copyright

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Facts

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

HN5[] **Scope of Copyright Protection, Formalities**

A copyright registration certificate made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. *17 U.S.C.S. § 410(c)*.

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Copyright

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Facts

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

HN6[] **Registration, Registration Certificates**

It is within the court's discretion to determine the evidentiary weight to be afforded a registration certificate dated more than five years after the first date of publication. 17 U.S.C.S. § 410(c).

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

HN7[] **Civil Infringement Actions, Presumptions**

The sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

Copyright Law > ... > Fair Use > Fair Use Determination > Factors

Copyright Law > ... > Defenses > Fair Use > General Overview

HN8[] **Fair Use Determination, Factors**

The Copyright Act, 17 U.S.C.S. § 107, provides that the fair use of a copyrighted work is not an infringement of copyright. Section 107 also provides four factors that a court must consider in determining whether a particular use is fair: 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2. the nature of the copyrighted work; 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4. the effect of the use upon the potential market for or value of the copyrighted work.

Copyright Law > ... > Defenses > Fair Use > General Overview

HN9[] **Defenses, Fair Use**

Although a commercial use does not by itself defeat a defense of fair use, every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.

Copyright Law > ... > Defenses > Fair Use > General Overview

HN10[] **Defenses, Fair Use**

The crux of the profit/non-profit distinction is whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.

Copyright Law > ... > Defenses > Fair Use > General Overview

HN11[] **Defenses, Fair Use**

Although a court, in deciding the question of fair use, may consider whether a work is original, imaginative, or creative, it may also consider whether the work represents a substantial investment of time and labor made in anticipation of financial return.

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > General Overview

HN12[] **Civil Infringement Actions, Presumptions**

This effect on the market element requires proof either that a particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. A plaintiff need not show actual present harm, nor need it show with certainty that future harm will result.

Business & Corporate Compliance > ... > Overview & Legal Concepts > Privacy > Radio Communications

Communications Law > Federal Acts > Federal Communications Act > General Overview

Communications Law > Overview & Legal Concepts > Theft of Services > Radio Communications

HN13[] **Privacy, Radio Communications**

No person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney. 19 U.S.C.S. § 119.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN14[] **Federal Acts, Telecommunications Act**

In order to establish liability under *47 U.S.C.S. § 605* a defendant must have intercepted or aided in the interception of, and divulged or published or aided the divulging or publishing of, a communication transmitted by the plaintiff.

Communications Law > Federal Acts > Telecommunications Act > General Overview

Criminal Law & Procedure > Criminal Offenses > Illegal Eavesdropping > General Overview

HN15[] **Federal Acts, Telecommunications Act**

Courts have held that the act of viewing a transmission that the viewer was not authorized to receive constitutes a publication.

Torts > Business Torts > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Business Use

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Continuous Use

Trade Secrets Law > Protected Information > General Overview

HN16[] Torts, Business Torts

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is a process or device for continuous use in the operation of the business.

Torts > Business Torts > Unfair Business Practices > General Overview

HN17[] Business Torts, Unfair Business Practices

It is clear that computer software is protectable under the law of trade secrets.

Business & Corporate Compliance > ... > Trade Secrets Law > Protection of Secrecy > Absolute & Relative Secrecy

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Protection of Secrecy > General Overview

Business & Corporate Compliance > ... > Protection of Secrecy > Reasonable Measures > Confidentiality Agreements & Restrictive Covenants

HN18[] Protection of Secrecy, Absolute & Relative Secrecy

Although a trade secret cannot be widely known absolute secrecy is not required. The Second Circuit requires that a trade secret be veiled in sufficient secrecy that except by use of improper means, there would be difficulty in acquiring the information.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Computer Fraud > General Overview

HN19[] Fraud, Wire Fraud

Unauthorized phone access to a computer supports a wire fraud conviction where the computer source code is considered property.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Contracts Law > Remedies > Equitable Relief > Injunctions

Torts > ... > Contracts > Intentional Interference > Remedies

Torts > ... > Commercial Interference > Contracts > General Overview

HN20[] Injunctions, Preliminary & Temporary Injunctions

A preliminary injunction is a proper remedy in cases alleging a tortious interference with contract.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN21[] Tying Arrangements, Clayton Act

Under *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, and *Section 3* of the Clayton Act, *15 U.S.C.S. § 14*, the elements that will establish that a tying arrangement is per se illegal are: 1) effect on a not insubstantial amount of interstate commerce; 2) a tying and a tied product; 3) sufficient market power to enable the seller to coerce the buyer to accept the tied product and actual coercion; and 4) anticompetitive effects in the tied market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN22[] Price Fixing & Restraints of Trade, Tying Arrangements

The requirement that a not insubstantial amount of interstate commerce be affected in the tied market is a de minimis requirement. The relevant inquiry is the absolute dollar amount of the goods affected in the tied product market, as opposed to the proportion of the entire product market that the affected goods comprise. The Supreme Court has held amounts ranging from as little as $ 60,800 to be not insubstantial. The Second Circuit has held that $ 60,000 would definitely meet the substantiality threshold.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN23[] Price Fixing & Restraints of Trade, Tying Arrangements

To determine whether two distinct products exist in an alleged tying arrangement, the court should focus on the character of the demand for each product rather than on the function of the products.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN24[] Price Fixing & Restraints of Trade, Tying Arrangements

The Supreme Court has stated that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. Accordingly, not every refusal separately to sell two products is a restraint of trade. Only those refusals to sell products separately that impose an unreasonable restraint on trade. Arrangements that meet the characteristics of a per se illegal tie-in are presumptively unreasonable and therefore objectionable under the ***antitrust law***.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN25[] **Sherman Act, Claims**

To establish a claim for illegal monopolization, a party must show that the alleged monopolist possesses monopoly power in the relevant market, and that it has the intent to monopolize.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN26[] **Antitrust & Trade Law, Sherman Act**

Section 2 of the Sherman Act, *15 U.S.C.S. § 2*, provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN27[] **Relevant Market, Product Market Definition**

The party alleging the monopoly violation bears the burden of establishing the relevant market.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN28[] **Relevant Market, Product Market Definition**

The term "monopoly power" only has meaning if applied to a particular market. Defining the relevant market requires, at a minimum, determining the relevant product market and the relevant geographic area of competition. A market definition is necessary to determine whether the alleged monopolist has sufficient market power to meet the monopoly threshold.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN29[] **Regulated Practices, Market Definition**

The standard the United States Supreme Court has enunciated as guiding the determination the parameters of a product market is the reasonable interchangeability test. The test of reasonable interchangeability comprises consideration of three issues. The first issue is functional interchangeability -- the degree to which various products are able to perform the same functions. A second aspect is reactive interchangeability. This concept represents the effect that a change in price of product X has on the demand for product Y. A third aspect is supply substitutability which refers to the extent to which producers would be willing to shift their resources from production of product X to production of product Y in response to price changes in product market Y, the alleged monopolized market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Evidence > Burdens of Proof > General Overview

HN30[] **Monopolies & Monopolization, Attempts to Monopolize**

A party asserting a claim of attempted monopolization must prove specific intent to monopolize and a dangerous probability of monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN31[] **Monopolies & Monopolization, Attempts to Monopolize**

A claim for attempted monopolization requires proof of specific intent to monopolize because conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a specific intent; an intent which goes beyond the mere intent to do the act. Proof of such specific intent may be inferred from conduct of the seller, documentation, or industrial background. It may also be proved directly where internal memoranda or statements by employees indicate such a specific intent.

Counsel: [1]** Leventhal & Senter, Washington, District of Columbia, Meredith S. Senter, of counsel, Hartman & Craven, New York, New York, Gary Stahl, of counsel, Ropes & Gray, Washington, District of Columbia, for Plaintiff.

Milberg, Weiss, Bershad, Specthrie & Lerach, New York, New York, Jared Specthrie and Sanford P. Dumain, of counsel, Fryer, Ross & Gowen, New York, New York, Hugh N. Fryer, of counsel, for Defendants.

Judges: Edelstein, United States District Judge.

Opinion by: EDELSTEIN

Opinion

[*1741]** **[*223]** OPINION AND ORDER

EDELSTEIN, UNITED STATES DISTRICT JUDGE

Plaintiff, Telerate Systems, Inc. ("Telerate"), a provider of financial information, has moved preliminarily to enjoin the defendants, Programit, Inc. ("Programit"), and its chairman and chief executive officer, Marshall Caro ("Caro"), from selling, manufacturing, and distributing a software package called "Excel-A-Rate." Plaintiff claims that defendants have 1) violated the copyright laws; 2) misappropriated plaintiff's trade secrets; 3) interfered with contracts between Telerate and some of their customers; and 4) violated the Telecommunications Act. [1] Defendants have cross-moved preliminary to enjoin plaintiff from disconnecting **[**2]** Excel-A-Rate users from the Telerate network. Defendants contend that plaintiff has violated the federal antitrust laws. Plaintiff's motion is granted. Defendants' motion is denied. [2]

BACKGROUND

Telerate is a provider of computerized financial information. Specifically, plaintiff provides "real time" prices, rates, and other information for various financial instruments and commodities, as well as a news wire. Programit is a computer software development company that has manufactured and sold a program **[**3]** it calls "Excel-A-Rate." The "Excel-A-Rate" program permits a subscriber to use a personal computer ("PC") to receive and to analyze the financial information provided by Telerate.

Plaintiff offers access to its database by several different methods. The most commonly used access method is through the Standard Telerate Network ("STN"). STN uses a number of telephone "party lines," **[*224]** each of which serves up to 16 subscribers. Each of the 16 parties on the line uses a terminal, called the Standard Telerate Terminal, which is leased to them by Telerate. Terminals on the STN may both receive and transmit data. The STN is the focus of this lawsuit.

[*1742]** Plaintiff also offers access to its database through the STN "party lines" using a subscriber's own equipment, typically a personal computer ("PC"). *See* Cowles Reply Affid. paras. 16, 17. [3] To use this "hybrid" service, a subscriber must obtain permission from Telerate, which then supplies the subscriber with a floppy disk to program the PC. This service is more expensive than the STN service using the Telerate terminal.

[4]** The information in the Telerate database may also be received using Standard Output Protocol ("SOP") service. Under SOP service, a Telerate regional computer is connected directly by a point-to-point communication line to the customer's computer. Telerate does not provide a terminal to SOP customers. SOP subscribers not only can receive data, but also may store the data, process it and display it on multiple screens that are connected to their computer. This service is significantly more expensive than STN and is economical only if a number of terminals are used.

Telerate also offers Telerate Access Service ("TAS"). TAS subscribers use their own terminals and access the database through Tymnet, a private network. As under the "hybrid" STN service, Telerate provides a TAS subscriber with a floppy disk containing a program that allows access to the system.

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[1] The complaint also contains a Lanham Act claim and state law theft of services and unfair competition claims. Although these claims were not addressed at the hearing on the motion for a preliminary injunction, plaintiff has reserved the right to pursue these claims at trial.

[2] Plaintiff moved to supplement the record with additional affidavits. Defendants oppose this motion. The court has considered this additional material, however, the additional material did not affect the outcome of the motion.

[3] Richard J. Cowles is Executive Vice President of Telerate.

Telerate also offers two related services: Broadcast Service, whereby subscribers receive information via satellite and Sideband Service by which subscribers receive information through an FM radio link. Under these two access modes, the customer uses his own equipment, usually a PC, and a floppy disk provided by Telerate. These **[**5]** two services do not allow access to the entire database. Telerate also provides access to its database through other financial information networks by means of such other networks' equipment, and has also provided a number of multi-drop "party lines" to a company in Canada that relicenses access to the ultimate consumer.

Plaintiff advised defendants that it considered the use of the Excel-A-Rate to be a violation of the Standard Telerate Agreement, which is the contract between Telerate and STN subscribers. Plaintiff has also advised subscribers that have informed Telerate of plans to install Excel-A-Rate that this would constitute a violation of the standard agreement.

The standard Telerate agreement provides that the subscriber shall not move Telerate equipment and that no foreign equipment shall be interfaced with Telerate equipment. For a fee, Telerate will waive this provision and permit subscribers to attach equipment to the Telerate terminal including a printer or a PC using the Excel-A-Rate program.

Excel-A-Rate

The Excel-A-Rate program permits an STN subscriber to receive Telerate data through a PC rather than a Telerate Terminal. Excel-A-Rate enables the PC to **[**6]** emulate the Telerate Terminal because it contains the Standard Telerate Protocol ("STP"). A protocol is a series of procedures and conventions that govern communications between a computer and various terminals linked to that computer. *See* Affidavit of Anthony Sabatini, Jr. para. 2 ("Sabatini Affid."). [4] Put another way, the protocol tells the computer "how" as opposed to "what" to communicate. *See* Sabatini Affid. para. 2.

A PC equipped with Excel-A-Rate does more than the basic Telerate terminal. In addition to simply sending, receiving, and displaying data, Excel-A-Rate permits the user continuously to update data requests and also to obtain a hard copy of the data. Excel-A-Rate also allows the subscriber to copy the data onto a disk and analyze the **[*225]** data. Further, Excel-A-Rate enables the user to attach additional terminals to the system.

Defendants have marketed Excel-A-Rate as a "way to get the most from **[**7]** Telerate." *See* Plaintiff's Ex. 4. A fact sheet distributed by defendants describes the Excel-A-Rate as a software package that replaces the Telerate terminal and enables a subscriber to connect a PC directly to the Telerate data line. Defendants promotional literature has also focused on the updating and copying features of the program.

Relationship Between Caro and Telerate

From late 1980 until early 1983, defendant Caro worked for Telerate as a consultant. Caro's first project was to develop a terminal that would permit a user to obtain multiple page updates of data and to display them on multiple screens. As part of this project, Caro worked on a written description of the Standard Telerate Protocol. In order to create this document, Caro was given access to the STP. In May of 1981, Caro completed the description of the STP. The completed document contained the following legend:

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Caro was also involved in a number of other **[**8]** projects for Telerate including: writing a description and implementation guide for the SOP; development of a PC terminal that would use the STP; work on a "driver" for a

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[4] Anthony Sabatini, Jr. is Vice President for Systems Development of Telerate.

PC that would use a standard industry protocol; and work on documenting a broadcast protocol. Sabatini Reply Affid. para. 62. The PC terminal project and the broadcast protocol project both involved access to the STP.

I. PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

In this circuit, ***HN1***[] the standard for the issuance of a preliminary injunction is a showing of "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious question 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 injunctive relief." *Kaplan v. Board of Educ., 759 F.2d 256, 259 (2d Cir. 1985)*; *accord* *Patchogue Nursing Center v. Bowen, 797 F.2d 1137, 1141 (2d Cir. 1986)*, *cert. denied*, *479 U.S. 1030, 107 S. Ct. 873, 93 L. Ed. 2d 828 (1987)*.

LIKELIHOOD OF SUCCESS ON THE **[**9]** MERITS

A. TORTIOUS INTERFERENCE WITH CONTRACT

HN2[] To establish tortious interference with contract under New York law, plaintiff must prove that:

1) there is a valid contract between the plaintiff and a third party; and

2) the defendant knew of the contract; and

3) the defendant intentionally and improperly procured the breach of that contract; and

4) damages resulted therefrom.

Forty Exchange Co. v. Cohen, 125 Misc. 2d 475, 481-82, 479 N.Y.S.2d 628, 633 (N.Y. Civ. Ct. 1984); *see* *Universal City Studios, Inc. v. Nintendo Co., 797 F.2d 70, 75 (2d Cir. 1986)*.

There is no dispute that there is a valid contract between the plaintiff and its subscribers. Further, it is clear that defendants had knowledge of the contract as a result of the work performed for Telerate and based on letters from Telerate advising defendants of the contracts. It is also clear that defendants induced subscribers to use the Excel-A-Rate program instead of the Telerate terminal. The defendants' advertising and "fact sheets" pointedly seek to have subscribers disconnect **[**10]** their Telerate terminals and use a PC to perform functions that the terminal cannot. Finally, the use of Excel-A-Rate will cause delays in response time for requested information. This delay damages the performance of the system and diminishes plaintiff's reputation. If the delays are frequent many subscribers are likely to switch **[*226]** to another information provider. This satisfies the fourth element of the test.

The only dispute regarding this claim centers on the meaning of the Telerate contract. Depending on the interpretation, the use of Excel-A-Rate may or may not constitute a breach of the agreement. If it is a breach, defendants may be found to have induced that breach and the third element of the claim will be satisfied.

The standard contract provides in part that:

> 1. Subscriber shall pay Telerate . . . monthly fees . . . for the Services. . . which include the equipment and information comprising the Services. . . . The terms of this Agreement shall commence on the date following installation of the equipment. . .
>
> 6. The equipment may not be moved, modified, or interfaced with any other equipment without Telerate's prior written consent. Subscriber shall **[**11]** be responsible for all physical loss or damage to the equipment used to deliver Services to its premises unless such loss or damage is due entirely to the fault or negligence of Telerate. . . .

Telerate contends that the contract is violated in two ways. First, in order to install the PC, the Telerate terminal must be disconnected and moved. Second, if the telephone lines that are used to transmit the date to the users location are deemed to be "Telerate Equipment," attaching the PC to the telephone lines will constitute an unauthorized interface.

Excel-A-Rate is designed to be connected directly to the telephone data line. [5] Testimony of Marshall Caro, Tr. at 177. Thus, the installation of Excel-A-Rate would require the user to move the Telerate Terminal, which would violate the contract.

[*1744]** **[**12]** With respect to plaintiff's second claim under the contract, it is disputed whether the data lines constitute "Telerate Equipment." Defendants contend that the "equipment" referred to in the contract means only the Telerate terminal.

The court finds that the contract is not ambiguous regarding the meaning of "equipment." ***HN3***[] While the two parties disagree as to the meaning of the term, this does not necessarily establish that the contract is ambiguous. *Libra Bank Ltd. v. Banco Nacional De Costa Rica, 570 F. Supp. 870, 893 (S.D.N.Y. 1983)*. The court finds that the term "equipment" includes all equipment used to deliver the service to the customer including the main computer, the terminal lines and the terminal. [6] This definition is consistent with paragraph six of the contract which uses the term "equipment" with the phrase "used to deliver Services to its premises." The equipment therefore constitutes more than simply the on-site Telerate terminal and includes all of the equipment needed to deliver the service.

[13]** Given this definition of "equipment" the use of Excel-A-Rate constitutes a breach of the agreement in that foreign equipment, specifically the PC, is interfaced with the Telerate data line. Plaintiff has established a likelihood of success on the merits of the interference with contractual relationship claim.

B. COPYRIGHT CLAIM

Plaintiff claims that defendants have violated the federal copyright laws by selling Excel-A-Rate and inducing purchasers to violate plaintiff's copyright by copying the Telerate database with Excel-A-Rate. Defendants assert that plaintiff does not hold a valid copyright. In the alternative, defendants claim that even if there is a valid copyright, there is no infringement of **[*227]** plaintiff's display right because Excel-A-Rate users have not publicly displayed the database. Defendants also argue that the copying of the database by Excel-A-Rate users constitutes a fair use. Finally, defendants oppose this claim by asserting that they cannot be found vicariously liable for any violation of the copyright laws by Excel-A-Rate users.

1. *Prima Facie Copyright Infringement Claim*

[14]** ***HN4***[] A plaintiff in a copyright case must prove two elements: (1) ownership of the copyright; and (2) infringement by the defendant. *See* *Nimmer on Copyright § 13.01*. ***HN5***[] A copyright registration certificate "made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." *17 U.S.C. § 410(c)*. Thus, the existence of a registration certificate shifts to the defendant the burden of disproving plaintiff's ownership of the copyright. Plaintiff has produced a certificate of registration and contends that it has thereby established a prima facie case of copyright ownership. *See* Complaint Ex. 1.

Defendants, however, allege that plaintiff has failed to establish a prima facie case because the true date of first publication was more than five years before the registration certificate. First, defendants indicate that Telerate has been in business since 1970 and the registration certificate recites October 18, 1985 as the date of first publication. Defendants **[**15]** reason that the database must have been first published more than five years prior to the date of registration, which was October 25, 1985. Second, defendants contend that because the database is constantly updated it "is patently inconsistent . . . that the copyright for the database at that given time was registered on October 25, 1985." Defendants' Memorandum in Opposition at 42 ("Defendants' Memo"). Accordingly, the defendants conclude that plaintiff has not established a prima facie case of copyright ownership.

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[5] The Excel-A-Rate PC may also be attached to one of the ports of the Telerate Terminal. This hook up does not permit the Excel-A-Rate to perform some of the additional features noted previously. It is clear that this method of attaching the Excel-A-Rate would be in violation of any interpretation of the Standard Agreement.

[6] As discussed *infra* at 234, the product Telerate subscribers purchase is access to the Telerate database. The system and all the equipment necessary to provide that access is better viewed as one entity.

First, defendants' position is merely conjecture. Defendants have adduced no evidence that would suggest a different date of first publication for the database than the date stated on the registration certificate. Consequently, because the registration certificate is prima facie evidence of the facts stated in it, *see* [17 U.S.C. § 410(c)](), the certificate is prima facie evidence that the date of first publication is October 18, 1985. Defendants have failed to disprove that fact, thus the court finds that plaintiff has established a prima facie case of copyright ownership.

Moreover, **[**16]** ***HN6***[] it is within the court's discretion to determine the evidentiary weight to be afforded a registration certificate dated more than five years after the first date of publication. *See* *17 U.S.C. § 410(c)*. Under the Copyright Act of 1909, which was in effect until 1978, a registration certificate was prima facie evidence of a copyright, regardless of the date of first publication. *See* *Nimmer on Copyright § 12.11[A]*. The **[***1745]** 1976 Act added the five year requirement because "the longer the lapse of time between publication and registration the less likely to be reliable are the facts stated in the certificate." H.Rep. No. 1476, 94th Cong., 2d Sess., 156, *reprinted in* 1976 Code Cong. and Admin. News 5659, 5772-73. The court, however, finds no reason to consider the plaintiff's registration certificate unreliable. Accordingly, the court would, in any event, accept the date of first publication on the registration certificate for purposes of establishing a prima facie case under *17 U.S.C. § 410(c)*. [7]

[17]** The defendants also assert substantive defenses to the claim of copyright infringement. Defendants contend that they are not liable for infringement under a theory of vicarious liability or contributory infringement [8] **[*228]** as alleged by the plaintiff. Second, defendants assert the defense of fair use. Finally, defendants claim that they are authorized to display publicly Telerate's database. [9]

2. *Vicarious Liability*

It is undisputed that the defendants in this case have not themselves copied the Telerate database. **[**18]** Plaintiff, therefore, bases its claim on a theory of vicarious liability. Telerate alleges that, by providing the means by which its customers may copy Telerate's database, defendants are vicariously liable for the alleged infringement by its customers. Defendants contend that vicarious liability is unavailable in copyright actions.

In *Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984)*, the Supreme Court addressed the issue of vicarious liability in the context of a copyright case. In *Sony*, two producers who held copyrights on a substantial number of motion pictures and television programs sought damages and an injunction against the Sony Corporation of America ("Sony"), a manufacturer of home video recorders. The case turned on whether Sony could be held liable for the clearly unauthorized copying of plaintiffs' copyrighted works by the purchasers of Sony video recorders. In the absence of specific statutory guidance, the Supreme Court analogized to the field of patent law and concluded that:

> **[**19]** ***HN7***[] The sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of *substantial noninfringing uses*.

Sony, supra, 434 U.S. at 442 (emphasis added).

Defendants contend that the *Sony* Court "explicitly rejected" the theory of contributory infringement. This is simply not true. The Court clearly stated that contributory infringement is available in cases in which it is necessary to protect a copyright holder's statutory monopoly by extending it to protect against copying devices. *See Sony, supra*, 434 U.S. at 442. The Court was careful to note that the main issue is to balance the interests of the copyright

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[7] Even if the certificate were in fact found to have been issued more than five years after the actual date of first publication, the court would be inclined to give the certificate the weight of prima facie evidence, as permitted under *Section 410(c)*.

[8] The theory of vicarious liability in the context of intellectual property is alternatively called "contributory infringement."

[9] The defendants also assert the defense of unclean hands defense by alleging that the plaintiff has violated the federal antitrust laws. Because the court finds that defendant did not demonstrate a likelihood of success on the merits of those claims, the unclean hands defense is unavailing and, accordingly, not considered in the instant discussion.

holder against the rights of others freely to engage in unrelated areas of commerce. *See id*. Accordingly, the Court settled on the fairly strict standard that to sustain a claim of contributory infringement a plaintiff must demonstrate that a defendant's product has no "substantial noninfringing uses." *Id*.

The defendants contend that Excel-A-Rate has "at least one **[**20]** significant use . . . which cannot conceivably be termed 'infringing,'" namely that it "enables Telerate's customers to use a personal computer to analyze the data received by Telerate." Defendants' Memo at 32. The data, however, must be copied by the program in order to analyze it. Contrary to defendants' contention, therefore, the suggested noninfringing use is in fact the primary infringing activity -- copying. Quite clearly, absent a valid defense, copying is an infringement of copyright. Accordingly, the court proceeds to evaluate the defense of fair use asserted by the defendant.

3. *Fair Use Defense*

HN8[] The Copyright Act provides that "the fair use of a copyrighted work . . . is not an infringement of copyright." *17 U.S.C. § 107*. *Section 107* also provides four factors that a court must consider in determining whether a particular use is fair:

> 1. the purpose and character of the use, including whether such use is of a **[*229]** commercial **[***1746]** nature or is for nonprofit educational purposes;
> 2. the nature of the copyrighted work;
>
> 3. the amount and substantiality **[**21]** of the portion used in relation to the copyrighted work as a whole; and
> 4. the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1)-(4).

a. Purpose and Character of Use

Telerate customers copy the information provided by Telerate primarily to analyze it and to apply the analysis in the financial markets. The purpose of the infringers' use of Telerate's work is thus for private commercial gain. ***HN9***[] Although a commercial use does not by itself defeat a defense of fair use, "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony, supra, 464 U.S. at 451*. Further, "the ***HN10***[] crux of the profit/non-profit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material *without paying the customary price." Harper & Row, Publishers, Inc. v. Nation Enterps., 471 U.S. 539, 562, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985)* **[**22]** (emphasis added). It appears that plaintiff normally charges customers for the privilege of copying portions of its database and accordingly, it is likely that plaintiffs would prevail on the first factor of the fair use defense.

b. Nature of the Copyrighted Work

The defendants claim that the Telerate database is a compilation and therefore is "more susceptible to a finding of fair use." Defendants' Memo at 35. ***HN11***[] Although the court, in deciding the question of fair use, may consider whether a work is original, imaginative, or creative, it may also consider whether the work represents "a substantial investment of time and labor made in anticipation of financial return." *MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981)*. The work in question appears to have some elements of both -- that is, it may not be imaginative or creative in a literary sense, but it does represent a significant investment of time and effort for the sole purpose of financial return. Accordingly, the nature of plaintiff's work dictates a result neither in favor nor against a finding of fair use.

[23]** c. Amount and Substantiality of Portion Used

The defendants assert in conclusory fashion that "only a small portion of Telerate's database can be copied at any time" and that "typically, only several pages out of the database of over 20,000 pages are of interest to the viewer." Defendants' Memo at 35. The defendants thus conclude that the portion of the database used by the alleged infringers is minor and points toward a finding of fair use.

In considering the third factor of the fair use defense, a court must consider not only the quantitative but also the qualitative substantiality of the copying. *See* Nimmer, *Nimmer on Copyright para. 13.05[A][3]* at 13-79. The database in question is, as defendants admit, designed to be used and read one page at a time. Its essence is the price quotations of various securities and newsletter-type of information. It is misleading therefore to suggest that copying only a few pages of 20,000 total pages of information on the database is not substantial. Although as a purely quantitative matter such use is not substantial, qualitatively, copying those few pages may be substantial in light of the structure and typical use of the database. **[**24]** Thus, it seems likely that plaintiffs would prevail on the issue of substantial use.

d. Effect on the Market

HN12[] This element "requires proof either that a particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." *Sony, 464 U.S. at 451*. Plaintiff need not show actual present harm, nor need it show with certainty that future harm will result. *Consumers Union of the United States, **[*230]** Inc. v. General Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983)*, *cert. denied*, *469 U.S. 823, 83 L. Ed. 2d 45, 105 S. Ct. 100, 224 U.S.P.Q. (BNA) 616 (1984)*. Defendants contend that the copying feature of Excel-A-Rate does not adversely affect the potential market for Telerate's database. To the contrary, defendants suggest that the claimed improvement in service Excel-A-Rate produces may actually increase the market for Telerate. This argument is unavailing for two reasons.

First, Telerate also provides an optional copying feature with its service, for which it charges **[**25]** a separate fee. The standard Telerate service does not include copying. Thus, defendants' product allows customers to use Telerate's database in a manner that exceeds the purpose contemplated by the agreement between the standard service user and Telerate. **[***1747]** Consequently, it is fair to conclude that Telerate loses the opportunity to charge for the privilege of copying its database.

Second, the use of Excel-A-Rate is likely to impair service to other Telerate subscribers on the same party line. *See* *supra at 225*. Therefore, the unauthorized copying of the database by the defendants' product may result in a deterioration of service to Telerate customers, which may in turn erode Telerate's market by damaging its reputation for reliability. Accordingly, it is likely that plaintiff will prevail on the factor of effect on the market.

e. Fair Use Summary

In summary, it appears that factors one, three, and four enumerated in *Section 107* weigh against a fair use defense. Although the factors of *Section 107* are merely illustrative and not exhaustive, *see* Nimmer, *Nimmer on Copyright para. 13.05[A]* at 13-66 to 13-67, at this stage of the case, those factors suggest that, at a minimum, **[**26]** plaintiffs have demonstrated a likelihood of success on the merits of its copyright infringement claim.

C. TELECOMMUNICATIONS ACT

Plaintiff asserts that defendants' sale of the Excel-A-Rate program is a violation of Section 705 of the Communications Act. *47 U.S.C. § 605*. [10] Section 705(a) is composed of four sentences containing various prohibitions. Plaintiff contends that defendants have violated the first and fourth sentences. The first sentence provides that:

> Except as authorized by Chapter 119, Title 19, ***HN13***[] no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney. . . .

[27]** ***HN14***[]

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[10] Congress amended the Telecommunications Act in 1984 and redesignated *Section 605* as Section 705. Nevertheless, Section 705 is still codified at *47 U.S.C. § 605*.

In order to establish liability under the first sentence of Section 705, the defendant must have (1) intercepted or aided in the interception of, and (2) divulged or published or aided the divulging or publishing of, a communication transmitted by the plaintiff. *See* California Satellite Systems v. Seimon, 767 F.2d 1364, 1366 (9th Cir. 1985); Note, *The Piracy of Subscription Television: An Alternative to the Communications Law*, 56 S. Cal. L. Rev. 935940-41 (1983) [hereinafter *Piracy of Television*]. Further, the signal must not have been intended for the general public. *See* 47 U.S.C. 605(a).

In this case, it is uncontested that Excel-A-Rate users have intercepted a communication transmitted by the plaintiff that was not intended for the general public. There are, however, two issues relating to the claim under the first sentence: (1) whether there has been an *unauthorized* interception of the communication; and (2) whether there has been any publication or divulging of the communication. *See* Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 127 (2nd Cir. 1982). **[**28]**

It is uncontested that Excel-A-Rate users have intercepted a communication transmitted by the plaintiff that was not **[*231]** intended for the general public. Although not conceded, it is equally apparent that the Excel-A-Rate permits a Telerate subscriber to receive unauthorized communications. The Standard Telerate Agreement provides that the subscriber shall not interface any foreign equipment with or move Telerate equipment. As discussed with respect to the tortious interference with contract claim, the use of the Excel-A-Rate constitutes a breach of the Standard Telerate Agreement. *See* supra at 231. Therefore, the receipt of information using the Excel-A-Rate is unauthorized.

The Excel-A-Rate user does not necessarily divulge or publish the transmission received to any third party. Nevertheless, courts applying Section 705 have employed a legal fiction to bring sellers and manufacturers of interception devices within the scope of this section of the statute. *Piracy of Television, supra*, 56 S. Cal. L. Rev. at 946-47; *see* Brown & Helland, Section 605 *of the Communications Act: Teaching A Salty Old Dog New Tricks*, 34 Cath. U.L. Rev. 635, 664 (1984). **[**29]** ***HN15***[] Courts have held that the act of viewing a transmission that the viewer was not authorized to receive constitutes a publication. *See, e.g.,* California Satellite Systems v. Seimon, 767 F.2d 1364, 1366 (9th Cir. 1985); National Subscription Television v. S & H TV, 644 F.2d 820, 826 (9th Cir. 1981); Ciminelli v. Cablevision, 583 F. Supp. 158, 164 (E.D.N.Y. 1984) (appendix reprinting ruling from the bench in *Cablevision v. Annasonic Electronic Supply*, No. CV-83-5159 (E.D.N.Y. Feb. 10, 1984)); *Cox Cable Cleveland Area, Inc. v. King, 582 F. Supp. 376, 380 (N.D. Ohio 1983)*. While **[***1748]** this legal fiction has been criticized by commentators, *see e.g*. Brown & Helland, *supra*, 54 S. Cal. L. Rev. at 946-47, it is consistent with the broad scope that Congress has indicated should be given to the statute, 130 Cong. Rec. S14286 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood), *reprinted in* 1978 U.S. Code Cong. & Ad. News 4746; *see also* Electronic Communications Privacy Act of 1986, H.R. Rep. No. 647, 99th **[**30]** Cong., 2d Sess. 22 (1986) (Communications Act might have some limited application to interception of data transmissions and electronic mail by private parties). Further, by interpreting the statute in this manner, it includes within the scope of this section activities that should be prohibited and might otherwise not be covered by any statute. *See* Ciminelli, 583 F. Supp. at 164. Under these circumstances, the court will continue to employ this legal fiction.

The viewing of the data by the Telerate subscriber using Excel-A-Rate, therefore, constitutes a publication within the meaning of the statute. Further, the use of the Excel-A-Rate product in conjunction with a personal computer to receive Telerate data is not an "authorized channel" of transmission and thus a violation of Section 705. Thus, plaintiff has established a likelihood of success on the merits of the claim relating to the first sentence on Section 705 and accordingly, the court need not address the plaintiff's alternative claim under § 705.

D. MISAPPROPRIATION OF A TRADE SECRET

With regard to trade secrets, New York has adopted the approach of the Restatement of Torts (1939). [11] *Q-Co Industries, Inc., v. Hoffman, 625 F. Supp. 608, 616 (S.D.N.Y. 1985)*. **[**31]** *See* *Delta Filter Corp. v. Morin, 108 A.D.2d 991, 992, 485 N.Y.S.2d 143, 144* (3rd Dep't 1985). The Restatement states that ***HN16***[] "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . . A trade secret is a process or device for continuous use in the operation of the business." *Restatement of Torts § 757 comment b*.

[*232] The STP would appear to be the type **[**32]** of "process or device" typically considered a trade secret. It is at the heart of the operation of plaintiff's business and is akin to a formula or pattern. *See* Sabatini Affid. at 28. Further, ***HN17***[] it is clear that computer software is protectible under the law of trade secrets. *See* *University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 534 (5th Cir. 1974)*; *Q-Co., supra, 625 F. Supp. at 617*. Finally, the STP confers a competitive advantage on Telerate by permitting it to provide access to its database in a secure and cost effective manner. *See* Affidavit of Richard J. Cowles at 12 ("Cowles Affid."). Even a slight competitive edge will satisfy this requirement of trade secret protection. *See* *Sheridan v. Mallinckrodt, Inc., 568 F. Supp. 1347, 1352 (N.D.N.Y. 1983)*. Nevertheless, defendants contend that the STP is not a trade secret because (1) the STP was not sufficiently "secret," and (2) the STP is not particularly complex and could have been reproduced through reverse engineering. For the reasons set forth below the court **[**33]** disagrees and finds that there is a likelihood that plaintiff will successfully prove that its STP is a trade secret that defendants misappropriated.

Defendants contend that STP was not veiled in sufficient secrecy to constitute a trade secret because defendant Caro was not informed the STP was a trade secret, no written confidentiality agreement was executed between Telerate and Caro, and the STP was revealed to various outside parties. ***HN18***[] Although a trade secret cannot be widely known, *see* *Ferber v. Sterndent Corp., 51 N.Y.2d 782, 433 N.Y.S.2d 85, 412 N.E.2d 1311 (1980)*, absolute secrecy is not required. *See* *Sheridan, supra, 568 F. Supp. at 1352*; *Q-Co, supra, 625 F. Supp. at 617*; *General Aniline & Film Corp. v. Frantz, 50 Misc. 2d 994, 272 N.Y.S.2d 600, 608 (Sup. Ct. 1966)*; *Fairchild Engine and Airplane Corp. v. Cox, 50 N.Y.S.2d 643, 62 U.S.P.Q. (BNA) 98 (Sup. Ct. 1944)*. The Second Circuit requires that a trade secret be veiled in sufficient secrecy that "'except by use of improper means, there would **[**34]** be difficulty in acquiring the information.'" *Q-Co Industries, supra, 625 F. Supp. at 617* (quoting *A.H. Emery Co. v. Marcan Products Corp., 389 F.2d 11, 16* (2d Cir.), *cert. denied*, *393 U.S. 835, 21 L. Ed. 2d 106, 89 S. Ct. 109, 159 U.S.P.Q. (BNA) 799 (1968))*; *see also* **[***1749]** *Sheridan, supra, 568 F. Supp. at 1352*.

Telerate has taken substantial measures to safeguard the secrecy of the STP that indicate that the STP was a secret, including restricting access to the STP by company employees, enforcing corporate policy against disclosure of trade secrets, and protecting the allegedly secret information by requiring a password to access the computer files as well as physically guarding the computer installation 24 hours a day. *See* *Delta Filter Corp. v. Morin, 108 A.D.2d 991, 993, 485 N.Y.S.2d 143, 145* (3rd Dep't 1985). Further, Caro's steadfast denials of knowledge of the secrecy of the STP is curious when it is considered that the document he authored for Telerate, which describes in detail the STP, bears a legend that the information therein contained is proprietary in nature and may not be reproduced **[**35]** without the express consent of Telerate.

The defendants also contend that one competent engineer, without guidance, could have discovered within one month the STP by reverse engineering. Defendants cite *Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 477, 40 L. Ed. 2d 315, 94 S. Ct. 1879 (1974)* for the proposition that "the ability to use reverse engineering to discover the purported trade secret negates a finding of liability for misappropriation." Defendants' Memo at 58. Defendants mischaracterize the citation to *Kewanee*. The case actually stands for the proposition that the law does not protect the owner of a trade secret from "discovery by fair and honest means such as independent invention, accidental disclosure, or by so-called reverse engineering." *See* *Kewanee, supra, 416 U.S. at 476*. Defendants do not contend, however, that the STP was discovered entirely by reverse engineering; rather, defendants claim that the

[11] The Restatement (Second) of Torts does not treat the law of misappropriation of trade secrets because the Council of the American Law Institute determined that reliance on tort principles in the field of trade regulation had diminished as the field has evolved into an independent area of the law. *See* Restatement (Second) of Torts, Introductory Note to Division Nine.

STP *could have been* discovered by reverse engineering. The *possibility* of discovery by "fair and honest methods" does not preclude the finding of a trade **[*233]** secret. At best, such possibility is one factor to consider **[**36]** in determining the novelty of the alleged trade secret.

Further, the proper focus of inquiry is not whether an alleged trade secret can be deduced by reverse engineering but rather, whether improper means are required to access it. Plaintiff has restricted access to the STP code by limiting the equipment that could be connected to its datalines. Under the terms of the Telerate Agreement, no equipment capable of reading the SOP can be hooked up without Telerate's consent.

Defendants indicate that a data scope was connected to a customer's data line so that the STP could be obtained. *See* Testimony of Marshall Caro, Tr. at 171. The use of a datascope is in violation of the Telerate Agreement because Telerate Equipment would have to be moved to attach the data scope and the data scope was interfaced with Telerate equipment. *See* *supra at 226*. The interception of the SOP through an unauthorized hookup of a line monitor is not a proper means of accessing the code. *See Ward v. Superior Court of the State of California*, 3 Comp. L. Rep. 206 (Cal. Super. Ct. 1972); *see also* *United States v. Seidlitz, 589 F.2d 152 (4th Cir. 1978)*, *cert. denied* **[**37]** , *441 U.S. 922, 60 L. Ed. 2d 396, 99 S. Ct. 2030 (1979)* (unauthorized ***HN19***[] phone access to computer supports wire fraud conviction where computer source code considered property under statute); *Hancock v. Decker, 379 F.2d 552 (5th Cir. 1967)* (conviction for computer program theft under Texas law).

Accordingly, the term "reverse engineering" is not a talisman that may immunize the theft of trade secrets. The relevant inquiry remains whether the means used to obtain the alleged trade secret, including reverse engineering, were proper. It appears that these means were not likely proper in the instant case. The court therefore finds that plaintiff's have demonstrated a likelihood of establishing that the STP is a trade secret that was misappropriated by the defendants.

E. IRREPARABLE HARM

Plaintiff claims that the use of the Excel-A-Rate program affects the level of performance of other users on the STN. Specifically, plaintiff contends that Excel-A-Rate slows the response time for page requests and in some instances has disrupts services. To support these claims, **[**38]** plaintiff relied on the testimony of an expert in queuing theory. The court accepts the testimony of the expert as representing Excel-A-Rate's potential impact on the Telerate network. According to the expert, the response time would be increased by 20% if two Excel-A-Rate terminals were attached in place of Telerate terminals on a normal 16 terminal party line. *See* Testimony of Dr. Howard Lee Morgan, Tr. at 45. The expert also noted that if one Excel-A-Rate terminal was attached with the automatic page request feature, the response time would be approximately 15 seconds and if two Excel-A-Rate terminals are attached the response time would go up to two minutes. *See* *id. at 44*. The two minute waiting period would certainly be unacceptable for any person wishing to use the information in the financial markets.

[*1750]** If the use of Excel-A-Rate is not enjoined, there will certainly be a degradation in the performance of the Telerate system. The effect of this degradation of service cannot be compensated in monetary terms and therefore satisfies the irreparable harm prong of the test.

Moreover, plaintiff's copyright claim creates a presumption of irreparable injury. *See e.g.,* *Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983)*, **[**39]** *cert. dismissed*, *464 U.S. 1033, 79 L. Ed. 2d 158, 104 S. Ct. 690 (1984)*; *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir. 1982)*, *cert. denied*, *459 U.S. 880, 74 L. Ed. 2d 145, 103 S. Ct. 176 (1982)*; *American Metro. Enterps. v. Warner Bros. Records, Inc., 389 F.2d 903, 90 (2d Cir. 1968)*. It is also clear that ***HN20***[] a preliminary injunction is a proper remedy in cases alleging a tortious interference with contract. *See* *Sperry & Hutchinson Co. v. Berkeley, 44 Misc. 2d 331, 253 N.Y.S.2d 700 (1963)*, *aff'd*, *22 A.D.2d 762,* ***[*234]*** *254 N.Y.S.2d 231 (1964)*. Thus, even without the evidence supplied by the expert, it is clear that there is sufficient irreparable harm to satisfy the standard for a preliminary injunction.

II. DEFENDANTS' CROSS-MOTION

Defendants have cross-moved for a preliminary injunction alleging that Telerate has violated the federal antitrust laws. Specifically, defendants contend that Telerate (1) engaged in an illegal tying arrangement; (2) maintained **[**40]** an illegal monopoly; and (3) attempted to create and maintain an illegal monopoly. The court will now evaluate the likelihood of defendants' success on the merits of these three claims. [12]

A. Tying Claim

The defendants claim that Telerate has committed a per se violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1 (1982)*, and *Section 3* of the Clayton Act, *15 U.S.C. § 14 (1982)*, by engaging in an illegal tying arrangement. ***HN21***[] The elements that will establish that a tying arrangement is per se illegal are:

1. Effect on a "not insubstantial" amount of interstate commerce; **[**41]**
2. A tying and a tied product;
3. Sufficient market power to enable the seller to coerce the buyer to accept the tied product and actual coercion;
4. Anticompetitive effects in the tied market.

See Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980); *R & G Affiliates, Inc. v. Knoll Intern., Inc., 587 F. Supp. 1395, 1398-99 (S.D.N.Y. 1984)* (Weinfeld, J.).

1. *Effect on Interstate Commerce*

HN22[] The requirement that a "not insubstantial" amount of interstate commerce be affected in the tied market is a de minimis requirement. The relevant inquiry is the absolute dollar amount of the goods affected in the tied product market, as opposed to the proportion of the entire product market that the affected goods comprise. *See Fortner Enterps., Inc. v. United States Steel Corp., 394 U.S. 495, 502, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*. The Supreme Court has held amounts ranging from as little as $ 60,800 to be "not insubstantial." *See United States v. Loew's, Inc., 371 U.S. 38, 49, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*. **[**42]** The Second Circuit has held that $ 60,000 would definitely meet the substantiality threshold. *See Yentsch v. Texaco, 630 F.2d 46, 58 (2d Cir. 1980)*. Although the parties have not set forth the dollar amount of commerce affected in the tied product market, it is apparent from the fact that 16,000 Telerate terminals have been installed, *see* Cowles Affid. para. 2, that a "not insubstantial" amount of commerce is involved in this case.

2. *Two Products*

Programit contends that Telerate's STP lines are a tying product and the terminals it provides to its STN customers are a tied product. The court disagrees.

HN23[] To determine whether two distinct products exist in an alleged tying arrangement, the court should focus on the character of the demand for each product rather than on the function of the products. *See Jefferson Parish Hosp. Dist. No. 4 v. Hyde, 466 U.S. 2, 19, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1983)*. In this case, the demand for Telerate's database cannot readily be distinguished from the demand for the STN terminal.

When customers subscribe **[**43]** to the Telerate service they are purchasing access to the continuously updated database Telerate maintains. The STN service is one of several modes of access that Telerate provides to its database and it is the only one that requires subscribers to use the STN terminal provided by Telerate. *See supra at 223-224*. How the data is displayed cannot be differentiated **[***1751]** from the data itself. To the subscriber, the value of the service **[*235]** is the form of the information a customer receives. In other words, there is no demand for Telerate terminals distinct from the demand for access to the Telerate database.

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[12] Based on the court's finding that plaintiff has made a showing of irreparable harm, the balance of hardships could not tip decidedly in favor of defendants. Accordingly, to prevail on their motion for a preliminary injunction, defendants must demonstrate a likelihood of success on the merits.

When a customer subscribes to Telerate STN service, it bargains for a certain output of information at a given price. Excel-A-Rate users obtain benefits not available to regular STN customers because of the enhanced features of Excel-a-rate. Thus, Excel-A-Rate users get a different product than the STN users get -- they get more information for their dollar. In fact, this notion was the primary marketing tool employed by Programit. *See, e.g.*, Plaintiff's Ex. 4-7.

Consequently, because the product purchased is information in a particular format, and because the format **[**44]** of the information depends on the display terminal, the court finds that the STN terminal and the Telerate database information are not separate products for antitrust purposes.

3. *Market Power and Coercion*

HN24[] The Supreme Court has stated that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish, supra, 466 U.S. at 12*; *see* *United States Steel Corp. v. Fortner Enterps., 429 U.S. 610, 620, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)*. Accordingly, not every refusal separately to sell two products is a restraint of trade. Only those refusals to sell products separately that impose an *unreasonable* restraint on trade. Arrangements that meet the characteristics of a per se illegal tie-in are presumptively unreasonable and therefore objectionable under the ***antitrust law***. *See e.g.,* *Arizona v. Maricopa County Med'l Soc'y, 457 U.S. 332, 342-43, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)* **[**45]** (discussing rationale of per se rule); *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)* (discussing areas in which per se rule has been applied); *International Salt Co. v. United States, 332 U.S. 392, 396, 92 L. Ed. 20, 68 S. Ct. 12 (1947)* (declaring tying arrangements per se illegal).

Coercion is most commonly inferred from what is commonly referred to as "market power" -- the ability of a seller to force a buyer to behave on the basis of considerations other than those relevant in a competitive market. In other words, a plaintiff must establish that the purported illegal tying arrangement displaced the usual market forces, such as price, quantity, and quality.

In this case, there is no indication that Telerate has forced its customers to do anything. Although its standard STN contract requires the use of STN terminals, these terminals are not a prerequisite to receiving information from the Telerate database. Telerate provides several modes of access to its database, and STN is the only one that requires the use of an STN terminal. Thus, customers are free to subscribe to a service other than STN if **[**46]** they do not want to lease the Telerate terminal.

Moreover, the STN service may also be used with the customer's own computer, provided that Telerate is informed. *See* Cowles Reply Affid. paras. 16, 17. This service is, however, more expensive than the basic STN subscription. Nevertheless, merely charging a higher price for the tying product is not equivalent to restraining competition in the market for the tied product. *See* *Jefferson Parish, 466 U.S. at 13*. Exploitation of market power to increase the price of the tying product is not necessarily contrary to the competitive goal sought by the Sherman Act, because, presumably, the higher price is justified by some discernible competitive advantage that the tying product has over other products.

Defendants rely heavily on the Ninth Circuit's opinion in *Digidyne v. Data General, 734 F.2d 1336 (9th Cir. 1984)*, *cert. denied*, *473 U.S. 908, 87 L. Ed. 2d 657, 105 S. Ct. 3534 (1985)*. *Data General* involved litigation between rival computer manufacturers. The defendant in that case, Data General, **[*236]** manufactured a computer system called NOVA, consisting of a central processing **[**47]** unit ("CPU") and a disk operating system called RDOS. The operating system contained the basic commands for operating the system. Data General refused to license the RDOS to all except the purchasers of its NOVA hardware. The Ninth Circuit held that such a refusal was a per se illegal tying arrangement.

The Ninth Circuit focused on the market power and coercion element of a tying arrangement. It concluded that the special attraction of the RDOS, the copyright protection it enjoys, the fact that it is a trade secret, and the fact that purchasers were often locked into the RDOS because of previous investment in application software induced purchasers to choose the NOVA system to give them access to the RDOS based software. Abandoning NOVA would mean scrapping not only the hardware, but the software as well. Consequently, it would have been prohibitively expensive to switch from RDOS, thereby effectively ruling out **[***1752]** an abandonment of the NOVA system. Programit's argument consists primarily of analogizing the facts of *Data General* to the facts of the instant case. The analogy, however, is inapposite. The basis for Data General's market power and coercion was its customers' inability **[**48]** to switch systems. In other words, Data General's customers were forced to purchase NOVA CPU's and some peripherals to obtain what they really wanted: the RDOS based software. In the instant case, Telerate does not condition access to its database on the leasing of terminals from it. Rather, Telerate offers a variety of methods of access to its database that provide various formats and options. What Telerate is doing is selling access to its database and it is not promoting sales or leases of computer hardware.

Consequently, the court finds that Programit has not demonstrated a likelihood of success on the merits regarding Telerate's market power or actual coercion on the part of Telerate.

4. *Anticompetitive Effects in the Tied Market*

The requirement that the party claiming an illegal tie-in prove anticompetitive effects in the tied market is essentially a requirement of harm. Because Telerate's "tying" of products is not per se illegal the effects of such "tying" are necessarily not "anticompetitive." Accordingly, this factor need not be further considered at this stage of the case.

5. *Summary of Tying Claim*

Accordingly, the court finds that defendants have failed **[**49]** to demonstrate a likelihood of success on the merits of its tying claim.

B. Monopoly Claim

Defendants also allege that plaintiff, Telerate, has violated *Section 2* of the Sherman Act, *15 U.S.C. § 2*, which proscribes monopolization and attempted monopolization. [13] **[**50]** ***HN25***[] To establish a claim for illegal monopolization, a party must show (1) that the alleged monopolist possesses monopoly power [14] in the relevant market, and (2) that it has the intent to monopolize. *See United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061* ***[*237]*** *(1980)*. Defendants apparently contend that Telerate has unlawfully used its alleged monopoly power in the market for its database [15] to distort competition in a second market, namely the market for terminals that interact with the Telerate system.

1. *Monopoly Power*

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[13] ***HN26***[] *Section 2* of the Sherman Act provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

15 U.S.C. § 2.

[14] A party may establish monopoly power directly or, more commonly, indirectly by demonstrating that the alleged monopolist has a large share of the relevant product market. The first step in proving market share is the definition of the relevant product market. Defining the relevant market involves determining the various contours of that market: product, geographic area, and time. Further, ***HN27***[] the party alleging the violation bears the burden of establishing the relevant market. In this case, defendants have failed to carry their burden of establishing what is the relevant market. *See generally* Kintner, Federal ***Antitrust Law*** §§ 12.2-12.4.

[15] A complete discussion of the relevant market is set forth below.

HN28[] The term "monopoly power" only has meaning if applied to a particular market. Defining the relevant market requires, at a minimum, determining the relevant product market **[**51]** and the relevant geographic area of competition. A market definition is necessary to determine whether the alleged monopolist has sufficient market power to meet the "monopoly" threshold. *See United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*.

In this case, the defendants first contend that the relevant market is the "provision of computerized data relating to transactions in United States Government securities." *See* Defendants' Proposed Findings of Fact para. 46. The defendant bases its assertion that Telerate has monopoly power in this alleged market on three items of evidence. First, defendant cites a Dean Witter research note, *see* Plaintiff's Ex. 1, which concludes Telerate "dominates the U.S. market for its type of service." *See* Defendants' Conclusions of Law at 12. Second, defendants assert that Telerate's marketing officer, Scott Rumbold, agreed to the characterization in the Dean Witter report, thereby admitting that Telerate dominates the United States market. *See* Defendants Ex. 3. Third, defendants contend that Telerate's prospectus and 10K **[***1753]** statement filed with the SEC support a finding of monopoly **[**52]** power by indicating that Reuters is the only company with comparable services and it has only a limited market share in the United States.

The court is not convinced that defendants have demonstrated a likelihood of success in establishing that Telerate has monopoly power in the market for "computerized data relating to transactions in United States Government securities," which defendants contend is the relevant market. *See* Defendants' Proposed Findings of Fact para. 46. Defendants' reliance on the Dean Witter report, as well as Mr. Rumbold's acquiesence in the conclusions of that report, is misplaced. That report was prepared by Dean Witter to recommend the purchase of Telerate stock. The report does not establish the relevant market within which Telerate operates; rather it was intended as a prognosis of future performance of the company's stock. [16]

[53]** In any event, the court does not find the Dean Witter research note to be probative of market power. The document bears a legend stating that the "accuracy or completeness [of the sources of the report] is not guaranteed." Moreover, it cannot be considered an expert opinion because its author has not been qualified as such. Finally, the report was put together to recommend the purchase of Telerate stock, rather than to define the relevant market.

HN29[] The standard the Supreme Court has enunciated as guiding the determination the parameters of a product market is the "reasonable interchangeability" test first set forth in *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)* and more fully developed by subsequent case law. *See United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*; *International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 3 L. Ed. 2d 270, 79 S. Ct. 245 (1959)*. **[**54]** The test of reasonable interchangeability comprises consideration of three issues. The first issue is "functional interchangeability" -- the degree to which various products are **[*238]** able to perform the same functions. A second aspect to reasonable interchangeability is reactive interchangeability, also known as cross-elasticity of demand, in economic jargon. Simply stated, this concept represents the effect that a change in price of product X has on the demand for product Y. *See e.g., du Pont, supra, 351 U.S. at 380-81*. A third aspect to reasonable interchangeability is supply substitutability -- a concept similar to cross-elasticity of demand but applied to the supply side of a market. Supply substitutability refers to the extent to which producers would be willing to shift their resources from production of product X to production of product Y in response to price changes in product market Y, the alleged monopolized market.

The defendants have not attempted to satisfy the reasonable interchangeability test in any way. Rather, as noted above, the defendants, relying on third-party statements regarding market dominance, purported admissions, and

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[16] It is amusing to note that the report observes that Telerate "dominates the U.S. market for its type of service" without describing the relevant market. In the same breath, the report indicates that Merrill Lynch and IBM are introducing a competing financial information service "[that] has certainly exerted a negative influence."

Telerate's **[**55]** profits, seek to prove Telerate's monopoly power directly without discussing the relevant market. The defendants support this approach by contending that market definition and analysis is not necessary when "there are no other discoverable facts establishing the existence and degree of market power." *See* Defendant's Proposed Findings Fact at 14 (citing Areeda & Turner, ***Antitrust Law*** 330 at para. 507 (Vol. II 1978)). The court disagrees.

Defendants have cited Areeda & Turner out of context. If direct proof of monopoly power were practicable, it would be preferable to the market analysis approach. The direct proof Areeda & Turner discuss in their treatise is direct economic proof, namely, demand and supply curves. Direct proof of monopoly power does not mean, however, testimony or physical evidence of opinions regarding the seller's market power. Demand and therefore, cost curves are very difficult to establish accurately, and market analysis provides the most convenient and accurate secondary measure of monopoly power.

In a further attempt to prove directly Telerate's purported monopoly power, defendants cite Telerate's operating income as secondary proof of Telerate's market **[**56]** power. [17] Indeed, one indicium of monopoly power is the reaping of so-called monopoly profits, which are evidenced by returns on capital invested that exceed the returns required to attract capital to that industry or market. In practice, however, such real economic returns **[***1754]** on capital are difficult to measure and the proper methods of measuring economic profits are much disputed. *See* Areeda & Turner, *supra*, para. 512c at 337. Further, one must be careful not to confuse excess returns on capital with high accounting profits. Accounting profits are affected by accounting conventions regarding depreciation, valuation of assets, and categorization of expenses as current or capital expenses. Consequently, citing accounting profits without more is unsatisfactory proof of monopoly profits, and in turn of monopoly power.

[57]** The defendants also contend that Telerate possesses monopoly power in "the market for data terminals and terminal related software that interconnect with its financial market information network." Defendants' Proposed Findings of Fact at 26-27. [18] Defendants base their claims of monopoly power in the peripherals market on their allegations that Telerate possesses monopoly power in the market for provision **[*239]** of data of United States Government securities. Because this court has already determined that Programit and Caro have failed in their burden of establishing the relevant market for Telerate's service it must necessarily reject the further conclusion that Telerate has monopoly power in the peripherals market. In addition, the defendants have failed to present any evidence that would address the requirements of the Supreme Court's "reasonable interchangeability" test and have, therefore failed to carry their burden with respect to the peripherals market as well.

[58]** In summary, it appears that defendants have failed to demonstrate a likelihood of success in establishing, with sufficient definiteness to satisfy the requirements of *Section 2* under the relevant case law, the contours of the market in which it claims Telerate possesses monopoly power. Defendants, therefore, have also failed to show that Telerate possesses monopoly power. Accordingly, defendants' claim that Telerate has committed a violation of *§ 2* of the Sherman Act by unlawfully exercising monopoly power must fail.

C. Attempted Monopolization

HN30[] A party asserting a claim of attempted monopolization must prove: (1) specific intent to monopolize; and (2) a dangerous probability of monopolization. *See* *Times Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; *Swift v. United States, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276 (1905)*;

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[17] Defendants claim, based on the Dean Witter report discussed earlier, that plaintiff's operating income "exceeded 50%" in 1982, 1983, 1984, and 1985. *See* Defendants' Findings of Fact at 13 para. 38. Telerate, by its executive vice-president Richard J. Cowles, claims that its pretax profits are declining and totalled 42% for the fiscal year ending September 30, 1985. *See* Cowles Reply Affid. para. 14.

[18] In their memorandum of law, defendants do not contend that Telerate possesses monopoly power in the market for peripherals that interface with its database; rather, defendants' argument is that Telerate has used its alleged monopoly power in the database market to distort competition in the peripherals market. Nevertheless, in its proposed findings of fact defendants advance the argument that Telerate possesses monopoly power in the peripherals market.

Northeastern Telephone Co. v. American Telephone and Telegraph Corp., 651 F.2d 76, 85 (2d Cir. 1981), *cert. denied*, *455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982)*.

[59]** 1. *Specific Intent to Monopolize*

HN31[] A claim for attempted monopolization requires proof of specific intent to monopolize because as Judge Learned Hand stated:

> "Conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a 'specific intent'; an intent which goes beyond the mere intent to do the act."

United States v. Aluminum Corporation of America, 148 F.2d 416, 431-32 (2d Cir. 1945). Proof of such specific intent may be inferred from conduct of the seller, documentation, or industrial background. It may also be proved directly where internal memoranda or statements by employees indicate such a specific intent. *See Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 54-55 (2d Cir. 1979)*.

Defendants assert that Telerate's conduct demonstrates its intent to monopolize the market for terminals accessing its database. Specifically, defendants **[**60]** note that (1) Telerate changed its protocol in March 1985, which eliminated the ability to keep two pages of data simultaneously updated; (2) Telerate threatened to terminate service to customers who purchased defendants Excel-A-Rate system; (3) Telerate harassed and intimidated defendant Programit's customers with calls from top executives; and (4) Telerate's chairman has threatened to "bury" Programit in expensive and protracted litigation and Telerate's executive vice-president has stated that Telerate would never deal with the defendants. *See* Defendants' Proposed Findings of Fact at paras. 91-94 at 28-29.

The plaintiff, Telerate, has asserted that its actions were prompted by concern for the integrity of its database system. It contends that unrestricted use of the Excel-A-Rate system will lead to unbearable delays in service to the non-Excel-A-Rate customers on each party line. Further, Telerate has presented testimony that it has no intention **[***1755]** of entering or competing in the peripheral equipment market and that its main interest is in concentrating on its data dissemination business.

Defendants contend that Telerate instituted the March 1985 change in its protocol merely **[**61]** to disrupt the Excel-A-Rate service. The court finds, however, that Telerate instituted the protocol change for legitimate business reasons. The executive **[*240]** vice-president of Telerate, Richard J. Cowles, testified that the protocol change was prompted by concern that the updating of multiple pages would unacceptably increase the response time for page requests by customers. Further, defendants contention that the protocol change degraded the Telerate service in order to disrupt the main feature of Excel-A-Rate is untenable. As noted above, Telerate has presented testimony that it is not interested in entering the computer peripherals market. In any event, it is clear that Telerate's primary business and the source of its acknowledged success stems from its database and its reputation for reliability. To conclude that in order to "monopolize" the market for computer terminals with access to its own database, Telerate would degrade its own service is not plausible in light of all the evidence adduced at the hearing. Accordingly, the court does not find that the protocol change supports defendants' allegation of specific intent to monopolize.

The court also finds that the **[**62]** threats to terminate service to those customers that used the Excel-A-Rate service were justified by Telerate's legitimate concern for the performance of its service. Further, Telerate believed in good faith that it was exercising its rights pursuant to what it perceived to be a breach of the service contract, which, under Telerate's interpretation, prohibited the moving of any Telerate equipment. Finally, the court finds that even if the alleged threats to "bury" Programit in a "protracted and complex litigation" were credible, they would be insufficient to demonstrate an intent to monopolize.

Accordingly, the court finds that defendants have failed to demonstrate a likelihood of establishing that Telerate had the specific intent to monopolize the market for computer peripherals connected with its database system.

2. *Dangerous Probability of Monopolization*

Dangerous probability of monopolization requires proof of market power in the relevant market sufficient to warrant application of the antitrust laws. This element, like the proof of monopoly power in the related offense of monopolization, is established by analysis of the relevant market. The record is more sparse **[**63]** on the issue of market definition than in defendants' monopolization claim.

Defendants seem to proceed on two theories regarding Telerate's market power. First, defendants contend that Telerate is seeking to "leverage" its monopoly power in the market for "computerized data relating to transactions in United States Government securities," into the market for data terminals and related software. This argument is clearly unavailing as the court has already found that defendants have failed to carry their burden of establishing Telerate's alleged monopoly power in the market for its database. Second, defendants contend that the relevant market is the market for data terminals that connect to a United States Government securities information network. There has been no evidence adduced as to why this is a relevant market or submarket. Moreover, this market definition relies on the market definition for the database, which the court has previously found not to be properly proved by defendants.

The court finds that defendants have also failed in their burden of establishing the "dangerous probability" prong of the attempted monopolization claim. Accordingly, the defendants have failed **[**64]** to demonstrate a likelihood of success on the merits of its attempted monopolization claim.

SUMMARY

Plaintiff has demonstrated a likelihood of success on the merits of its claims of copyright infringement, misappropriation of trade secrets, interference with contract, and violations of the Telecommunications Act. Plaintiff further will suffer irreparable harm if a preliminary injunction does not issue. Thus, plaintiff has satisfied the requirements for issuance of a preliminary injunction. Defendants have failed to demonstrate a likelihood of success on the merits of their antitrust claims. Consequently, **[*241]** they have not satisfied the requirements for a preliminary injunction.

CONCLUSION

For the reasons stated plaintiff's motion for a preliminary injunction is hereby granted and defendants' cross-motion is denied.

SO ORDERED.

DATED: New York, New York June 10, 1988

[Allied Tube & Conduit Corp. v. Indian Head](#)

Supreme Court of the United States

February 24, 1988, Argued ; June 13, 1988, Decided

No. 87-157

Reporter
486 U.S. 492 *; 108 S. Ct. 1931 **; 100 L. Ed. 2d 497 ***; 1988 U.S. LEXIS 2629 ****; 56 U.S.L.W. 4539; 1988-1 Trade Cas. (CCH) P68,062

ALLIED TUBE & CONDUIT CORP. v. INDIAN HEAD, INC.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Disposition: *817 F.2d 938*, affirmed.

Core Terms

immunity, conduit, standard-setting, electrical, government action, antitrust liability, products, steel, anti trust law, anticompetitive, polyvinyl chloride, antitrust, state and local government, publicity campaign, organizations, codes, marketplace, private association, decisionmaking, associations, benefits, Sherman Act, railroads, boycott, genuine, private organization, legislative action, political activity, restraint of trade, economic interest

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN1[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by Noerr. The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Where, independent of any government action, an anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. The validity of such efforts, and thus the applicability of Noerr immunity, varies with the context and nature of the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

In whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Typically, private standard-setting associations include members having horizontal and vertical business relations. Undoubtedly members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule-of-reason analysis to private associations.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Absent a showing to the contrary, a government acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf. The dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious. But where persons unaccountable to the public impose the restraint and without official authority, many of whom have personal financial interests in restraining competition, the U.S. Supreme Court has no difficulty concluding that the restraint has resulted from private action.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr doctrine does not immunize every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

Lawyers' Edition Display

Decision

Antitrust exemption for efforts to influence government action held not applicable to attempt to influence fire protection association's promulgation of private electrical code routinely incorporated into law.

Summary

A manufacturer of plastic electrical conduit sought to have the National Fire Protection Association (NFPA)--a private, voluntary association representing industry, labor, firefighters, and others--list such conduit as an acceptable alternative to steel conduit in the NFPA's triennially revised National Electrical Code (NEC), which code is routinely adopted into law by many state and local governments and is widely accepted by insurers, contractors, and others as identifying acceptable electrical products. Manufacturers of steel conduit and other interested parties agreed among themselves to recruit numerous individuals to join the NFPA, pay those individuals' expenses, and organize those individuals at the NFPA annual meeting as a bloc vote against the proposal to include plastic conduit in the 1981 NEC; and they were successful in defeating that proposal. The plastic conduit manufacturer then filed an action against the steel conduit interests in the United States District Court for the Southern District of New York, which action alleged that those interests had unreasonably restrained trade in the electrical conduit market in violation of 1 of the Sherman Act (*15 USCS 1*). The jury, determining that the interests had subverted the NFPA's consensus standard-making process even though they had not actually broken any NFPA rules, found the interests liable and awarded to the plaintiff manufacturer damages for profits which that manufacturer had lost as a result of the effect which the exclusion of plastic conduit from the 1981 NEC had in the marketplace of its own force, though not for any damages resulting from the adoption of the NEC by government entities. The District Court, however, set aside the jury's verdict on the ground that the interests' actions were subject to the Noerr-Pennington doctrine--which protects petitioning of the government from scrutiny under the Sherman Act--because (1) the NFPA was akin to a legislature, and (2) the interests had genuinely sought, through acceptable political methods, to influence the NFPA and thereby influence the government entities which adopt the NEC. The United States Court of Appeals for the Second Circuit, vacating the District Court's judgment and remanding with instructions to reinstate the jury's award, declined to extend the Noerr-Pennington doctrine to (1) the lobbying of private "quasi-legislative" bodies or (2) efforts to indirectly influence government action through such bodies (*817 F2d 938*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Brennan, J., joined by Rehnquist, Ch. J., and Marshall, Blackmun, Stevens, Scalia, and Kennedy, JJ., it was held that the conduct of the steel conduit interests, despite its political impact, was not immune from federal antitrust liability under the Noerr doctrine, since (1) as to the immunity accorded those who merely urge the government to restrain trade, the NFPA--being (a) without official authority, (b) unaccountable to the public, and (c) composed in part of persons having economic incentives to restrain trade--could not be treated as a "quasi-legislative" body simply because legislatures routinely adopt the NEC; and (2) as to the immunity accorded to private restraints which are incidental to a valid effort to influence governmental action, an economically interested party, exercising decisionmaking authority in formulating a product standard for a private association that comprises market participants, enjoys no Noerr immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

White, J., joined by O'Connor, J., dissented, expressing the view that the Noerr doctrine protects participants in private organizations such as the NFPA that regularly propound and publish health and safety standards for a variety of products and industries and then present these standards to state and local governments for the purpose of having them enacted into law.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > combination to influence government action -- formulation of private electrical code -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]

The conduct of manufacturers of steel electrical conduit, and other interested parties, in attempting to influence a private fire protection association's promulgation of electrical systems product standards so as to prevent the recognition of plastic conduit as an acceptable alternative to steel conduit--by agreeing among themselves to recruit numerous individuals to join the association and vote as a bloc against a proposal to include plastic conduit in the standards--is not immune from federal antitrust liability under the doctrine of *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc. (1961) 365 US 127, 5 L Ed 2d 464, 81 S Ct 523*, which protects concerted efforts to restrain or monopolize trade by petitioning government officials, even though the association's standards are widely adopted into law by state and local governments; such conduct does not enjoy the immunity accorded under the Noerr doctrine to those who merely urge the government to restrain trade, since the association--being (1) without official authority, (2) unaccountable to the public, and (3) composed in part of persons having economic incentives to restrain trade--cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt its standards; nor does Noerr immunity apply on the theory that the exclusion of plastic conduit from the standards is incidental to a valid effort to influence government action by influencing a source from which many governments derive their laws, since the context and nature of the conduct at issue make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws, rather than the kind of political activity which the Noerr doctrine is designed to protect; where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no Noerr immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace. (White and O'Connor, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > petitioning government officials -- > Headnote:
LEdHN[2][] [2]

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from federal antitrust liability, but the scope of this protection depends on the source, context, and nature of the anticompetitive restraint at issue.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > petitioning government -- public restraint -- > Headnote:
LEdHN[3][] [3]

Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > petitioning government -- private restraint -- > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]***LEdHN[4C]***[] [4C]***LEdHN[4D]***[] [4D]***LEdHN[4E]***[] [4E]

Where an anticompetitive restraint results directly from private action, independent of any government action, that restraint cannot form the basis for federal antitrust liability if it is incidental to a valid effort to influence governmental action, but the mere fact that an anticompetitive activity is also genuinely intended to influence governmental action is not alone sufficient to render that activity immune from antitrust liability; the validity of efforts to influence government action, and thus the applicability of this immunity, varies with the context and nature of the activity, so that a publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods, whereas in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations; private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action.

EVIDENCE §173 > presumption as to motive -- private parties -- government -- > Headnote:
LEdHN[5][] [5]

It may be presumed, absent a showing to the contrary, that a government acts in the public interest; private parties, on the other hand, may be presumed to be acting primarily on their own behalf.

APPEAL §1662 > effect of decision on other grounds -- > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

Given the United States Supreme Court's conclusion--in an action by a manufacturer of plastic electrical conduit who (1) alleges that parties interested in the marketing of steel electrical conduit violated 1 of the Sherman Act (*15 USCS 1*) by conspiring to improperly influence a private fire protection association to exclude plastic conduit from its electrical systems product standards, which standards are routinely adopted into law by many state and local governments, and (2) has obtained a jury verdict for damages based on the effect the exclusion had in the marketplace of its own force, as opposed to the effect of the standards' adoption into law--that the conduct of the steel conduit interests is not immune from federal antitrust liability under the rule relating to concerted efforts to restrain or monopolize trade by petitioning government officials, the Supreme Court need not decide whether, or to what extent, the efforts of the steel conduit interests to publicize the stigma which plastic conduit suffered by being excluded from the standards--which efforts may have exacerbated the independent market effect of the exclusion--alter the incidental status of the resulting anticompetitive harm.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > immunity for petitioning government -- sham exception -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]

With regard to the doctrine that concerted efforts to restrain or monopolize trade by petitioning government officials are immune from federal antitrust liability, the "sham" exception to that doctrine does not cover the activity of an antitrust defendant who genuinely seeks to achieve a governmental result but does so through improper means.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > influencing industry standards -- compliance with rules -- > Headnote:
LEdHN[8][] [8]

The validity, under the federal antitrust laws, of efforts by manufacturers of steel electrical conduit and other interested parties to influence a private fire protection association's promulgation of electrical systems product standards so as to prevent the recognition of plastic conduit as an acceptable alternative to steel conduit, is not established solely by the literal compliance of those parties with the rules of the association, since the hope of procompetitive benefits from the promulgation of such private standards depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members which have economic interests in restraining competition; an association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards.

Syllabus

The National Fire Protection Association -- a private organization that includes members representing industry, labor, academia, insurers, organized medicine, firefighters, and government -- sets and publishes product standards and codes related to fire protection. Its National Electrical Code (Code), which establishes requirements for the design and installation of electrical wiring systems, is routinely adopted into law by a substantial number of state and local governments, and is widely adopted as setting acceptable standards by private product-certification laboratories, insurance underwriters, and electrical inspectors, contractors, and distributors. Throughout the relevant period, the Code permitted the use of electrical conduit made of **[****2]** steel. Respondent, a manufacturer of plastic conduit, initiated a proposal before the Association to extend Code approval to plastic conduit as well. The proposal was approved by one of the Association's professional panels, and thus could be adopted into the Code by a simple majority of the members attending the Association's 1980 annual meeting. Before the meeting was held, petitioner, the Nation's largest producer of steel conduit, members of the steel industry, other steel conduit manufacturers, and independent sales agents collectively agreed to exclude respondent's product from the 1981 Code by packing the annual meeting with new Association members whose only function was to vote against respondent's proposal. After the proposal was defeated at the meeting and an appeal to the Association's Board of Directors was denied, respondent brought suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of *§ 1* of the Sherman Act. The jury found petitioner liable, but the court granted a judgment n.o.v. for petitioner, reasoning that it was entitled to antitrust immunity under the doctrine of **[****3]** *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523*. The Court of Appeals reversed.

Held: Noerr antitrust immunity does not apply to petitioner. Pp. 499-510.

(a) The scope of *Noerr* protection depends on the source, context, and nature of the anticompetitive restraint at issue. Where a restraint is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. In this case, the relevant context is the standard-setting process of a private association without official authority that includes members having horizontal and vertical business relations and economic incentives to restrain competition. Such an association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt its Code, and thus petitioner does not enjoy the immunity afforded those who merely urge the government to restrain trade. Pp. 499-502.

(b) Nor does *Noerr* immunity apply to petitioner on the theory that the exclusion of plastic conduit from **[****4]** the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Although, because a large number of governments routinely adopt the Code into law, efforts to influence the Association's standard-setting process are arguably the most effective means of influencing legislation regulating electrical conduit, and although *Noerr* immunity is not limited to "direct" petitioning of government officials, the *Noerr* doctrine does not immunize every concerted activity that is genuinely intended to influence governmental action. There is no merit to the argument that, regardless of the Association's nonlegislative status, petitioner's efforts to influence the Association must be given the same wide berth accorded legislative lobbying or efforts to influence legislative action in the political arena. Pp. 502-504.

(c) Unlike the publicity campaign to influence legislation in *Noerr*, petitioner's activity did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but took place within the confines of a private standard-setting process. The validity of petitioner's **[****5]** efforts to influence the Code is not established, without more, by petitioner's literal compliance with the Association's rules, for the hope of the Code's procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards. At least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace. Pp. 505-510.

Counsel: Marvin E. Frankel argued the cause for petitioner. With him on the briefs were Robert M. Heller, Arthur B. Kramer, and Debora K. Grobman.

Fredric W. Yerman argued the cause for respondent. With him on the brief were Michael Malina, Randolph S. Sherman, and Richard A. De Sevo. *

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* Briefs of amici curiae urging reversal were filed for the State of Illinois by Neil F. Hartigan, Attorney General, and Robert E. Davy, Jr., Assistant Attorney General; and for the Western Fire Chiefs Association et al. by William J. Meeske and Alexander D. Thomson.

Briefs of amici curiae urging affirmance were filed for the United States et al. by Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Cohen, Deputy Assistant Attorney General Starling, Paul J. Larkin, Jr., Robert B. Nicholson, John J. Powers III, Marion L. Jetton, Robert D. Paul, and Ernest J. Isenstadt; and for the State of Alaska et al. by Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Lloyd E. Constantine, Susan Beth Farmer, Elizabeth M. O'Neill, and George W. Sampson, Assistant Attorneys General, Grace Berg Schaible, Attorney General of Alaska, Richard D. Monkmon, Assistant Attorney General, Robert K. Corbin, Attorney General of Arizona, John Steven Clark, Attorney General of Arkansas, Jeffrey A. Bell, Deputy Attorney General, John Van de Kamp, Attorney General of California, Andrea Ordin, Chief Assistant Attorney General, Thomas P. Dove, Deputy Attorney General, Duane Woodard, Attorney General of Colorado, Thomas P. McMahon, First Assistant Attorney General, Joseph I. Lieberman, Attorney General of Connecticut, Robert M. Langer, Assistant Attorney General, Warren Price III, Attorney General of Hawaii, Robert A. Marks, Supervising Deputy Attorney General, Thomas J. Miller, Attorney General of Iowa, John Perkins, Deputy Attorney General, James E. Tierney, Attorney General of Maine, Stephen L. Wessler, Assistant Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, Michael F. Brockmeyer, Assistant Attorney General, Frank J. Kelley, Attorney General of Michigan, Louis J. Caruso, Solicitor General, Robert C. Ard, Jr., Assistant Attorney General, Hubert H. Humphrey III, Attorney General of Minnesota, Cary Edwards, Attorney General of New Jersey, Laurel A. Price, Deputy Attorney General, Lacy H. Thornburg, Attorney General of

[**6]**

Judges: BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which O'CONNOR, J., joined, post, p. 511.

Opinion by: BRENNAN

Opinion

[*495] **[***502]** **[**1934]** JUSTICE BRENNAN delivered the opinion of the Court.

LEdHN[1A][] [1A]Petitioner contends that its efforts to affect the product standard-setting process of a private association are immune from antitrust liability under the *Noerr* doctrine primarily because the association's standards are widely adopted into law by state and local governments. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* *(Noerr)*. The United States Court of Appeals for the Second Circuit held that *Noerr* immunity did not apply. We affirm.

I

The National Fire Protection Association (Association) is a private, voluntary organization with more than 31,500 individual and group members representing industry, labor, academia, insurers, organized medicine, firefighters, **[****7]** and government. The Association, among other things, publishes product standards and codes related to fire protection through a process known as "consensus standard making." One of the codes it publishes is the National Electrical Code (Code), which establishes product and performance requirements for the design and installation of electrical wiring systems. Revised every three years, the Code is the most influential electrical code in the nation. A substantial number of state and local governments routinely adopt the Code into law with little or no change; private certification laboratories, such as Underwriters Laboratories, normally will not list and label **[*496]** an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

[1935]** Among the electrical products covered by the Code is electrical conduit, the hollow tubing used as a raceway to carry electrical wires through the walls and floors of buildings. Throughout the relevant period, the Code permitted using **[****8]** electrical conduit made of steel, and almost all conduit sold was in fact steel conduit. Starting in 1980, respondent began to offer plastic conduit made of polyvinyl chloride. Respondent claims its plastic conduit offers significant competitive advantages over steel conduit, including pliability, lower installed cost, and lower susceptibility to short circuiting. In 1980, however, there was also a scientific basis for concern that, during fires in high-rise buildings, polyvinyl chloride conduit might burn and emit toxic fumes.

Respondent initiated a proposal to include polyvinyl chloride conduit as an approved type of electrical conduit in the 1981 edition of the Code. Following approval by one of the Association's professional panels, this proposal was scheduled for consideration at the 1980 annual meeting, where it could be adopted or **[***503]** rejected by a

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North Carolina, Richard H. Carlton, Assistant Attorney General, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, LeRoy S. Zimmerman, Attorney General of Pennsylvania, Eugene F. Wayne, Chief Deputy Attorney General, James E. O'Neil, Attorney General of Rhode Island, Roger A. Tellinghuisen, Attorney General of South Dakota, Jim Mattox, Attorney General of Texas, Mary F. Keller, Executive Assistant Attorney General, John J. White, Assistant Attorney General, David L. Wilkinson, Attorney General of Utah, Kenneth O. Eikenberry, Attorney General of Washington, John R. Ellis, Deputy Attorney General, Tina Kondo, Assistant Attorney General, Charles G. Brown, Attorney General of West Virginia, Mark D. Kindt, Deputy Attorney General, Donald J. Hanaway, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General.

simple majority of the members present. Alarmed that, if approved, respondent's product might pose a competitive threat to steel conduit, petitioner, the Nation's largest producer of steel conduit, met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent **[****9]** sales agents. They collectively agreed to exclude respondent's product from the 1981 Code by packing the up-coming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal.

Combined, the steel interests recruited 230 persons to join the Association and to attend the annual meeting to **[*497]** vote against the proposal. Petitioner alone recruited 155 persons -- including employees, executives, sales agents, the agents' employees, employees from two divisions that did not sell electrical products, and the wife of a national sales director. Petitioner and the other steel interests also paid over $ 100,000 for the membership, registration, and attendance expenses of these voters. At the annual meeting, the steel group voters were instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communication. Few of the steel group voters had any of the technical documentation necessary to follow the meeting. None of them spoke at the meeting to give their reasons for opposing the proposal to approve polyvinyl chloride conduit. Nonetheless, with their solid vote in **[****10]** opposition, the proposal was rejected and returned to committee by a vote of 394 to 390. Respondent appealed the membership's vote to the Association's Board of Directors, but the Board denied the appeal on the ground that, although the Association's rules had been circumvented, they had not been violated. [1]

In October 1981, respondent brought this suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of *§ 1* of the Sherman Act. 26 Stat. 209, *15 U.S. C. § 1*. A bifurcated jury trial began in March 1985. Petitioner conceded that it had conspired with the other **[****11]** steel interests to exclude respondent's product from the Code and that it had a pecuniary interest to do so. The jury, instructed under the rule of reason that respondent carried the burden of showing that the anticompetitive effects of petitioner's actions outweighed any procompetitive benefits of standard **[*498]** setting, found petitioner liable. In answers to special interrogatories, the jury found that petitioner did not violate any rules of the Association and acted, at least in part, based on a genuine belief that plastic conduit was unsafe, but that petitioner nonetheless **[**1936]** did "subvert" the consensus standardmaking process of the Association. App. 23-24. The jury also made special findings that petitioner's actions had an adverse impact on competition, were not the least restrictive means of expressing petitioner's opposition to the use of polyvinyl **[***504]** chloride conduit in the marketplace, and unreasonably restrained trade in violation of the antitrust laws. The jury then awarded respondent damages, to be trebled, of $ 3.8 million for lost profits resulting from the effect that excluding polyvinyl chloride conduit from the 1981 Code had of its own force **[****12]** in the marketplace. No damages were awarded for injuries stemming from the adoption of the 1981 Code by governmental entities. [2]

[**13]** The District Court then granted a judgment n.o.v. for petitioner, reasoning that *Noerr* immunity applied because the Association was "akin to a legislature" and because petitioner, "by the use of methods consistent with acceptable standards of political action, genuinely intended to influence the [Association] with respect to the National Electrical Code, and to thereby influence the various state and local legislative bodies which adopt the [Code]." App. to Pet. for **[*499]** Cert. 28a, 30a. The Court of Appeals reversed, rejecting both the argument that

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[1] Respondent also sought a tentative interim amendment to the Code, but that was denied on the ground that there was not sufficient exigency to merit an interim amendment. The Association subsequently approved use of polyvinyl chloride conduit for buildings of less than three stories in the 1984 Code, and for all buildings in the 1987 Code.

[2] Although the District Court was of the view that at trial respondent relied solely on the theory that its injury "flowed from legislative action," App. to Pet. for Cert. 31a, the Court of Appeals determined that respondent was awarded damages *only* on the theory "that the stigma of not obtaining [Code] approval of its products and [petitioner's] 'marketing' of that stigma caused independent marketplace harm to [respondent] in those jurisdictions *permitting* use of [polyvinyl chloride] conduit, as well as those which later adopted the 1984 [Code], which permitted use of [polyvinyl chloride] conduit in buildings less than three stories high. [Respondent] did *not* seek redress for any injury arising from the adoption of the [Code] by the various governments." *817 F.2d 938, 941, n. 3 (1987)* (emphasis added). We decide the case as it was framed by the Court of Appeals.

the Association should be treated as a "quasi-legislative" body because legislatures routinely adopt the Code and the argument that efforts to influence the Code were immune under *Noerr* as indirect attempts to influence state and local governments. *817 F.2d 938 (1987)*. We granted certiorari to address important issues regarding the application of *Noerr* immunity to private standard-setting associations. [3] *484 U.S. 814 (1987)*.

[**14]** II

LEdHN[2][] [2]***LEdHN[3]***[] [3]***LEdHN[4A]***[] [4A]***HN1***[] Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by *Noerr; Mine Workers v. Pennington, 381 U.S. 657, 669-672, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*; and *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*.The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. *Noerr, 365 U.S. at 136*; see also *Pennington, supra, at 671*. In addition, ***HN2***[] where, independent of any government action, the anticompetitive restraint **[****15]** results directly from **[***505]** private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. *Noerr, supra, at 143*. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even **[**1937]** when the campaign employs unethical **[*500]** and deceptive methods. *Noerr, supra, at 140-141*. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.[4] *California Motor Transport, supra, at 512-513*.

[**16]** In this case, the restraint of trade on which liability was predicated was the Association's exclusion of respondent's product from the Code, and no damages were imposed for the incorporation of that Code by any government. The relevant context is thus the standard-setting process of a private association. ***HN4***[] Typically, private standard-setting associations, like the Association in this case, include members having horizontal and vertical business relations. See generally 7 P. Areeda, ***Antitrust Law*** P1477, p. 343 (1986) (trade and standard-setting associations routinely treated as continuing conspiracies of their members). There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. [5] **[****18]** See *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have **[****17]** traditionally been objects of antitrust scrutiny. See, *e. g., ibid.; Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961) (per curiam)*. See also *FTC v. Indiana Federation of Dentists,* ***[*501]*** *476 U.S. 447 (1986)*. When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by

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[3] We also granted certiorari on the issue whether, if not immune under *Noerr*, petitioner's conduct violated the Sherman Act, but we now vacate our grant of that issue as improvident.

[4] ***LEdHN[4B]***[] [4B]

Of course, ***HN3***[] in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action. *Noerr, 365 U.S. at 144*; *California Motor Transport, 404 U.S. at 511*.

[5] "Product standardization might impair competition in several ways. . . . [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices." 7 P. Areeda, ***Antitrust Law*** P1503, p. 373 (1986).

members with economic interests in stifling product competition, cf. *Hydrolevel, supra, at 570-573* (noting absence of "meaningful safeguards"), those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule-of-reason **[***506]** analysis to product standard-setting by private associations. [6]

LEdHN[1B][] [1B]***LEdHN[5]***[] [5]Given this context, petitioner does not enjoy the immunity accorded those who merely urge the government to restrain trade. We agree with the Court of Appeals that the Association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt the Code the Association publishes. *817 F.2d, at 943-944*. Whatever *de facto* authority **[****19]** the Association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade. See *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-708, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*. See also *id., at 706-707*; *Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-792, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)*. "We may presume, ***HN5***[] absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Hallie v. Eau Claire, 471 U.S. 34, 45, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*. The dividing line between restraints resulting from governmental action and those resulting from private action **[*502]** may not always be obvious. [7] But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty **[****20]** concluding that the restraint has resulted from private action.

[**21]** ***LEdHN[1C]***[] [1C]***LEdHN[6A]***[] [6A]Noerr immunity might still apply, however, if, as petitioner argues, the exclusion of polyvinyl chloride conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Petitioner notes that the lion's share of the anticompetitive effect in this case came from the predictable adoption of the Code into law by a large number of state and local governments. See *817 F.2d at 939, n. 1*.Indeed, petitioner argues that, because state and local governments rely so heavily on the Code and lack the resources or technical expertise to second-guess it, efforts to influence the Association's standard-setting process are the most effective means **[***507]** of influencing legislation regulating electrical conduit. This claim to *Noerr* immunity has some force. The effort to influence governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the 1981 Code into a number of statutes **[****22]** and local ordinances. Nor can we quarrel with petitioner's contention that, given the widespread adoption of the Code into **[*503]** law, any effect the 1981 Code had in the marketplace of its own force was, in the main, incidental to petitioner's genuine effort to influence governmental action. [8] And, as

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[6] See 2 J. von Kalinowski, Antitrust Laws and Trade Regulation §§ 6I.01[3], 6I.03, 6I.04, pp. 6I-6 to 6I-7, 6I-18 to 6I-29 (1981) (collecting cases). Concerted efforts to *enforce* (rather than just agree upon) private product standards face more rigorous antitrust scrutiny. See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659-660, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)* *(per curiam)*. See also *Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941)*.

[7] See, *e. g., California Motor Transport, supra, at 513* (stating in dicta that "conspiracy with a licensing authority to eliminate a competitor" or "bribery of a public purchasing agent" may violate the antitrust laws); *Mine Workers v. Pennington, 381 U.S. 657, 671, 14 L. Ed. 2d 626, 85 S. Ct. 1585, and n. 4 (1965)* (holding that immunity applied but noting that the trade restraint at issue "was the act of a public official who is not claimed to be a co-conspirator" and contrasting *Continental Ore*); *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-708, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*; 1 P. Areeda & D. Turner, ***Antitrust Law*** P206 (1978) (discussing the extent to which *Noerr* immunity should apply to commercial transactions involving the government). See also *Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-792, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)*; *Continental Ore, supra, at 706-707*.

petitioner persuasively argues, the claim of *Noerr* immunity cannot be dismissed on the ground that the conduct at issue involved no "direct" petitioning of government officials, for *Noerr* itself immunized a form of "indirect" petitioning. See *Noerr* (immunizing a publicity campaign directed at the general public on the ground that it was part of an effort to influence legislative and executive action).

[**23]** ***LEdHN[4C]***[] [4C]Nonetheless, the validity of petitioner's actions remains an issue. ***HN6***[] We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. **[**1939]** If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-463, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*. Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia v. Evans, 316 U.S. 159, 86 L. Ed. 1346, 62 S. Ct. 972 (1942)*. Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry **[****24]** and spur legislative action. Immunity might even be **[*504]** claimed for anticompetitive mergers on the theory that they give the merging corporations added political clout. Nor is it necessarily dispositive that packing the Association's meeting may have been the most effective means of securing government action, for one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection. We thus conclude that the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity.

Here petitioner's actions took **[***508]** place within the context of the standard-setting process of a private association. Having concluded that the Association is not a "quasi-legislative" body, we reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a "quasi-legislature" and given the same wide berth accorded legislative lobbying. That rounding up supporters is an acceptable and constitutionally protected **[****25]** method of influencing elections does not mean that rounding up economically interested persons to set private standards must also be protected. Nor do we agree with petitioner's contention that, regardless of the Association's nonlegislative status, the effort to influence the Code should receive the same wide latitude given ethically dubious efforts to influence legislative action in the political arena, see *Noerr, 365 U.S. at 140-141*, simply because the ultimate aim of the effort to influence the private standard-setting process was (principally) legislative action. The ultimate aim is not dispositive. A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena simply because the odds were very good that the court's decision would be codified -- nor for that matter would misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action.

[*505] ***LEdHN[1D]***[] [1D]What distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's **[****26]** activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves. True, in *Noerr* we immunized conduct that could be characterized as a conspiracy among railroads to destroy business relations between truckers and their customers. *Noerr, supra, at 142*.But we noted there:

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[8] ***LEdHN[6B]***[] [6B]

The effect, independent of government action, that the 1981 Code had in the marketplace may to some extent have been exacerbated by petitioner's efforts to "market" the stigma respondent's product suffered by being excluded from the Code. See 17 F.2d at 941, n. 3. Given our disposition *infra*, we need not decide whether, or to what extent, these "marketing" efforts alter the incidental status of the resulting anticompetitive harm. See generally *Noerr, 365 U.S. at 142* (noting that in that case there were. "no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers").

"There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced **[**1940]** to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry." *365 U.S. at 142-143*.

In light of those findings, **[****27]** we characterized the railroads' activity as a classic "attempt . . . to influence legislation by a campaign of publicity," an "inevitable" and "incidental" effect of which was "the infliction of some direct injury upon the interests of the party against whom the campaign is directed." *Id., at 143*. The essential character of such a publicity campaign was, we concluded, political, and could not be segregated from the activity's impact on business. Rather, the plaintiff's cause of action simply embraced the inherent possibility in such political fights "that **[***509]** one group or the other will get hurt by the arguments that are made." *Id., at 144*. As a political activity, special factors counseled against regulating the publicity campaign under the antitrust laws:

[*506] "Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate **[****28]** 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 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 140-141* (footnote omitted).

In *Noerr*, then, the political context and nature of the activity precluded inquiry into its antitrust validity. [9]

[**29]** ***LEdHN[7A]***[] [7A]Here the context and nature of the activity do not counsel against inquiry into its validity. Unlike the publicity campaign in *Noerr*, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process. The validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law. See *supra, at 500*. Indeed, because private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the **[*507]** understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits, see *ibid.*, the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication. The activity at issue here thus cannot, as in *Noerr*, be characterized **[****30]** as an activity that has traditionally been regulated with extreme caution, see *Noerr, 365 U.S. at 141*, or as an activity that "bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act," *id., at 136*. And petitioner did not confine itself to efforts to persuade an independent decisionmaker, cf. *id., at 138, 139* (describing the immunized **[***510]** conduct as "mere solicitation"); rather, it organized and orchestrated the actual exercise of the Association's decisionmaking authority in setting a standard. **[**1941]** Nor can the setting of the Association's Code be characterized as merely an exercise of the power of persuasion, for it in part involves the exercise of market power. The Association's members, after all, include consumers, distributors, and manufacturers of electrical conduit, and any agreement to exclude polyvinyl chloride conduit from the Code is in part an implicit agreement not to trade in that type of electrical conduit. Cf. *id., at 136*. Although one could reason backwards from

[9] Similarly in *California Motor Transport* any antitrust review of the validity of the activity at issue was limited and structured by the fact that there the antitrust defendants were "us[ing] the channels and procedures of state and federal agencies and courts." *404 U.S. at 511*; see also *id., at 512-513*.

the legislative impact of the Code to the conclusion that the conduct at **[****31]** issue here is "political," we think that, given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact. Just as the antitrust laws should not regulate political activities "simply because those activities have a commercial impact," *id., at 141*, so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact. [10]

[**32]**

[*508] ***LEdHN[4D]***[] [4D]*NAACP v. Claiborne Hardware Co., 458 U.S. 886, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982)*, is not to the contrary. In that case we held that the *First Amendment* protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the **[***511]** Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id., at 914-915*. Here, in contrast, **[*509]** petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits **[****33]** from making it difficult for respondent to compete. [11]

LEdHN[1E][] [1E] ***LEdHN[8]***[] [8] **[****34]** Thus in this case the context and nature of petitioner's efforts to influence the Code **[**1942]** persuade us that the validity of those efforts must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process. The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the Association, for the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by

[10] ***LEdHN[7B]***[] [7B]

It is admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact, and this is itself a case close to the line. For that reason we caution that our decision today depends on the context and nature of the activity. Although criticizing the uncertainty of such a particularized inquiry, *post*, at 513, the dissent does not dispute that the types of activity we describe *supra, at 503-504*, could not be immune under *Noerr* and fails to offer an intelligible alternative for distinguishing those nonimmune activities from the activity at issue in this case. Rather, the dissent states without elaboration that the sham exception "is enough to guard against flagrant abuse," *post*, at 516, apparently embracing the conclusion of the United States Court of Appeals for the Ninth Circuit that the sham exception covers the activity of a defendant who "genuinely seeks to achieve his governmental result, but does so *through improper means." Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 465, n. 5 (1987)* (emphasis in original). Such a use of the word "sham" distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action. *365 U.S. at 144*. See also P. Areeda & H. Hovenkamp, ***Antitrust Law*** P203.1a, pp. 13-14 (Supp. 1987). More importantly, the Ninth Circuit's approach renders "sham" no more than a label courts could apply to activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity), thus providing a certain superficial certainty but no real "intelligible guidance" to courts or litigants. *Post*, at 513. Indeed, the Ninth Circuit concluded that the very activity the dissent deems protected was an unprotected "sham." *827 F.2d at 465*.

[11] ***LEdHN[4E]***[] [4E]

Although the absence of such anticompetitive motives and incentives is relevant to determining whether petitioner's restraint of trade is protected under *Claiborne Hardware*, we do not suggest that the absence of anticompetitive purpose is necessary for *Noerr* immunity. As the dissent points out, in *Noerr* itself the major purpose of the activity at issue was anticompetitive. *Post*, at 512-513. Our statement that the "ultimate aim" of petitioner "is not dispositive," *supra, at 504*, stands only for the proposition that, at least outside the political context, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability.

adopting rules that fail to provide such safeguards. [12] The issue of immunity in this case thus collapses into the issue of antitrust liability. Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market **[****35]** participants, that **[*510]** party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

LEdHN[1F][] [1F]This conclusion does not deprive state and local governments of input and information from interested individuals or organizations or leave petitioner without ample means to petition those governments. Cf. *Noerr, 365 U.S. at 137-138*. See also *California Motor Transport, 404 U.S. at 510*.Petitioner, and others concerned about the safety or competitive threat of polyvinyl chloride conduit, can, with full antitrust immunity, engage in concerted efforts to influence those governments through direct lobbying, publicity campaigns, **[****36]** and other traditional avenues of political expression. To the extent state and local governments are more difficult to persuade through these other avenues, that no doubt reflects their preference for and confidence **[***512]** in the nonpartisan consensus process that petitioner has undermined. Petitioner remains free to take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body. [13] And petitioner can avoid the strictures of the private standard-setting process by attempting to influence legislatures through other forums. **[*511]** What petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition.

[**37]** The judgment of the Court of Appeals is

Affirmed.

Dissent by: WHITE

Dissent

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961), held that the Sherman Act should not be construed **[**1943]** to forbid joint efforts by railway companies seeking legislation that would disadvantage the trucking industry. These efforts for the most part involved a public relations campaign rather than direct lobbying of the lawmakers and were held not subject to antitrust challenge because of the fundamental importance of maintaining the free flow of information to the government and the right of the people to seek legislative relief, directly or indirectly. *Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed.*

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[12] Even petitioner's counsel concedes, for example, that *Noerr* would not apply if the Association had a rule giving the steel conduit manufacturers a veto over changes in the Code. Tr. of Oral Arg. 41-42.

[13] The dissent mistakenly asserts that we today hold that *Noerr* immunity does not apply to mere efforts to persuade others to exclude a competitor's product from a private code. See *post*, at 514-516. Our holding is expressly limited to cases where an "economically interested party exercises *decisionmaking* authority in formulating a product standard for a private association that comprises market participants." *Supra, at 509* (emphasis added); see also *supra, at 506-507* (relying in part on the distinction between activity involving the exercise of decisionmaking authority and market power and activity involving mere attempts to persuade an independent decisionmaker). Cf. *Noerr, 365 U.S. at 136*. The dissent also mistakenly asserts that this description encompasses all private standardsetting associations. See *post*, at 515. In fact, many such associations are composed of members with expertise but no economic interest in suppressing competition. See, *e. g., Sessions, supra, at 461*, and n. 2.

2d 626, 85 S. Ct. 1585 (1965), and *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*, applied the rule to efforts to seek executive action and to administrative and adjudicative proceedings.

The Court now refuses to apply the rule of these cases **[****38]** to the participants in those private organizations, such as the National Fire Protection Association (NFPA), that regularly propound and publish health and safety standards for a variety of products and industries and then present these codes to state and local authorities for the purpose of having them enacted into law. The NFPA and those participating in the code-writing process will now be subject to antitrust liability if their efforts have anticompetitive effects and do not withstand scrutiny under the rule of reason. Believing that this **[***513]** result is a misapplication of the *Noerr* decision and an improvident construction of the Sherman Act, I respectfully dissent.

[*512] This case presents an even stronger argument for immunity than did *Noerr* itself. That decision turned on whether the design or purpose of the conduct was to obtain or influence the passage or enforcement of laws. The Court concedes that petitioner's actions in this case constituted a "genuine effort to influence governmental action," *ante*, at 503, and that this was its "ultimate aim," *ante*, at 504. In *Noerr*, the publicity campaign was dispersed widely among the public in a broad **[****39]** but necessary diluted attempt to move public opinion in hopes that government officials would take note and respond accordingly. The campaign apparently had some influence on the passage of tax laws and other legislation favorable to the railroads in New Jersey, New York, and Ohio, and procured the Governor's veto of a bill that had been passed in Pennsylvania. See *365 U.S. at 130*; see also *155 F. Supp. 768, 777-801 (ED Pa. 1957)*. Here, the NFPA actually drafted proposed legislation in the form of the National Electrical Code (NEC) and presented it countrywide. Not only were petitioner's efforts in this case designed to influence the passage of state laws, but there was also a much greater likelihood that they would be successful than was the case in *Noerr*. This is germane because it establishes a much greater likelihood that the "purpose" and "design" of petitioner's actions in this case was the "solicitation of governmental action with respect to the passage and enforcement of laws," *365 U.S. at 138*.

Rather than directly confronting the severe damage that today's decision does to the *Noerr* doctrine, the majority asserts that the **[****40]** "ultimate aim" of petitioner's efforts "is not dispositive." *Ante*, at 504. That statement cannot be reconciled with the statements quoted earlier from *Noerr*, where it was held that even if one of the major purposes, or even the *sole* purpose, of the publicity campaign was "to destroy the truckers as competitors," *365 U.S. at 138*, those actions were immunized from antitrust liability because ultimately they were "directed toward obtaining governmental action," **[*513]** *id., at 140*. The majority later doubles back on this statement, and suggests that it is important in this case that "petitioner was at least partially motivated by the desire to lessen competition, and . . . stood to reap substantial economic benefits from making it difficult for respondent to compete." *Ante*, at 509. It need hardly be said that all of this was also true in *Noerr*. Nobody condones fraud, bribery, **[**1944]** or misrepresentation in any form, and other state and federal laws ensure that such conduct is punishable. But the point here is that conduct otherwise punishable under the antitrust laws either becomes immune from the operation of those laws when **[****41]** it is part of a larger design to influence the passage and enforcement of laws, or it does not. No workable boundaries to the *Noerr* doctrine are established by declaring, and then repeating at every turn, that everything depends on "the context and nature of" the activity, **[***514]** *ante*, at 504, 505, 506, 509, if we are unable to offer any further guidance about what this vague reference is supposed to mean, especially when the result here is so clearly wrong as long as *Noerr* itself is reputed to remain good law. One unfortunate consequence of today's decision, therefore, is that district courts and courts of appeals will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it.

If there were no private code-writing organizations, and state legislatures themselves held the necessary hearing and wrote codes from scratch, then business concerns like Allied, together with their friends, could jointly testify with impunity about the safety of various products, even though they had anticompetitive motives in doing so. This much the majority concedes, as it does that the major purpose of the code-writing organizations **[****42]** is to influence legislative action. These days it is almost a foregone conclusion that the vast majority of the States will adopt these codes with little or no change. It is untenable to consider the code-writing process by such organizations as the NFPA as too far removed **[*514]** from the legislative process to warrant application of the doctrine announced in

Noerr and faithfully applied in other cases. This was the view of Judge Sneed and his colleagues on the Ninth Circuit in *Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458 (1987)*, and the reasons they gave for applying *Noerr* in this context are much more persuasive than anything to the contrary the majority now has to offer.

The Court's decision is unfortunate for another reason. There are now over 400 private organizations preparing and publishing an enormous variety of codes and standards. State and local governments necessarily, and as a matter of course, turn to these proposed codes in the process of legislating to further the health and safety of their citizens. The code that is at issue in this case, for example, was adopted verbatim by 25 States and the District of Columbia; **[****43]** 19 others adopted it with only minor changes. It is the most widely disseminated and adopted model code in the world today. There is no doubt that the work of these private organizations contributes enormously to the public interest and that participation in their work by those who have the technical competence and experience to do so should not be discouraged.

The Court's decision today will surely do just that. It must inevitably be the case that codes such as the NEC will set standards that some products cannot satisfy and hence in the name of health and safety will reduce or prevent competition, as was the case here. Yet, putative competitors of the producer of such products will now think twice before urging in the course of the code-making process that those products not be approved; for if they are successful (or even if they are not), they may well become antitrust defendants facing treble-damages liability unless they can prove to a court and a jury that they had no evil motives but were merely "presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body," *ante*, at 510 (though with the knowing and inevitable result **[****44]** of eliminating competition). In **[***515]** this case, for example, even **[*515]** if Allied had not resorted to the tactics it employed, but had done no more than successfully argue in good faith the hazards of using respondent's products, it would have inflicted the same damage on respondent and would **[**1945]** have risked facing the same antitrust suit, with a jury ultimately deciding the health and safety implications of the products at issue.

The Court's suggestion that its decision will not affect the ability of these organizations to assist state and local governments is surely wrong. The Court's holding is "that at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effects the standard has of its own force in the marketplace." *Ante*, at 509-510. This description encompasses the structure and work of all such organizations as we now know them. The Court is saying, in effect, that where a private organization sets standards, the participants can be sued **[****45]** under the antitrust laws for *any* effects those standards have in the marketplace *other than* those flowing from their adoption into law. But the standards will have *some* effect in the marketplace even where they are also adopted into law, through publicity and other means, thus exposing the participants to liability. Henceforth, therefore, any private organization offers such standards at its peril, and without any of the breathing room enjoyed by other participants in the political process.

The alternative apparently envisioned by the Court is that an organization can gain the protection of the *Noerr* doctrine as long as nobody with any economic interest in the product is permitted to "exercis[e] decisionmaking authority" (*i. e.*, vote) on its recommendations as to particular product standards. Insisting that organizations like the NFPA conduct themselves like courts of law will have perverse effects. Legislatures are willing to rely on such organizations precisely because their standards are being set by those who **[*516]** possess an expert understanding of the products and their uses, which are primarily if not entirely those who design, manufacture, sell, **[****46]** and distribute them. Sanitizing such bodies by discouraging the active participation of those with economic interests in the subject matter undermines their utility.

I fear that exposing organizations like the NFPA to antitrust liability will impair their usefulness by inhibiting frank and open discussion of the health and safety characteristics of new or old products that will be affected by their codes. The Court focuses on the tactics of petitioner that are thought to have subverted the entire process. But it is not suggested that if there are abuses, they are anything more than occasional happenings. The Court does speculate about the terrible practices that applying *Noerr* in this context could lead us to condone in future cases, *ante*, at 503-504, but these are no more than fantasies, since nothing of the sort occurred in the wake of *Noerr* itself. It seems to me that today's decision is therefore an unfortunate case of overkill.

Of course, the *Noerr* immunity is not unlimited and by its terms is **[***516]** unavailable where the alleged efforts to influence legislation are nothing but a sham. As the Ninth Circuit held, this limitation is enough to guard against **[****47]** flagrant abuse. In any event, occasional abuse is insufficient ground to render the entire process less useful and reliable. I would reverse the judgment below and remand for further proceedings.

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Beer Wholesalers, Inc. v. Miller Brewing Co.

Court of Appeals of Minnesota

June 14, 1988 ; June 21, 1988, Filed

No. C5-88-285

Reporter
426 N.W.2d 438 *; 1988 Minn. App. LEXIS 597 **; 1988-1 Trade Cas. (CCH) P68,108

Beer Wholesalers, Inc., Appellant, Wallace C. Bohrer, Sr., Plaintiff, v. Miller Brewing Company, et al., Respondents, East Side Beverage Company, Defendant

Subsequent History: Review denied by *Beer Wholesalers, Inc. v. Miller Brewing Co., 1988 Minn. LEXIS 699 (Minn., Aug. 24, 1988)*

Writ of certiorari denied *Beer Wholesalers, Inc. v. Miller Brewing Co., 489 U.S. 1039, 109 S. Ct. 1173, 103 L. Ed. 2d 235, 1989 U.S. LEXIS 606 (1989)*

Prior History: **[**1]** Appeal from District County District Court, Hon. William B. Christensen, Judge.

Disposition: Affirmed.

Core Terms

distributor, prices, beer, trial court, renew, termination, distributorship, conspiracy, manufacturer, summary judgment, notice, retail, price-fixing, Wholesalers, nonrenewal, terms, coercion, covenant, modified, Brewers, costs, tortious interference, acquiesced, appears, argues, cases

LexisNexis® Headnotes

Contracts Law > Contract Modifications > General Overview

HN1[] **Contracts Law, Contract Modifications**

Whether a pre-existing agreement has been modified depends on the parties' objective manifestations, not their subjective understanding.

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > Notice Requirements

HN2[] **Termination, Good Cause**

The Beer Brewers and Wholesalers Act, *Minn. Stat. § 325B.01*-.17 (1977), provides that contracts between brewers and distributors will automatically renew unless good cause exists for termination or nonrenewal; a distributor will have 90 days after written notice to rectify any deficiencies; and a brewer may not sell beer to a distributor who intends to distribute that beer in a territory already covered by another distributor.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Business & Corporate Law > ... > Causes of Action > Fiduciary Duties > Good Faith & Fair Dealing

HN3[] **Types of Contracts, Covenants**

Every non-sales contract contains an implied covenant of good faith which requires that one party not make the other's performance impossible.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN4[] **Causes of Action, Restraints of Trade**

Minn. Stat. § 325.8013 (1976) makes unlawful any contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade. A contract, combination, or conspiracy between two or more persons in competition for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price of any commodity is deemed to restrain trade unlawfully. *Minn. Stat. § 325.8015* (1976) (now codified as *Minn. Stat. § 325D.53, subd. 1* (1986)).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN5[] **Vertical Restraints, Resale Price Maintenance**

Under federal ***antitrust law***, vertical resale price maintenance is per se illegal, and written contracts which fix retail prices are proscribed. Although a manufacturer can lawfully announce resale prices in advance without eliciting an "agreement," it may not secure adherence to suggested prices by means which go beyond mere declination to sell to a customer who will not observe announced policy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN6[] **Price Fixing & Restraints of Trade, Vertical Restraints**

In cases where a manufacturer terminates a distributor for possibly price-related motivations, and the distributor asserts that he was terminated as part of a price-fixing conspiracy, the distributor must show (1) the existence of an agreement or conspiracy; and (2) a causal connection between the agreement and the termination.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN7[] **Price Fixing & Restraints of Trade, Vertical Restraints**

An unlawful conspiracy can be established if a manufacturer coerces a distributor into a retail price schedule and the distributor acquiesces. In such cases, an agreement to fix prices can be inferred from the parties' behavior. However, more than a showing that the distributor conformed to the suggested price is required. There must be evidence that the manufacturer sought such conformity and the distributor communicated its acquiescence. Evidence that a distributor changed its prices in response to coercion may meet this standard.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN8[] **Price Fixing & Restraints of Trade, Vertical Restraints**

In order to establish a nationwide conspiracy to fix prices by a manufacturer, a distributor would have to show that the manufacturer's price policy (1) was firmly enforced; (2) applied to all distributors; and (3) was acquiesced in by most of them.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN9[] **Standards of Review, Abuse of Discretion**

An award of the costs of discovery depositions is within the discretion of the trial court and will not be reversed absent a clear abuse of discretion.

Syllabus

1. Evidence was insufficient to raise a genuine issue of material fact on claims of breach of contract, fraudulent inducement, tortious interference, and violation of Minnesota antitrust and beer wholesalers acts.

2. Trial court did not abuse its discretion in taxing cost of depositions of appellant's chief officers.

Counsel: John A. Cochrane, John E. Thomas, St. Paul, Minnesota, for Appellant.

J. Marquis Eastwood, David Y. Trevor, Dorsey & Whitney, Minneapolis, Minnesota, for Respondents.

Judges: Lansing, Presiding Judge, Randall, Judge, and Kalitowski, Judge.

Opinion by: LANSING

Opinion

[*439] When Miller did not renew its beer distributorship, Beer Wholesalers, Inc. (BWI), brought this action alleging various statutory violations and common law claims. The trial court entered summary judgment dismissing all claims, and BWI appeals. We affirm.

FACTS

On October 8, 1973, Miller Brewing and BWI signed a distributorship agreement which provided that

> [1] Miller would sell beer to the distributor "in such quantities as Distributor shall order and Miller shall accept."
>
> [2] the contract **[**2]** would automatically be renewed "unless either party hereto shall, not less than ninety (90) days prior to the end of the initial term of this Agreement, give written notice to the other party of election not to renew this Agreement." No reason was required for nonrenewal of the contract.
> [3] the distributor's rights were fully set forth in the written contract.
> [4] the distributor got unrestricted, non-exclusive territory in which to distribute, unless limited by state law.
> [5] the agreement could be modified only by a writing signed by two Miller officers, although specific provisions could be waived by conduct of the party waiving compliance.

On June 28, 1978, more than 90 days before the expiration of the contract, Miller **[*440]** notified BWI of its intention not to renew the contract, citing various deficiencies in BWI's operation. BWI responded to the list of dissatisfactions item by item. During the final 90 days of the contract, BWI made several attempts to explain and correct the listed deficiencies, but Miller did not change its decision and the distributorship agreement expired on October 8, 1978.

BWI then brought this suit against Miller and East Side Beverage Company, **[**3]** a BWI competitor, alleging violations of the Beer Brewers and Wholesalers Act, contract law, tort law and ***antitrust law***, and requesting compensatory damages of $ 26.6 million and punitive damages of $ 5 million plus costs and attorney's fees. East Side settled and was dismissed in 1985.

BWI appeals the entry of summary judgment dismissing its claims against Miller and also challenges the trial court's taxation of costs.

ISSUES

1. Did the trial court err in granting summary judgment for Miller?

2. Did the trial court abuse its discretion in taxing costs?

ANALYSIS

I

BWI and Miller do not dispute the existence or terms of the October 1973 distributorship agreement. BWI contends, however, that the agreement was modified by the notice of termination and Miller's subsequent conduct and that

Miller breached the modified contract and an implied covenant of good faith; tortiously interfered with BWI's customers; fraudulently induced it to improve its distributorship in the hope of having it renewed; and violated Minnesota antitrust and beer wholesalers statutes.

A. Breach of contract.

The written agreement expressly provided that it could be modified only by a writing signed by two **[**4]** Miller officers, and there is no evidence that Miller waived either its right not to renew the agreement or the provision requiring a writing for modification. BWI argues that Miller's July 1978 notice of intention not to renew, which was signed by two Miller officers, gave rise to a new contract between the parties, the terms of which were established by a course of dealing between the parties during July, August and September 1978.

Although BWI does not state specifically the terms of the alleged modification, BWI appears to argue that Miller offered to renew if BWI remedied the listed deficiencies and that BWI accepted that offer by continuing to distribute Miller beer and even adding new accounts. BWI further asserts that this modified agreement was breached by Miller's bad faith conduct after the notice of nonrenewal by failing to specify deficiencies, failing to stop another distributor selling beer in BWI's territory, failing to deliver beer orders, discontinuing manufacture of a brand of beer, and not renewing the agreement.

HN1[] Whether a pre-existing agreement has been modified depends on the parties' objective manifestations, not their subjective understanding. *See Pine River* ***[**5]*** *State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983)*. In this case, as the trial court pointed out in its memorandum, Miller's conduct accorded with the terms of the written agreement. Although the nonrenewal letter listed BWI's alleged deficiencies, nothing in its language implies a promise to renew BWI if the deficiencies were corrected. Miller's conduct in reviewing BWI's attempts to correct the deficiencies also does not imply a promise to renew the distributorship in the absence of objective evidence that Miller offered to change its decision. On this evidence, the trial court did not err in granting Miller summary judgment on the breach of contract claim.

B. Beer Brewers and Wholesalers Act.

In 1977 the Minnesota legislature passed ***HN2***[] the Beer Brewers and Wholesalers Act, *Minn. Stat. § 325B.01*-.17 (1977). The Act provides, in pertinent part, that contracts **[*441]** between brewers and distributors will automatically renew unless good cause exists for termination or nonrenewal; a distributor will have 90 days after written notice to rectify any deficiencies; and a brewer may not sell beer to a distributor who intends to distribute that beer in a territory already **[**6]** covered by another distributor. The Act was expressly made applicable to all contracts in existence on May 28, 1977.

The trial court determined, on the basis of the Minnesota Supreme Court's decision in *Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868 (Minn. 1986)*, that the Act did not govern the contract between Miller and BWI. In *Jacobsen* the provisions of the Act directly contradicted specific provisions of the contract between Jacobsen and Anheuser-Busch, and the court held that the Act, "applied retroactively to a preexisting agreement between a brewer and a wholesaler as mandated by *Minn. Stat. § 325B.15* does unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement." *Id. at 875*.

The *Jacobsen* court's holding was not limited to the facts of the case before it nor to the specific provision of the act dealing with ownership transfers, and it precludes retroactive application of the Act to the October 8, 1973, contract between BWI and Miller. Because Miller's notice of nonrenewal did not extend the contract by modification, BWI cannot bring the distributorship agreement within the governance **[**7]** of the Act. The trial court did not err in finding that it could not constitutionally apply the Act to the parties in this case.

BWI further asserts that because Miller acted in accordance with the Act (listing BWI's deficient performance and giving 90 days' notice of intent not to renew) and received benefits from the law (BWI's solicitation of unnamed new accounts in the last 90 days of the contract), Miller should be estopped from challenging the Act's constitutionality.

Although the supreme court has held that a taxpayer cannot simultaneously challenge a provision of the tax code when seeking benefits under the same provision, *see Gale v. Commissioner of Taxation, 228 Minn. 345, 352-53, 37 N.W.2d 711, 716 (1949)*, that holding has not extended to other constitutional challenges. For example, a party was allowed to challenge two provisions of the Dram Shop Act in a suit seeking benefits under the act. *Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981)*. Even if the court had found that Miller sought benefits under the Act, Miller would not necessarily have been precluded from challenging the Beer Law's constitutionality.

[8]** In addition, the alleged "benefit" asserted was that BWI continued to market Miller beer during the 90-day period in the hope of avoiding nonrenewal. The written contract already obligated BWI to "aggressively market and sell Miller beer." Because Miller received only what it was contractually entitled to, it cannot be said to have invoked the Act so as to preclude a constitutional challenge.

C. Implied Covenant of Good Faith and Fair Dealing.

BWI argues that Miller breached an implied covenant of good faith and fair dealing governing the distributorship agreement, citing *Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979)*, and *Bain v. Champlin Petroleum, 692 F.2d 43 (8th Cir. 1982)*. Both cases involved franchises, were decided under the laws of other states, and addressed whether arbitrary termination breached the quasi-fiduciary duty imposed on franchisors by law.

BWI's reliance on *American Warehousing v. Michael Ede Management, Inc., 414 N.W.2d 554 (Minn. Ct. App. 1987)*, is similarly misplaced. Although the court held that ***HN3***[] every non-sales contract contains an implied covenant of good faith which requires that one **[**9]** party not make the other's performance impossible, that implied covenant did not extend to the performance of actions outside the scope of the written agreement. *Id. at 557-58*.

BWI's claims of breach of this covenant do not present evidence that Miller made the 1973 contract impossible to perform. **[*442]** Most of BWI's complaints relate to activities that occurred during the 90 days after Miller's notice of nonrenewal which made the "terms" of Miller's June 28 letter impossible to follow. Because the June 28 letter and activities of the next 90 days did not constitute a new contract, Miller's motives in failing to renew the agreement are immaterial. *See Wild v. Rarig, 302 Minn. 419, 441-42, 234 N.W.2d 775, 790 (1975)*. The trial court did not err in granting summary judgment on this claim.

D. Fraudulent Inducement.

BWI alleges that before it became a Miller distributor, a Miller representative said that Miller intended to allow BWI to "keep the brand" so long as sales were increasing and that, at Miller's urgings, BWI added computer equipment, trucks, personnel and accounts. Because BWI cites no cases in support of this claim, the precise **[**10]** legal theory on which it relies is unclear. As the trial court noted, remarks from the Miller representative did not rise to the level of an offer and BWI's other activity was already expected under the 1973 contract.

The only misrepresentation alleged is Miller's declaration of intent to let BWI keep the distributorship so long as sales were increasing. BWI provides no evidence to support that allegation and does not allege that the declaration was falsely made to induce BWI to enter into the agreement, or that BWI was justified in relying on the statement in spite of the conflicting terms of the express written agreement. On these facts, the trial court did not err in concluding that BWI failed to raise a genuine issue of fact on this claim.

E. Defamation and Tortious Interference.

BWI bases its tortious interference and defamation claims on evidence that a retailer told BWI that a Miller representative had made a specific derogatory remark about BWI to the retailer. The trial court correctly held this evidence inadmissible hearsay insufficient to raise a fact issue on the tortious interference claim. *See American Warehousing, 414 N.W.2d at 558*.

As BWI points **[**11]** out, the statement by Miller to the retailer, if used to show that Miller made a derogatory statement and not to prove BWI's deficiencies, would not be hearsay. But BWI advances the retailer's statement to prove the matter asserted for purposes of defamation and tortious interference, and it is therefore hearsay. *Minn. R. Evid. 803(3)*, the state-of-mind exception on which BWI also relies, specifically excludes statements of memory to prove the fact remembered, and no reason appears why, in the decade since this litigation commenced, BWI could not have obtained this evidence in admissible form. The trial court did not err in granting summary judgment on this claim.

BWI's other claims of tortious interference are based on Miller's failure to deliver enough beer, discontinuing manufacture of a particular brand, and other activities which were clearly permitted under the parties' distributorship agreement. The trial court correctly concluded that BWI failed to present disputed material facts to support this claim.

F. Minnesota ***Antitrust Law***.

HN4[] *Minn. Stat. § 325.8013* (1976) makes unlawful any "contract, combination, or conspiracy between two or more persons in unreasonable restraint of **[**12]** trade." A "contract, combination, or conspiracy between two or more persons in competition * * * for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price * * * of any commodity" is deemed to restrain trade unlawfully. *Minn. Stat. § 325.8015* (1976) (now codified as *Minn. Stat. § 325D.53, subd. 1* (1986)).

HN5[] Under federal ***antitrust law***, vertical resale price maintenance is per se illegal, and written contracts which fix retail prices are proscribed. *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407-08, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*. Although a manufacturer can lawfully announce resale prices in advance without eliciting an "agreement," it may not secure adherence to suggested prices **[*443]** "by means which go beyond * * * mere declination to sell to a customer who will not observe * * * announced policy." *United States v. Parke, Davis & Co., 362 U.S. 29, 43, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*.

Much of the litigation in this area involves ***HN6***[] cases in which a manufacturer terminates a distributor for possibly price-related motivations, and the distributor asserts that he was terminated as part of a price-fixing conspiracy. In such cases the distributor **[**13]** must show (1) the existence of an agreement or conspiracy; and (2) a causal connection between the agreement and the termination. In this case BWI alleges three unlawful combinations: (1) between itself and Miller; (2) between Miller and East Side; and (3) between Miller and distributors nationwide.

A. Miller-BWI.

HN7[] An unlawful conspiracy can be established if a manufacturer coerces a distributor into a retail price schedule and the distributor acquiesces. *Albrecht v. The Herald Co., 390 U.S. 145, 150 n.6, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*. In such cases, an agreement to fix prices can be inferred from the parties' behavior. However, under *Monsanto Corp. v. Spray-Rite Service Corp, 465 U.S. 752, 764 n.9, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, "more than a showing that the distributor conformed to the suggested price" is required. There must be evidence that the manufacturer sought such conformity and the distributor communicated its acquiescence. Evidence that a distributor changed its prices in response to coercion may meet this standard. *See Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1164 (7th Cir. 1987)*.

BWI argues that Miller coerced it into changing its prices on two **[**14]** occasions:

(1) In September 1977 a Miller representative told BWI to set the price for domestic Lowenbrau at $ 8.56 per case so that the retail price to consumers would be $.50 per six-pack over the price of Michelob. However, BWI's normal gross profit margin of 22 percent would have required a price of $ 9.30 per case. The Miller representative told BWI that that price "would be the rape of the Miller Brewing Company" and that marketing research showed that Lowenbrau had to be sold at 50 cents per case over Michelob. Under this "coercive threat," BWI priced Lowenbrau at $ 8.75.

(2) In January-February 1978 Miller raised its prices to wholesalers, and BWI raised its prices in February. On April 20, 1978, Miller announced another price raise effective June 1. In late May, a Miller representative asked BWI when they were going to raise prices and said if they didn't raise prices soon, Miller would think they didn't need the money and raise its prices to BWI. In mid-June, East Side raised its prices, and BWI raised them shortly thereafter to a level about ten percent below East Side's. On June 28, 1978, Miller sent BWI the termination letter.

BWI does not allege any other instances in **[**15]** which it changed its prices in response to "coercion" by Miller, and the cited examples do not raise a genuine issue of fact on the existence of a price-fixing agreement between Miller and BWI. In neither incident did BWI fully comply with Miller's price "demands," and in the second incident no specific price was even demanded. BWI cites no authority allowing implication of an "agreement" to fix prices where the ultimate price is less than demanded, and the only "coercion" in the facts alleged by BWI appears to have been an unserious remark.

Additionally, BWI's theory is contradictory in that it argues that it had an agreement with Miller on prices, but was terminated because of its refusal to fix prices. At least one court has approved summary judgment dismissing a claim based on such "mutually exclusive" theories when there was no other evidence of coercion. *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1266 (9th Cir. 1983)*; *compare* *Yentsch v. Texaco Inc., 630 F.2d 46, 54-55 (2d Cir. 1980)* (strong evidence of wide-spread coercion).

B. Miller-East Side.

BWI appears to allege that East Side participated in a price-fixing conspiracy **[**16]** **[*444]** with Miller by dumping bad Lowenbrau in BWI's territory to give Miller a pretext for terminating BWI. However, BWI has produced no evidence that East Side knew of Miller's alleged price-fixing plan, or that it dumped the beer in order to aid that plan. *See* *Monsanto, 465 U.S. at 764* ("there must be evidence that tends to exclude the possibility that manufacturer and nonterminated distributors were acting independently"); *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (agreement between manufacturer and nonterminated distributor to terminate a price-cutting distributor is per se illegal only if they also agree on price).

Because BWI does not even allege that East Side and Miller agreed on a price, and East Side may have been independently trying to get rid of bad beer, summary judgment on this claim was appropriate.

C. National Conspiracy.

Finally, BWI claims that Miller was engaged in price-fixing nationwide. There is evidence that Miller conducted extensive research to determine the best market price for Lowenbrau and tried to pressure BWI to set the price accordingly. It also appears that **[**17]** the two pricing chapters in Miller's Lowenbrau Marketing Manual no longer exist.

BWI also lists four instances of pricing pressures in addition to the two to which it acquiesced: (1) a Miller representative tried to get BWI to price Miller Lite at the same price as Schlitz Light and stated that he would deny having tried to get BWI to lower prices; (2) a representative tried to get the price of Miller Lite reduced; (3) a representative asked BWI if it was going to run a price-off promotion; and (4) a representative told BWI that it would not allow it co-op money unless BWI went along with the terms of the co-op (BWI did not go along, but received the co-op money in full).

The last two incidents do not appear coercive, but the first two tend to show that Miller pressured BWI to change its prices. This case is thus distinguishable from *Monsanto* and *Business Electronics*, in which the only evidence of price-fixing consisted of termination in response to complaints by competing dealers.

Nonetheless, ***HN8***[] in order to establish a nationwide conspiracy to fix prices, BWI would have to show that Miller's price policy (1) was firmly enforced; (2) applied to all distributors; and (3) was **[**18]** acquiesced in by most of them. *Yentsch, 630 F.2d at 52*. The evidence does not raise a genuine issue of fact on these elements. Although the existence of a price policy could be inferred from the disappearance of the price section of the manual and there is evidence that Miller attempted to influence BWI's prices, the record is devoid of evidence that Miller coerced other distributors or that they adhered to any pricing policy.

Under *Monsanto, 465 U.S. at 762-63*, manufacturers do have a legitimate interest in retail prices, and the existence of an agreement to fix them may not be inferred from ambiguous evidence. This case does not present sufficient evidence of coercion and acquiescence to satisfy BWI's burden of producing evidence that reasonably tends to prove the existence of a common scheme.

Because we conclude that BWI has failed to raise a genuine issue as to any of the alleged price-fixing conspiracies, we do not address whether such conspiracies would be unlawful *per se* under *Minn. Stat. § 325.8015*, which on its face applies only to agreements among competitors.

II

BWI argues that the trial court abused its discretion in taxing costs **[**19]** against BWI. Specifically, BWI claims that almost $ 6,000 of the $ 6,300 costs awarded Miller were for depositions described as cumulative, duplicative, unnecessary and rarely cited in the trial memos.

HN9[] An award of the costs of discovery depositions is within the discretion of the trial court and will not be reversed absent a clear abuse of discretion. *Striebel v. Minnesota State High School League, 321 N.W.2d 400, 403 (Minn. 1982)*. An award of **[*445]** costs for discovery depositions of the plaintiff's two chief officers falls within the discretion of the court.

DECISION

Affirmed.

End of Document

[McLaughlin v. Liu](#)

United States Court of Appeals for the Ninth Circuit

December 9, 1987, Argued and Submitted ; June 14, 1988, Filed

No. 87-5669

Reporter

849 F.2d 1205 *; 1988 U.S. App. LEXIS 7945 **; 109 Lab. Cas. (CCH) P35,077; 28 Wage & Hour Cas. (BNA) 1137

Ann McLaughlin, Secretary of Labor, U.S. Department of Labor, * Plaintiff-Appellee, v. Joe H. Liu, Individually and Doing Business as J L Fashions, Defendants-Appellants

Prior History: **[**1]** Appeal from the United States District Court for the Central District of California, D.C. No. CV-85-5462, James M. Ideman, District Judge, Presiding.

Core Terms

summary judgment, overtime, direct evidence, piecework, circumstantial evidence, nonmoving party, credibility, premium, sworn, material fact, implausibility, non-movant, summary judgment motion, pay period, conspiracy

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

If the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Civil Procedure > Judgments > Summary Judgment > General Overview

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN2[] **Judgments, Summary Judgment**

* Ann McLaughlin is substituted for her predecessor, William Brock, III, as Secretary of the Department of Labor. Fed. R. App. P. 43(c)(1).

Credibility determinations are jury functions, not those of a judge ruling on a motion for summary judgment. The evidence of the non-movant is to be believed.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Implausible Claims

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

HN3[] **Monopolies & Monopolization, Conspiracy to Monopolize**

On summary judgment in inquiry is authorized into the implausibility of inferences from circumstantial evidence, particularly in antitrust conspiracy cases, not an inquiry into the credibility of direct evidence.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN4[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The plaintiff resisting a summary judgment motion must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed respondents.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN6[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN7[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Plaintiffs alleging an antitrust conspiracy involving predatory pricing can only avoid summary judgment if they produce evidence tending to exclude the possibility that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN8[] **Summary Judgment, Evidentiary Considerations**

At the summary judgment stage of the litigation, the judge does not weigh conflicting evidence with respect to a disputed material fact. Nor does the judge make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions. These determinations are within the province of the factfinder at trial. Therefore, at summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party: if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN9[] **Summary Judgment, Entitlement as Matter of Law**

Inferences from circumstantial evidence must also be drawn in the light most favorable to the nonmoving party. Inferences may be drawn from underlying facts that are not in dispute, such as background or contextual facts, and from underlying facts on which there is conflicting direct evidence but which the judge must assume may be resolved at trial in favor of the nonmoving party. Assuming the existence of these underlying facts, however, an inference as to another material fact may be drawn in favor of the nonmoving party only if it is rational or reasonable and otherwise permissible under the governing substantive law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN10[] **Summary Judgment, Entitlement as Matter of Law**

If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party. The nonmoving party's evidence must be taken as true. Inferences from the nonmoving party's specific facts as to other material facts, however, may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing substantive law. This inquiry ensures that a genuine issue of material fact exists for the factfinder to resolve at trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN11[] **Summary Judgment, Evidentiary Considerations**

Where there is no direct evidence of a conspiracy, the defendant may discharge its summary judgment burden by proffering a plausible and justifiable alternative interpretation of its conduct that rebuts the plaintiff's allegation of conspiracy. And again where an antitrust plaintiff's allegation of a conspiracy is based solely on indirect evidence that is capable of inferences of both lawful and unlawful behavior, the plaintiff must produce some evidence tending to exclude the possibility that the defendant acted independently.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Types of Evidence > Circumstantial Evidence

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN12[] **Summary Judgment, Opposing Materials**

It is of course permissible on summary judgment to assess the plausibility of a legal argument, as opposed to assessing the weight or credibility of direct evidence of a material fact.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN13[] **Summary Judgment, Evidentiary Considerations**

The party opposing a motion for summary judgment, with evidence competent under *Fed. R. Civ. P. 56*, is to be believed; it is for the jury at trial, not for the judge on a pretrial motion, to decide whose evidence is more credible. A judge assessing the persuasiveness of evidence presented on a motion for summary judgment may discount such evidence as unspecific or immaterial, but not as unbelievable.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Governments > Courts > Judges

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN14[] **Summary Judgment, Evidentiary Considerations**

Since direct evidence concerning a historical fact therefore hinges on the witness' credibility and cognitive abilities, a true conflict concerning such evidence is exclusively within the province of the jury. A conflict of direct evidence concerning a material historical fact may never be settled by the judge on a motion for summary judgment. If the conflict concerns indirect evidence, the judge must make an initial determination that the inference to be drawn is a reasonable one, although it is in this area that the power of a judge under *Fed. R. Civ. P. 56* is most unclear.

Counsel: Edwin M. Rosenberg, Los Angeles, California, for the Defendants-Appellants.

Gerald F. Krizan, United States Department of Labor, Washington, District of Columbia, for the Plaintiff-Appellee.

Judges: James R. Browning, Chief Judge, Procter Hug, Jr. and Stephen Reinhardt, Circuit Judges.

Opinion by: BROWNING

Opinion

[*1206] BROWNING, Chief Judge:

The district court granted summary judgment to the Secretary in an action for violation of the overtime provisions of the Fair Labor Standards Act (FLSA), *29 U.S.C. § 201 et seq.*, during the period from February 1, 1983 to June 28,

1985. [1] The Secretary's showing in support of the motion consisted of two items. The first was a government investigator's affidavit with accompanying photocopies of Liu's original piecework records for the biweekly pay period ending April 6, 1985. These records demonstrated that during this pay period Liu did not pay an overtime premium for overtime work; rather, each employee's total earnings were exactly equal to the value of the piecework he or she produced during all of the hours worked in **[**2]** that period. The second item upon which the Secretary relied was Liu's response to the Secretary's Requests for Admissions, in which Liu agreed with the statement that "employees paid piecework were paid only piecework." [2]

In opposition to the motion for summary judgment, Liu relied on his sworn declaration in which he asserted that he had paid an overtime premium for piecework performed during overtime hours for all pay periods except the period ending April 6, 1985, and that during this one period he had deviated **[**3]** from his practice of prior and subsequent pay periods on the mistaken advice of an accountant friend whom he named. Liu attached a "piecework register" purporting to show a dollar amount of piecework performed by each employee which was less than the total compensation paid to employees who had worked overtime by an amount equal to overtime premiums properly calculated. Liu asserted in his declaration that his piecework register and payroll records were accurate. He also submitted sworn answers to interrogatories stating he paid the proper overtime premium and describing the manner in which the premium was calculated -- a method the Secretary concedes was the proper one for calculating overtime for employees paid on a piecework basis. [3]

The issue is whether the evidence **[**4]** created a conflict that could only be resolved at trial regarding the central issue of whether an overtime premium was paid during pay periods other than that ending April 6, 1985. [4]

The Secretary argues the district court was authorized to grant summary judgment **[*1207]** by *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, because Liu's sworn declaration and sworn answers to interrogatories were "implausible." [5] The Secretary relies on the following language from the *Matsushita* opinion:

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[1] The district court granted summary judgment against Liu on the issue of waiver of his defense under *29 U.S.C. § 260* and on the government's charge that he had violated the FLSA's record-keeping requirements. These rulings are not challenged on appeal.

[2] This statement cannot be viewed as conclusively admitting that no overtime premium was paid. It could reasonably be read as indicating that employees who were paid on a piecework basis did not *also* receive hourly wages. This reading is confirmed by Liu's denial of Requests Nos. 8 and 9, which asked in a more straightforward fashion whether Liu's records showing the payment of an overtime premium were false.

[3] The Secretary complains that Liu's opposition to the summary judgment motion relied upon materials in the record before the filing of that motion, rather than presenting affidavits. However, it is well-established that a party opposing summary judgment may rely on material already on file in the case. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2722 at 55-56 (2nd ed. 1983).

[4] We affirm the grant of summary judgment to the extent it found Liu in violation of the FLSA overtime requirements for the April 6, 1985 pay period.

[5] The Secretary points to several circumstances casting doubt on Liu's defense. Liu destroyed the current records of employees' piecework earnings despite FLSA regulations which require preservation of such records for three years, (*see 29 C.F.R. § 516.5*), thereby shifting the burden of producing evidence to Liu under *Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946)*. Liu claims to have changed his pay computation practices only during the single two-week pay period for which the Secretary had obtained original piecework records, and admitted to the violations for the single pay period only after it was revealed that the Secretary had copies of the piecework tickets and all of the piecework computations for that period. Liu claims he abandoned his long-practiced method of computing overtime for this two-week period on the casual advice of a friend, and offers no explanation for returning to it. The district court also noted that Liu's "piecework register" may not have been prepared until after the litigation had begun.

> It follows from these settled principles that HN1[] if the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.
>
> Id. at 587.

[5]** In a case such as this in which the opposition to a motion for summary judgment rests upon sworn statements, the Secretary's reading of *Matsushita* would abrogate the long-standing rule that credibility may not be resolved by summary judgment -- a rule reiterated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), within ninety days after *Matsushita* was filed: HN2[] "Credibility determinations . . . are jury functions, not those of a judge . . . ruling on a motion for summary judgment. . . . The evidence of the non-movant is to be believed. . . ." Id. at 255.

It is clear from the *Matsushita* opinion that the Court was not speaking of direct evidence, but of circumstantial evidence. *Matsushita* HN3[] authorizes an inquiry on summary judgment into the "implausibility" of inferences from circumstantial evidence, particularly in antitrust conspiracy cases, not an inquiry into the credibility of direct evidence. [6]

[6]** This case does not involve inferences from circumstantial evidence. Liu's **[*1208]** sworn statements that he calculated and paid overtime in accordance with the requirements of law are direct evidence of the central fact in dispute. Liu does not ask that inferences be drawn in his favor, but that his testimony be taken as true. To this he is clearly entitled under *Anderson* ("The evidence of the non-movant is to be believed," 477 U.S. at 255) and a host of other decisions. [7] Summary judgment cannot be justified in the face of such evidence.

Our opinions on summary judgment subsequent to *Anderson* and *Matsushita* have honored the difference between weighing direct evidence and refusing to draw unreasonable inferences from circumstantial evidence. We have upheld summary judgment on the basis of *Matsushita's* "implausibility" standard only where the non-movant relied on inferences from circumstantial evidence. [8] We analyzed the distinction explicitly and at some length in T. W.

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[6] In *Matsushita* the Court noted the absence of direct evidence of a predatory pricing conspiracy. 475 U.S. at 583. Left only with circumstantial evidence, the Court stated that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." Id. at 588. In such a case, the Court said HN4[] the plaintiff resisting a summary judgment motion "must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed respondents." *Id.* The Court noted that in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984), "we emphasized that HN5[] courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." Matsushita, 475 U.S. at 593. "Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." Id. at 594. The Court noted that the only "direct evidence" of a predatory pricing conspiracy on which the lower court relied was direct evidence of subsidiary combinations which at most was only circumstantial evidence of the overall predatory pricing conspiracy plaintiffs sought to prove. Id. at 595-96. The Court reviewed this circumstantial evidence and concluded it did not establish a plausible motive to engage in the alleged predatory pricing conspiracy. Id. at 596. HN6[] "Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." Id. at 596-97. The Court concluded that HN7[] plaintiffs alleging an antitrust conspiracy involving predatory pricing can only avoid summary judgment if they produce evidence "tend[ing] to exclude the possibility that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy." Id. at 597-98 (citations and quotations marks omitted).

[7] *See* 10A Wright, Miller & Kane, *supra*, § 2727 at 128 n. 6 (citing cases).

Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). We noted that ***HN8***[] at the summary judgment **[**7]** stage of the litigation,

> "the judge does not weigh conflicting evidence with respect to a disputed material fact. . . . Nor does the judge make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions. . . . These determinations are within the province of the factfinder at trial. Therefore, at summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party: if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact.
>
> *Id.* (citations omitted).

Turning to inferences from circumstantial evidence, we said:

> ***HN9***[] Inferences must also be drawn in the light most favorable to the nonmoving party. . . . Inferences may be drawn from underlying facts that are not in dispute, such as background or contextual facts . . ., and from underlying facts on which there is conflicting direct evidence but which the judge must assume may be resolved at trial in favor of the nonmoving party. Assuming the existence of these underlying facts, **[**8]** however, an inference as to another material fact may be drawn in favor of the nonmoving party only if it is "rational" or "reasonable" **[*1209]** and otherwise permissible under the governing substantive law.
>
> *Id. at 631* (citations omitted).
>
> We continued:
>
> ***HN10***[] If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party. The nonmoving party's evidence must be taken as true. Inferences from the nonmoving party's "specific facts" as to other material facts, however, may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing

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[8] In *California Arch. Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987)*, we upheld summary judgment against plaintiffs who claimed that defendant defrauded them by encouraging them to buy more goods but keeping its plans to close secret. Stressing that "there is no direct evidence -- no 'smoking gun'", we noted that "had Franciscan planned to close, it is unlikely that it would have undertaken these expensive projects. It is also unlikely that Franciscan would go to such lengths merely to encourage the dealers to buy more tile. No economic incentive to act in that manner exists. Therefore to avoid the stigma of implausibility, the evidentiary burden of the dealers is heavy." *Id. at 1470*.

In *Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)*, we affirmed summary judgment in reliance on *Matsushita* where there was no direct evidence of the antitrust conspiracy and the circumstantial evidence "was as consistent with permissible competitive behavior as with illegal conspiracy." *Id. at 904*. We explained that *Matsushita* addressed inference-drawing: "the only inferences permitted . . . are those that are reasonable given the substantive law which is the foundation for the claim or defense. . . . In the context of the case before us, the substantive law is the law of antitrust, and if the claim makes no economic sense, a speculative inference from the jury will not help it. In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim." *Id. at 902*. *See also* *The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148*, slip op. at 6388, 6398, 6407, 6412-13 (1988); *Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 525-28 (9th Cir. 1987)*(sustaining the grant of JNOV on weak circumstantial evidence of a price fixing conspiracy).

United States v. King Features Entertainment, Inc., 843 F.2d 394, 399 (9th Cir. 1988) is not to the contrary. The sole issue in that case was whether a contract interpretation was plausible, which "is a matter of law." *Id. at 398*. ***HN12***[] It is of course permissible on summary judgment to assess the plausibility of a legal argument, as opposed to assessing the weight or credibility of direct evidence of a material fact.

> substantive law. This inquiry ensures that a "genuine" issue of material fact exists for the factfinder to resolve at trial.
>
> Id. at 631-32.

We reiterated **HN11**[] "*where there is no direct evidence of a conspiracy*, the defendant may discharge its summary judgment burden by proffering a 'plausible and justifiable' alternative interpretation of its conduct that rebuts the plaintiff's allegation of conspiracy." *Id.* ***[**9]*** *at 632* (emphasis added). And again "where an antitrust plaintiff's allegation of a conspiracy *is based solely on indirect evidence that is capable of inferences of both lawful and unlawful behavior*, the plaintiff must produce some evidence tending to exclude the possibility that the defendant acted independently." *Id.* (emphasis supplied).

[10]** Other circuits also have explicitly noted that *Matsushita's* implausibility analysis is confined to drawing inferences from circumstantial evidence. *See* *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335, 1338 (3d Cir. 1987)* (reversing summary judgment and distinguishing *Matsushita* because "here plaintiff, unlike the plaintiffs in *Matsushita*, has produced direct evidence of a conspiracy"). In *Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291 (5th Cir. 1987)*, the Fifth Circuit reversed a summary judgment based upon the district court's conclusion that the movant's documentary showing on the central issue of fact was "unreasonable" in contrast to the "inaccurate and imprecise recollections" of the testimony of the non-movant and his witnesses on the same issue. *Id. at 293*. Noting *Matsushita's* doctrine that "a judge may require parties making an 'implausible' claim to 'come forward with more persuasive evidence to support their claim than would otherwise be necessary' to avoid summary judgment" (*id. at 294*), Judge Rubin emphasized, "The Supreme Court has not, however, approved summary judgments that rest on credibility determinations." *Id.* **[**11]** He continued:

> **HN13**[] The party opposing a motion for summary judgment, with evidence competent under *Rule 56*, is to be believed; it is for the jury at trial, not for the judge on a pretrial motion, to decide whose evidence is more credible. A judge assessing the "persuasiveness" of evidence presented on a motion for summary judgment may discount such evidence as unspecific or immaterial, but not as unbelievable. *Id.* [9]

Because Liu's sworn statement that he paid the proper overtime premium was **[**12]** "direct evidence of a material fact" (*T. W. Electric, 809 F.2d at 631*), the district court erred in granting summary judgment to the Secretary.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

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[9] *See also* Note, *Summary Judgment and Circumstantial Evidence*, *40 Stan L. Rev. 491, 494-95 (1988)*("**HN14**[] Since direct evidence concerning a historical fact therefore hinges on the witness' credibility and cognitive abilities, a true conflict concerning such evidence is exclusively within the province of the jury. . . . [A] conflict of direct evidence concerning a material historical fact may never be settled by the judge on a motion for summary judgment. . . . If the conflict concerns indirect evidence, the judge must make an initial determination that the inference to be drawn is a reasonable one, although it is in this area that the power of a judge under *Rule 56* is most unclear."

R.C. Bigelow, Inc. v. Unilever N.V.

United States District Court for the District of Connecticut

June 15, 1988, Decided ; June 15, 1988, Filed

Civil No. B-88-299 (JAC)

Reporter

689 F. Supp. 76 *; 1988 U.S. Dist. LEXIS 5679 **; 1988-1 Trade Cas. (CCH) P68,095

R.C. Bigelow, Inc. v. Unilever N.V., Thomas J. Lipton, Inc., Celestial Seasonings, Inc. and Kraft, Inc.

Core Terms

predatory, pricing, antitrust, allegations, tea, proposed acquisition, monopoly power, distributors, Deposition, herbal, genuine issue of material fact, anti trust law, defendants', injunctive, retail, summary judgment motion, no evidence, competitors, schematics, suppliers, raw

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

In order to grant a motion for summary judgment, the court must determine that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. A material fact is one whose resolution will affect the ultimate determination of the case. A factual dispute is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN2[] **Summary Judgment, Entitlement as Matter of Law**

The party opposing summary judgment must provide a factual basis for its allegations and may not rely on mere speculation or conjecture as to the true nature of the facts.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] Summary Judgment, Entitlement as Matter of Law

In determining whether a material issue of fact exists, the court must resolve all ambiguities and draw all inferences against the party moving for summary judgment.

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 > ... > Private Actions > Remedies > General Overview

HN4[] Remedies, Damages

Section 16 of the Clayton Act, *15 U.S.C.S. § 26*, provides injunctive relief for private parties threatened with loss or damage by a violation of the antitrust laws.

Antitrust & Trade Law > Clayton Act > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] Antitrust & Trade Law, Clayton Act

Only a private plaintiff threatened with antitrust injury has standing to sue under *15 U.S.C.S. § 26*. In other words, a private plaintiff must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] Regulated Practices, Trade Practices & Unfair Competition

Because the antitrust laws were enacted for the protection of competition, not competitors, only harm stemming from a reduction in competition qualifies as injury cognizable under the antitrust laws. Activity which seeks to reduce competition is also referred to as "anticompetitive" or "predatory."

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] **Regulated Practices, Monopolies & Monopolization**

It is clear that the mere possession of monopoly power does not ipso facto condemn a market participant.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN8[] **Regulated Practices, Monopolies & Monopolization**

The plaintiff must not simply be a competitor of an alleged monopolist; rather, the plaintiff must show antitrust injury.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN9[] **Regulated Practices, Price Discrimination**

Predatory pricing has been authoritatively defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. The appropriate measure of cost is prices below reasonably anticipated marginal cost.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN10[] **Regulated Practices, Price Discrimination**

Claims of threatened injury from predatory pricing must be evaluated with care since predatory pricing schemes are infrequently attempted and their success is inherently uncertain.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN11[] **Regulated Practices, Trade Practices & Unfair Competition**

Proof that an entity will commit bad acts is difficult to provide at the preliminary injunction stage. This is not to say, however, that once those bad acts occur, relief cannot be had. The antitrust laws provide treble damage recovery for competitors who successfully attack anticompetitive activities.

Counsel: Paul Windels, Jr., Anthony A. Dean, (Windels, Marx, Davies & Ives), New York, New York, Counsel for Plaintiff.

Richard Orr, (Tyler Cooper & Alcorn), New Haven, Connecticut, Counsel for Defendants Thomas J. Lipton, Inc., Celestial Seasonings, Inc. and Kraft, Inc.

Richard J. Wertheimer, (Arnold & Porter), Washington, District of Columbia, Counsel for Defendant Thomas J. Lipton, Inc.

Tefft W. Smith, (Kirkland & Ellis), Chicago, Illinois, Counsel for Defendants Celestial Seasonings, Inc. and Kraft, Inc.

Judges: **[**1]** Jose A. Cabranes, United States District Judge.

Opinion by: CABRANES

Opinion

[*77] RULING ON MOTION FOR SUMMARY JUDGMENT

JOSE A. CABRANES, UNITED STATES DISTRICT JUDGE

Plaintiff R.C. Bigelow, Inc. ("Bigelow"), the nation's third largest producer of herbal tea, seeks to enjoin a proposed merger of the two largest producers of herbal tea in the country. The question presented is whether Bigelow has made a sufficient showing of "antitrust injury" to establish standing under section 16 of the Clayton Act, *15 U.S.C. § 26*.

Bigelow brings this action for injunctive relief against Unilever N.V. ("Unilever"), Thomas J. Lipton, Inc. ("Lipton"), Celestial Seasonings, Inc. ("Celestial"), and Kraft, Inc. ("Kraft"), [1] pursuant to section 16 of the Clayton Act, *15 U.S.C. § 26*. Bigelow alleges that the proposed acquisition **[**2]** by Lipton of Celestial will substantially lessen competition and create a monopoly in the national market for herbal teas, thereby **[*78]** threatening Bigelow with serious loss and damages. Defendants have moved for summary judgment on the ground that plaintiff lacks standing to assert its claim for injunctive relief. [2]

[3]** On May 31, 1988, the court entered a temporary restraining order upon the consent of defendants Lipton, Celestial and Kraft enjoining defendants from carrying out the proposed transaction until either defendants' dispositive motion is granted, or a trial on the merits now scheduled for June 20, 1988 is concluded. A hearing on the motion for summary judgment was held on June 10, 1988. At that hearing, the parties represented that, if necessary, they were ready to proceed to a trial on the merits, and that no new or additional discovery would be necessary. *See* Certified Official Transcript of Hearing of June 10, 1988 (filed June 13, 1988) ("Transcript") at 61-63, 67-68. Accordingly, the motion for summary judgment is ripe for decision.

I.

HN1[] In order to grant a motion for summary judgment, the court must determine that there is no "genuine issue as to any material fact" and that "the party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. A "material" fact is one whose resolution will affect the ultimate determination of the case. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. A factual dispute is "genuine" when "the evidence is such that a **[**4]** reasonable jury could return a verdict for the nonmoving party." *Id*. ***HN2***[] The party opposing summary judgment must provide a factual basis for its allegations and may not rely on "mere speculation or conjecture as to the true nature of the facts." *Knight v. United States Fire Insurance Co., 804 F.2d 9, 12 (2d Cir.*

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[1] Celestial is a subsidiary of Kraft, and Lipton is a subsidiary of Unilever. Although Unilever has neither entered an appearance in this case nor responded in any other manner, the parties are in agreement that Unilever's presence in this action is unnecessary at this stage of the proceedings. *See* Certified Official Transcript of Hearing of June 10, 1988 (filed June 13, 1988) ("Transcript") at 13-14.

[2] Defendant originally filed a document entitled "Defendants' Memorandum in Opposition to Plaintiff's Request for a Temporary Restraining Order." At the hearing of May 31, 1988, the defendants agreed that that memorandum was, in effect, a motion to dismiss for failure to state a claim, and agreed to have the court consider the documents as such. At the same time, the court and the parties agreed on a schedule for expedited discovery prior to a hearing on defendants' motion and, if necessary, a hearing on plaintiff's motion for a preliminary injunction. *Rule 12(b) of the Federal Rules of Civil Procedure* provides that if, on a motion to dismiss for failure to state a claim, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." At the hearing of June 10, 1988, the parties agreed that the court might treat the pending motion as one for summary judgment. *See* Transcript at 15.

1986), *cert. denied*, *480 U.S. 932, 107 S. Ct. 1570, 94 L. Ed. 2d 762 (1987)*. **HN3**[] In determining whether a material issue of fact exists, the court must resolve all ambiguities and draw all inferences *against* the moving party. *See* Anderson, 106 S. Ct. at 2509-11. Accordingly, the court must determine whether plaintiff has raised a genuine issue of material fact with respect to the threshold standing issue of "antitrust injury."

II.

HN4[] Section 16 of the Clayton Act, *15 U.S.C. § 26*, provides injunctive relief for private parties "threatened [with] loss or damage by a violation of the antitrust laws." In *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*, the Supreme Court held that **HN5**[] only a private plaintiff threatened with "antitrust injury" has standing to sue under section 16. In other words, "a private plaintiff must allege threatened loss or damage 'of the type the antitrust **[**5]** laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *107 S. Ct. at 491* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. **HN6**[] Because the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*,'" *Brunswick, 429 U.S. at 488* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))* (emphasis in *Brown*), "only harm stemming from a reduction in competition qualifies as injury cognizable under the antitrust laws." *Adams v. Pan American World Airways, Inc., 264 U.S. App. D.C. 174, 828 F.2d 24, 26 (D.C.Cir. 1987)*, *cert. denied*, *485 U.S. 961,* ***[*79]*** *108 S. Ct. 1225, 99 L. Ed. 2d 425 (1988)*. Activity which seeks to reduce competition is also referred to as "anticompetitive" or "predatory." *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 2857, 86 L. Ed. 2d 467 (1985)*. In this case, therefore, the question is whether the proposed acquisition of Celestial by Lipton poses a threat of harm to Bigelow resulting from anticompetitive or predatory activity.

It is undisputed that the acquisition of Celestial by Lipton will result in Lipton's control of at least 80% of the market in herbal teas. [3] *See* Exhibit 9 to Affidavit of **[**6]** Clayton A. Prugh (filed June 9, 1988) ("Prugh Affidavit"); Transcript at 20. A post-acquisition market share of 80% is more than sufficient to establish a *prima facie* showing of "monopoly power." *See United States v. Waste Management, Inc., 743 F.2d 976, 981 (2d Cir. 1984)*. **HN7**[] It is clear, however, that "the mere possession of monopoly power does not *ipso facto* condemn a market participant." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*; *see also Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 84-85 (2d Cir. 1981)*, *cert. denied*, *455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982)*. As the Court of Appeals for the Fifth Circuit recently observed, "in *Cargill*, the [Supreme] Court required that **HN8**[] the plaintiff not simply be a competitor of an alleged monopolist; rather, the plaintiff must show antitrust injury." *Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95, 100 (5th Cir. 1988)*. Accordingly, the mere fact that Lipton will possess monopoly power after the proposed acquisition is not a sufficient showing that Lipton will exercise that power in a way that will cause antitrust injury to Bigelow. **[**7]** *See also* 3 P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 710 (Supp. 1987) ("Mere monopoly pricing is not a violation of the Sherman Act.").

It is arguable that a showing of monopoly power would be sufficient if it were also shown that Lipton was acting with predatory intent when it sought to acquire Celestial. *See Aspen Skiing, 105 S. Ct. at 2857* & n.28. Bigelow contends that Lipton intends to acquire Celestial in order to secure monopoly power and thereafter drive plaintiff out of the herbal tea market. In support of this contention, Bigelow argues that Lipton has paid "a substantial premium over the realistic value of Celestial" and is prepared to pay this premium as a means to obtaining monopoly power. Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction (filed May 26, 1988) at 14. Bigelow has also submitted evidence showing that Lipton approached Bigelow one week after the proposed acquisition was announced expressing an interest to buy Bigelow. *See* Affidavit of David C. Bigelow (filed **[**8]** May 30, 1988) ("Bigelow Affidavit") at para. 34. In plaintiff's view, this evidence demonstrates that Lipton was acting with predatory intent when it sought to acquire Celestial.

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[3] Defendants agreed to assume for the purposes of this argument that the relevant market is "herbal tea" as opposed to "tea." *See* Transcript at 18.

There is nothing in the record, however, to indicate why the proposed purchase price for Celestial ought to be regarded as excessively high. More important, there is nothing in the record to suggest that Lipton was willing to pay a substantial premium in order to obtain monopoly power. To the contrary, there is evidence showing that Celestial was sold to Kraft four years earlier at a price within reasonable range of the price now being offered by Lipton. *See* Deposition of David W. Frost (filed June 9, 1988) at 15. Indeed, the president of plaintiff, David C. Bigelow, has testified that he would be willing to sell his own company (whose market share is less than a third of Celestial's) for a substantially *greater* sum than Lipton is offering to pay for Celestial. *See* Deposition of David C. Bigelow (filed June 10, 1988) ("Bigelow Deposition") at 253; Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss (filed June 9, 1988) ("Plaintiff's Memorandum") at 3. Mr. Bigelow also **[**9]** observed, with reference to the **[*80]** high value of his own company, that "franchises [sic] are very valuable today. I don't have to tell you. Franchises like Bigelow, Lipton, and Celestial [are] strongly valuable." *Id*. Finally, the evidence in the record supports Lipton's position that the purchase price reflects in part Lipton's expected cost savings and efficiencies. *See* Exhibit 13 to Prugh Affidavit; Attachment 3 to Affidavit of Andrew M. Rosenfield (filed June 10, 1988) at Exhibit 1. Without some factual showing that Lipton's purchase price reflects a payment for monopoly power, plaintiff's allegations of predatory intent remain speculative.

Plaintiff has also submitted several of Lipton's internal memoranda for the purpose of demonstrating Lipton's intent to "eliminate competition" in the herbal tea market. *See* Exhibits 17, 18, 19, 20, 21, 23, 24 to Prugh Affidavit. However, these memoranda indicate nothing more than general competitive intent to "play hardball" with the competition. Bigelow Deposition at 158. They do not suggest that Lipton intended to "eliminate competition" by any means other than fair competition. To the contrary, the evidence demonstrates that Lipton **[**10]** simply intended to engage in "vigorous competition." *Cargill, 107 S. Ct. at 492*. Without evidence that Lipton's acquisition of Celestial is an attempt "to exclude rivals on some basis other than efficiency," Bigelow's allegations of predatory intent must fail. R. Bork, *The Antitrust Paradox* 138 (1978).

Although plaintiff has failed to raise a genuine issue of material fact regarding Lipton's intent in acquiring Celestial, plaintiff may nevertheless establish "antitrust injury" if it can show that there is a substantial likelihood that Lipton will engage in predatory activity after the acquisition. In this regard, Bigelow alleges several predatory practices in which Lipton is likely to engage, with resulting antitrust injury. These are: (a) predatory pricing; (b) improper control over retail store shelf space and promotional schemes; (c) improper control over distributers to retail stores; and (d) improper control over suppliers of raw herbs.

A.

HN9[] Predatory pricing has been authoritatively defined by the Supreme Court as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Cargill, **[**11]** 107 S. Ct. at 493*. Our Court of Appeals, in turn, has defined the appropriate measure of cost as "prices below reasonably anticipated marginal cost." *Northeastern Telephone, 651 F.2d at 88*. The Supreme Court has warned that "***HN10***[] claims of threatened injury from predatory pricing must . . . be evaluated with care," *Cargill, 107 S. Ct. at 495 n.17*, since predatory pricing schemes are infrequently attempted and their success is "inherently uncertain." *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1357, 89 L. Ed. 2d 538 (1986)*. [4]

Although plaintiff alleges that Lipton will engage in selective and temporary price reductions for at least some brands to a level below cost, **[**12]** *see* Bigelow Affidavit at 22, plaintiff has nevertheless failed to submit any evidence whatsoever in support of this allegation. To the contrary, Mr. Bigelow stated in his deposition that he has "no idea what prices will do" after the proposed acquisition. Bigelow Deposition at 137. Upon being asked "what specifically, if anything, do you believe that Lipton will do in the marketplace for herb tea upon the consummation of

[4] The Supreme Court has also noted that "the mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition . . . mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" ***Cargill, 107 S. Ct. at 495 n.17*** (quoting *Matsushita, 106 S. Ct. at 1360*).

[the proposed acquisition]", Mr. Bigelow responded, "If I were to answer that, I mean it would just be pure speculation on my part . . . as to what I would anticipate that they would do. I have no idea how they are going to manage the two companies." *Id. at 138*. Plaintiff's **[*81]** counsel concedes that plaintiff has submitted no evidence of past instances of predatory pricing, *see* Transcript at 52, and there is no evidence in the record to suggest a present intent to engage in any such activity in the future. The evidence relied upon by plaintiff in this case is similar to that found insufficient by the Supreme Court in *Cargill*, where the Court observed that the "evidence" of predatory pricing consisted "only of four passing references . . . to the possibility **[**13]** that [defendant's] prices might dip below cost." *Cargill, 107 S. Ct. at 494*. The Court found such evidence to "fall far short of establishing an allegation of injury from predatory pricing." *Id*. Similarly, plaintiff's unsupported and contradictory allegations of predatory pricing in this case are insufficient to establish a threat of antitrust injury. [5]

B.

In addition to predatory pricing, Bigelow argues that Lipton will induce supermarket chains to decrease **[**14]** or eliminate the amount of shelf space and the promotional schemes allocated to Bigelow. It has submitted evidence of Lipton's prior use of "planograms," or store shelf schematics, in support of its claim that Lipton will attempt to influence improperly retail stores. *See* Exhibits 33, 35 to Prugh Affidavit. Bigelow contends that Lipton, because it would command a monopoly share of the herbal tea market, could effectively require retailers to adopt these self-serving schematics or planograms.

The only material which Bigelow has submitted in support of this allegation, however, is a letter from its attorney to the Federal Trade Commission which sets forth a list of retail chain stores which allegedly have adopted Lipton's tea department schematic. *See* Exhibit 35 to Prugh Affidavit. However, standing alone, this information, if taken as true for the purposes of this motion, fails to raise a genuine issue of material fact with respect to whether Lipton will improperly compel retail store chains to adopt its schematics. Indeed, defendants have submitted an affidavit by Zip Lemmerman, Senior Vice President, Merchandising, for Pathmark Supermarkets, in which Mr. Lemmerman states **[**15]** that "it is Pathmark, and not Lipton or any other supplier, which decides shelf location and how much space each product will receive in the allocation." Affidavit of Zip Lemmerman, Exhibit 3 to Defendants' Memorandum in Opposition to Plaintiff's Request for a Temporary Restraining Order (filed May 31, 1988). Bigelow does not contend that planograms are *per se* illegal, but rather, that Lipton will employ such schematics in an illegal manner. Without some evidence of a prior history of such behavior, however, or a present intent to engage in such behavior in the future, Bigelow has failed to raise a genuine issue of material fact on this claim. [6]

C.

Plaintiff also alleges as predatory activity that Lipton will exercise improper control over distributors and suppliers. With respect to distributors, Bigelow submitted no evidence that Lipton will attempt to interfere improperly **[**16]** with plaintiff's distributors. Indeed, Mr. Bigelow views these distributors as "loyal" to his company. Bigelow Deposition at 191. He noted that his company has "a longstanding relationship with these distributors and we are very, **[*82]** very strong with these people." *Id. at 190*. In fact, Mr. Bigelow stated that his distributors would have "no reason" at this time to anticipate reducing or eliminating their services to plaintiff. *Id. at 187-88*.

D.

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[5] Even if the court were to have found that plaintiff had raised a genuine issue of material fact with respect to whether there was a substantial likelihood that Lipton would engage in predatory pricing, plaintiff has failed to submit any evidence raising a genuine issue concerning Lipton's ability to absorb the market shares of its competitors once prices have been cut, and the barriers to entry in the market when prices are subsequently raised to supracompetitive levels. These factors are also essential to a claim of predatory pricing, *see* ***Cargill, 107 S. Ct. at 494 n.15***, and plaintiff's failure to raise genuine issues of material fact with respect to them would also be fatal to its claim of predatory pricing.

[6] Indeed, David C. Bigelow testified at his deposition that he does not expect Lipton to increase the amount of advertising and promotions for herbal tea previously expended by Lipton and Celestial. *See* Bigelow Deposition at 182. Mr. Bigelow even suggested that there might be a reduction. *See* *id. at 247*.

With respect to suppliers, plaintiff contends that the proposed acquisition poses a threat that Lipton will exercise improper control over the raw herb market. Again, however, Bigelow's allegations lack factual support in the record. No evidence in the record has been brought to the court's attention to support Bigelow's claims that it will suffer any shortage of raw materials *as a result of the proposed acquisition*. Although Bigelow has submitted evidence suggesting that the raw herb market suffers from "major world shortages," Exhibit 29 to Prugh Affidavit, there is no evidence suggesting that Lipton will intentionally interfere with plaintiff's supply of raw herbs during these times of shortage. Accordingly, the court finds that **[**17]** plaintiff has failed to raise a genuine issue of material fact concerning Lipton's alleged predatory control over distributors and suppliers.

III.

As the Court of Appeals for the Fifth Circuit has observed, "*Cargill* has imposed significant barriers to competitor attempts to enjoin merger transactions." *Phototron Corp., 842 F.2d at 102*. "***HN11***[] Proof that an entity will commit bad acts is difficult to provide at the preliminary injunction stage. This is not to say, however, that once those bad acts occur, relief cannot be had. The antitrust laws provide treble damage recovery for competitors who successfully attack anticompetitive activities." *Id*. Although Bigelow asserts that at a later date it will be nearly impossible to unscramble the proverbial "scrambled eggs" of antitrust lore, *see* Plaintiff's Memorandum at 19, it is the case that Bigelow will nonetheless have an action for treble damages and injunctive relief for any antitrust injuries that it may suffer. [7] Having failed at this preliminary stage to raise a genuine issue of material fact with respect to whether it is threatened with antitrust injury, plaintiff's claim must fail. Accordingly, defendants' motion for summary **[**18]** judgment must be granted.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is granted.

It is so ordered.

Dated at New Haven, Connecticut, this 15th day **[**19]** of June, 1988.

End of Document

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[7] At oral argument, counsel for plaintiff contended that plaintiff would *not* have a remedy at law if Lipton were to engage in the alleged activity because the alleged predatory activity would be too difficult to prove. *See* Transcript at 55-56. If plaintiff concedes that he would not be able to prove that he had suffered antitrust injury once the alleged illegal activity occurred, then it is difficult to understand how the court could find that a substantial likelihood now exists that plaintiff will suffer antitrust injury in the future. *Cf.* ***Cargill, 107 S. Ct. at 490*** (noting that "it would be anomalous . . . to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred").

Christianson v. Colt Indus. Operating Corp.

Supreme Court of the United States

April 18, 1988, Argued ; June 17, 1988, Decided

No. 87-499

Reporter

486 U.S. 800 *; 108 S. Ct. 2166 **; 100 L. Ed. 2d 811 ***; 1988 U.S. LEXIS 2733 ****; 7 U.S.P.Q.2D (BNA) 1109; 56 U.S.L.W. 4625; 1988-1 Trade Cas. (CCH) P68,081; 11 Fed. R. Serv. 3d (Callaghan) 452

CHRISTIANSON ET AL. v. COLT INDUSTRIES OPERATING CORP.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

Disposition: *822 F.2d 1544*, vacated and remanded.

Core Terms

patents, patent law, district court, petitioners', patent-law, cases, court of appeals, cause of action, well-pleaded, antitrust, courts, law of the case, invalid, trade secret, monopolization, decisions, appellate jurisdiction, jurisdictional issue, federal patent law, federal law, infringement, accessories, manufacture, proprietary, adherence, customers, litigated, lawsuit, lack jurisdiction, summary judgment

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN1[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

28 U.S.C.S. § 1295(a)(1) grants the Court of Appeals for the Federal Circuit exclusive jurisdiction over an appeal from a final decision of a district court of the United States if the jurisdiction of that court was based, in whole or in part, on *28 U.S.C.S. § 1338*. *Section 1338(a)*, in turn, provides that the district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN2[] **Subject Matter Jurisdiction, Federal Questions**

In order to demonstrate that a case is one "arising under" federal patent law, the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Substantial Questions

Constitutional Law > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN3[] **Federal Questions, Substantial Questions**

A district court's federal-question jurisdiction extends over only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded claims. Linguistic consistency demands that *28 U.S.C.S. § 1338(a)* jurisdiction likewise extends only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN4[] **Civil Infringement Actions, Jurisdiction**

Under the well-pleaded complaint rule, as appropriately adapted to *28 U.S.C.S. § 1338(a)*, whether a claim "arises under" patent law must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN5[] **Civil Infringement Actions, Jurisdiction**

A case raising a federal patent-law defense does not, for that reason alone, "arise under" patent law, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. Nor is it necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question is essential. If, on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not be entitled to the relief it seeks, then the claim does not "arise under" those laws. Thus, a claim supported by alternative theories in the complaint may not form the basis for *28 U.S.C.S. § 1338(a)* jurisdiction unless patent law is essential to each of those theories.

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN6[] **Antitrust & Trade Law, Sherman Act**

Section 2 of the Sherman Act condemns every person who shall monopolize, or attempt to monopolize. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN8[] **Pleadings, Amendment of Pleadings**

See *Fed. R. Civ. P. 15(b)*.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN9[] **Preclusion of Judgments, Law of the Case**

The doctrine of the law of the case posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN10[] Standards of Review, Clearly Erroneous Review

The law-of-the-case doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Governments > Courts > Creation & Organization

HN11[] Jurisdictional Sources, Statutory Sources

Courts created by statute can have no jurisdiction but such as the statute confers.

Lawyers' Edition Display

Decision

Court of Appeals for Federal Circuit held not to have jurisdiction over appeal from District Court where complaint asserted antitrust claims for which patent law theory was not necessary to success.

Summary

Three days after the leading manufacturer of the M16 rifle had voluntarily dismissed patent infringement claims which it had brought in the United States District Court for the Central District of Illinois against one of its former employees, who had started a business of selling M16 parts, the former employee brought an action in the District Court against the manufacturer, seeking (1) damages and injunctive and equitable relief for the manufacturer's violations of 1 and 2 of the Sherman Act (*15 USCS 1* and *2*), and (2) actual and punitive damages under state law for the manufacturer's tortious interference with his business relationships. In the complaint, the former employee alleged that he had been driven out of the business of selling parts for the M16 by the manufacturer's litigation tactics and communications to others, including representations by the manufacturer to several of the former employee's current and potential customers that the former employee was misappropriating the manufacturer's trade secrets. The complaint also included allegations stating that unless the manufacturer's basic and improvement patents relating to the M16--many of which had already expired--were invalid, anyone with ordinary skill in the rifle-making art was able to use the technology of the patents upon their expiration. The manufacturer answered, interposing the defense that its conduct was justified by a need to protect its trade secrets, and asserting counterclaims which arose out of the former employee's alleged misappropriation of such trade secrets. Prior to trial, the former employee moved for summary judgment, expressly raising for the first time the contention that the manufacturer's patents relating to the M16 were invalid from their inception for failure to meet the "enablement" and "best mode" requirements of *35 USCS 112*. Because of such invalidity, the former employee argued, the trade secrets which the patents should have disclosed lost any applicable state-law protections, and were invalid with respect to the former employee's claims to which such invalidity was material, including (1) his monopolization claim under 2 of the Sherman Act, based on the manufacturer's lawsuit and letters to his competitors, and (2) his "group-boycott" claim under 1 of the Sherman Act, in that virtually all his suppliers and customers had agreed with the manufacturer to stop doing business with him. The District Court granted the former employee's summary judgment motion (*609 F Supp 1174*), and subsequently entered an order stating that (1) nine of the manufacturer's already-expired patents relating to the M16 were invalidated from their inception, and (2) all of the manufacturer's trade secrets regarding the M16, whether connected with the patents or not, were void and unenforceable, and technical information relating to such trade secrets was to be made available to the former employee (613 F Supp 330). The manufacturer appealed to the United States Court of Appeals for the Federal Circuit. The former employee moved to transfer the appeal to the United States Court of Appeals for the Seventh Circuit, on the ground that the claims of the complaint in the action did not "arise under" a federal patent statute, and thus that the Federal Circuit did not have jurisdiction of the claim under 28 USCS 1295(a)(1), which incorporates 28 USCS 1338 by reference. In an unpublished order, the Court of Appeals for the Federal Circuit granted the transfer motion. The Court of Appeals for the Seventh Circuit, raising the issue of its jurisdiction over the appeal sua sponte, concluded that the Court of Appeals for the Federal Circuit had been "clearly wrong," and transferred the appeal back to the Court of Appeals for the Federal Circuit (798 F2d 1051). On retransfer, the Court of Appeals for the Federal Circuit (1) adhered to its prior conclusion that it lacked jurisdiction over the appeal, and stated that the Court of Appeals for the Seventh Circuit had exhibited a monumental misunderstanding of the patent jurisdiction granted to the Court of Appeals for the Federal Circuit, (2) ruled that it nevertheless would address the merits of the appeal in the "interest of justice," and (3) reversed the summary judgment which the District Court had granted to the former employee (822 F2d 1544).

On certiorari, the United States Supreme Court vacated the judgment of the Court of Appeals for the Federal Circuit and remanded with instructions to transfer the case to the Court of Appeals for the Seventh Circuit. In an opinion by Brennan, J., expressing the unanimous view of the court, it was held that (1) pursuant to the well-pleaded complaint rule, the Court of Appeals for the Federal Circuit did not have jurisdiction over the manufacturer's appeal, since a patent law issue, while arguably necessary to at least one theory under both the former employee's monopolization and group-boycott antitrust claims, was not necessary to the overall success of either claim, in that there were reasons completely unrelated to the provisions and purposes of patent law why the former employee might or might not be entitled to the relief he sought under both claims; (2) the Court of Appeals for the Federal Circuit was not obliged to adopt the Court of Appeals for the Seventh Circuit's analysis of the jurisdictional issue as the law of the case; and (3) the Court of Appeals for the Federal Circuit, upon properly concluding that it lacked jurisdiction, should not have decided the merits anyway "in the interest of justice."

Stevens, J., joined by Blackmun, J., concurred, expressing the view that if the question whether a claim arises under the patent laws is asked at the end of a trial in order to decide whether the Court of Appeals for the Federal Circuit has appellate jurisdiction, the answer may be different than if the question had been asked at the outset to decide whether a Federal District Court has jurisdiction to try the case.

Headnotes

APPEAL §228 > Federal Circuit jurisdiction -- claims "arising under" patent laws -- antitrust claims -- remand -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]

The United States Court of Appeals for the Federal Circuit does not have appellate jurisdiction, pursuant to its authority under 28 USCS 1295(a)(1), to review a final decision of a Federal District Court based in whole or in part on 28 USCS 1338--which provides, in 1338(a), that District Courts have original jurisdiction of civil actions "arising under" any Act of Congress relating to patents--where a patent law issue, while arguably necessary to at least one theory under (1) a monopolization claim under 2 of the Sherman Act (15 USCS 2) and (2) a group-boycott claim under 1 of the Sherman Act (15 USCS 1), both of which were raised in District Court in the plaintiff's antitrust count, which was the only complaint count arguably involving such issues, is not necessary to the overall success of either claim; accordingly, the United States Supreme Court will (1) vacate, for lack of jurisdiction, a judgment of the Court of Appeals for the Federal Circuit which, while disavowing the Court of Appeals for the Federal Circuit's appellate jurisdiction in a case retransferred to it by the United States Court of Appeals for the Seventh Circuit--after the Court of Appeals for the Seventh Circuit had found the Court of Appeals for the Federal Circuit's initial transfer to it under

28 USCS 1631 to be "clearly wrong"--improperly proceeded to reach the merits anyway "in the interest of justice," and (2) remand the case to the Court of Appeals for the Federal Circuit with instructions to transfer the case to the Court of Appeals for the Seventh Circuit.

COURTS §257 > federal question jurisdiction -- > Headnote:
LEdHN[2][] [2]

Under 28 USCS 1331, a Federal District Court's federal question jurisdiction extends over only those cases in which a well-pleaded complaint establishes either that the federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded claims.

COURTS §289 > federal question jurisdiction -- patent laws -- > Headnote:
LEdHN[3][] [3]

A Federal District Court's jurisdiction under 28 USCS 1338 extends only to those cases in which a well-pleaded complaint establishes either that the federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

COURTS §289 > federal question jurisdiction -- patent laws -- anticipation of defenses -- > Headnote:
LEdHN[4][] [4]

Under the well-pleaded complaint rule, as appropriately adapted to 28 USCS 1338, whether a claim "arises under" patent law must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose; a case raising a patent law defense does not, for that reason alone, "arise under" patent law, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

COURTS §289 > REMOVAL OF CAUSES §67 > federal question jurisdiction -- patent laws -- omission of necessary patent claims -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

Merely because a claim makes no reference to federal patent law does not necessarily mean that the claim does not "arise under" patent law within the meaning of 28 USCS 1338; just as a plaintiff may not defeat removal, for lack of general federal question jurisdiction, by omitting to plead necessary federal questions in a complaint, so a plaintiff may not defeat 1338 jurisdiction by omitting to plead necessary federal patent law questions.

COURTS §289 > federal question jurisdiction -- patent laws -- alternative theories -- > Headnote:
LEdHN[6][] [6]

It is not necessarily sufficient, for purposes of securing jurisdiction under *28 USCS 1338*, that a well-pleaded claim alleges a single theory under which resolution of a patent law question is essential; if on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not be entitled to the relief it seeks, then the claim does not "arise under" those laws for purposes of 1338; thus, a claim supported by alternative theories in the complaint may not form the basis for 1338 jurisdiction unless patent law is essential to each of those theories.

COURTS §289 > federal jurisdiction -- patent laws -- monopolization claim -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]***LEdHN[7C]***[] [7C]

A claim in a Federal District Court action that the leading manufacturer, seller, and marketer of M16 rifles engaged in conduct constituting monopolization against a former employee who operated a business of manufacturing and selling M16 parts, in violation of 2 of the Sherman Act (*15 USCS 2*), does not "arise under" the federal patent laws within the meaning of *28 USCS 1338* where, although one theory of relief advanced by the former employee involves a patent law issue--namely, that the manufacturer made false assertions in its letters and pleadings that the former employee was violating its trade secrets, when such trade secrets were not protected under state law because the manufacturer's M16 patents were invalid under *35 USCS 112*--there are other reasons completely unrelated to the provisions and purposes of federal patent law why the former employee may or may not be entitled to the relief he seeks under the monopolization claim, including the facts, as disclosed in the complaint, (1) that the manufacturer authorized the former employee's use of the trade secrets to some extent, and (2) that most of the manufacturer's alleged monopolization conduct--which included the use of inapplicable court orders, misrepresentations that such orders protected its proprietary data, and the filing of a prior lawsuit against the former employee in bad faith so as to urge current and potential customers to refrain from doing business with the former employee--could be deemed wrongful apart from the truth or falsity of the manufacturer's accusations that the former employee had infringed the manufacturer's trade secrets.

COURTS §289 > federal jurisdiction -- patent laws -- group boycott claim -- > Headnote:
LEdHN[8A][] [8A]***LEdHN[8B]***[] [8B]

A claim in a Federal District Court action that the leading manufacturer, seller, and marketer of M16 rifles, engaged in conduct constituting a group boycott, in violation of 1 of the Sherman Act (*15 USCS 1*), by agreeing with virtually all suppliers and customers of a former employee who operated a business of manufacturing and selling M16 parts to refrain from transacting further business with the former employee, does not "arise under" the federal patent laws within the meaning of *28 USCS 1338* where, notwithstanding the former employee's attempt to prove the unreasonableness of the alleged agreement--under the theory that its purpose was to protect the manufacturer's trade secrets from infringement by the former employee, but that the manufacturer had no trade secrets to infringe since the patents giving rise to the proprietary information protected were invalid under *35 USCS 112*--the complaint contains alternative, nonpatent theories of relief on its face, including the theory that the alleged agreement was unreasonable because the manufacturer had authorized the former employee to use the trade secrets.

COURTS §255 > federal question jurisdiction -- well-pleaded complaint -- > Headnote:
LEdHN[9][] [9]

The well-pleaded complaint rule for determining federal question jurisdiction under *28 USCS 1331* focuses on claims, and not theories of entitlement to relief.

APPEAL §228 > COURTS §255 > Federal Circuit jurisdiction -- well-pleaded complaint -- patent laws -- > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

The United States Court of Appeals for the Federal Circuit cannot assert appellate jurisdiction over an appeal under *28 USCS 1295(a)(1)*, notwithstanding the well-pleaded complaint rule, based on a derivation from the congressional policy of creating a Court of Appeals for the Federal Circuit with exclusive jurisdiction over certain patent cases, that Congress' goals would be better served if such jurisdiction were instead fixed by reference to the case actually litigated; since a Federal District Court's jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, the referent for the Court of Appeals for the Federal Circuit's jurisdiction under 1295(a)(1) must be the same, and the legislative history of the Court of Appeals for the Federal Circuit's jurisdictional provisions confirms that focus; the United States Supreme Court has no more authority to read 1295(a)(1) as granting the Court of Appeals for the Federal Circuit jurisdiction over an appeal where the well-pleaded complaint does not depend on patent law, than to read *28 USCS 1338* as granting a District Court jurisdiction over such a complaint.

APPEAL §228 > Federal Circuit jurisdiction -- patent laws -- implied cause of action -- consent of parties -- > Headnote:
LEdHN[11A][] [11A]***LEdHN[11B]***[] [11B]

The United States Court of Appeals for the Federal Circuit does not have appellate jurisdiction, notwithstanding the well-pleaded complaint rule, to review a Federal District Court summary judgment on grounds that summary judgment papers gave rise to an implied cause of action under *35 USCS 112*, a federal patent statute--in which case the pleadings were amended by the consent of the parties to include such cause of action under *Rule 15(b) of the Federal Rules of Civil Procedure*--where, although the papers focused almost entirely on patent law issues, (1) there was no evidence of any consent among the parties to litigate the new patent law claim, but rather such issues fell squarely within the purview of theories of recovery, defenses, and counterclaims that the pleadings in the case already encompassed, and (2) the District Court never intimated that the patent issues were relevant to any cause of action other than those raised expressly in the complaint.

APPEAL §228 > COURTS §632 > Federal Circuit -- determination of jurisdiction -- law of the case -- effect of transfer -- > Headnote:
LEdHN[12A][] [12A]***LEdHN[12B]***[] [12B]

The United States Court of Appeals for the Federal Circuit cannot assert appellate jurisdiction over an appeal from a Federal District Court judgment, notwithstanding the well-pleaded complaint rule, based on principles of the law of the case--pursuant to a determination by the United States Court of Appeals for the Seventh Circuit, on transfer from the Court of Appeals for the Federal Circuit, that the Court of Appeals for the Federal Circuit had jurisdiction over the appeal--where (1) the Court of Appeals for the Federal Circuit, to which the appeal had first been taken, was the first to decide the jurisdictional issue by transferring the case to the Court of Appeals for the Seventh Circuit, even though the Court of Appeals for the Federal Circuit did not explicate its rationale for transferring the case--which meant that the Court of Appeals for the Seventh Circuit, and not the Court of Appeals for the Federal Circuit, had departed from the law of the case, (2) even if the Court of Appeals for the Seventh Circuit's decision was the law of the case, the Court of Appeals for the Federal Circuit did not exceed its power in revisiting the jurisdictional issue and concluding that the Court of Appeals for the Seventh Circuit's decision was "clearly wrong," and (3) law of the case did not bind the United States Supreme Court in reviewing the decisions below.

APPEAL §1766 > law of the case -- coordinate courts -- > Headnote:
LEdHN[13][] [13]

Under the doctrine of the law of the case, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case; such rule of practice, promoting the finality and efficiency of the judicial process by protecting against the agitation of settled issues, applies as much to the decisions of a coordinate court in the same case as to a court's own decisions, since the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law--otherwise, transferee courts that feel entirely free to revisit transfer decisions of a coordinate court could threaten to send litigants into a vicious circle of litigation.

APPEAL §1766 > law of the case -- > Headnote:
LEdHN[14][] [14]

The law of the case doctrine turns on whether a court previously decided upon a rule of law, not on whether, or how well, it explained its decision; the doctrine expresses the practice of the courts generally to refuse to reopen what has been decided, and is not a limit to their power; a court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances, such as where the initial decision was clearly erroneous and would work a manifest injustice.

APPEAL §1766 > law of the case -- Supreme Court review -- > Headnote:
LEdHN[15][] [15]

The doctrine of the law of the case cannot bind the United States Supreme Court in reviewing decisions below, and a petition to the Supreme Court for a writ of certiorari can expose the entire case to review; just as a Federal District Court's adherence to the law of the case cannot insulate an issue from appellate review, a Federal Court of Appeals' adherence to the law of the case cannot insulate an issue from the Supreme Court's review.

APPEAL §228 > Federal Circuit -- authority where jurisdiction is lacking -- > Headnote:
LEdHN[16][] [16]

Where the United States Court of Appeals for the Federal Circuit has correctly concluded that it lacks jurisdiction, the Court of Appeals for the Federal Circuit has no authority to reach the merits anyway "in the interest of justice"; under *28 USCS 1631*, the Court of Appeals for the Federal Circuit has authority to make a single decision upon concluding that it lacks jurisdiction--whether to dismiss the case or, "in the interest of justice," to transfer it to a Federal Court of Appeals that has jurisdiction.

COURTS §161 > statutory jurisdiction -- > Headnote:
LEdHN[17][] [17]

Courts created by statute can have no jurisdiction but such as the statute confers.

APPEAL §1766 > COURTS §632 > law of the case -- transfer -- > Headnote:
LEdHN[18][] [18]

Under law of the case principles, if a transferee Federal Court of Appeals can find the transfer decision by another Court of Appeals plausible, the transferee court's jurisdictional inquiry is at an end.

Syllabus

The principal statutes involved in this case, which arises from a jurisdictional dispute between Courts of Appeals, are *28 U.S. C. § 1295(a)(1)* -- granting the Federal Circuit exclusive jurisdiction over an appeal from a final decision of a federal district court "if the jurisdiction of that court was based, in whole or in part, on" *28 U.S. C. § 1338* -- and *§ 1338(a)*, which grants the district courts original jurisdiction of any civil action "arising under" any federal statute relating to patents. Respondent (Colt), which is the leading manufacturer, seller, and marketer of M16 rifles and their parts and accessories, held and developed patents relating to the rifle, and has maintained the secrecy **[****2]** as to specifications essential to the mass production of interchangeable M16 parts. Petitioner Christianson, a former Colt employee, established a corporation (also a petitioner), and began selling M16 parts. Colt joined petitioners with other defendants in a patent-infringement lawsuit, but ultimately voluntarily dismissed its claims against petitioners. In the meantime, Colt notified several of petitioners' current and potential customers that petitioners were illegally misappropriating Colt's trade secrets, and urged them to refrain from doing business with petitioners. Petitioners then brought this antitrust action against Colt in Federal District Court for violations of *§§ 1* and *2* of the Sherman Act. The complaint alleged, *inter alia*, that Colt's letters, litigation tactics, and other conduct drove petitioners out of business. Petitioners later amended the complaint to assert a second cause of action under state law for tortious interference with their business relationships. Colt asserted a defense that its conduct was justified by a need to protect its trade secrets and countersued on a variety of claims arising out of petitioners' alleged misappropriation of M16 patent **[****3]** specifications. Petitioners filed a motion for summary judgment raising a patent-law issue -- related to the validity of Colt's patents -- to which the complaint only obliquely hinted. The District Court awarded petitioners summary judgment as to liability on both the antitrust and the tortious-interference claims. On Colt's appeal, the Court of Appeals for the Federal Circuit held that it lacked jurisdiction and transferred the appeal to the Court of Appeals for the Seventh Circuit. The Seventh Circuit, however, raising the jurisdictional issue *sua sponte*, concluded that the Federal Circuit was "clearly wrong" and transferred the case back. The Federal Circuit, although concluding that the Seventh Circuit's jurisdictional decision was "clearly wrong," addressed the merits in the "interest of justice," and reversed the District Court.

Held:

1. The Court of Appeals for the Federal Circuit would not have jurisdiction of the appeal of a final judgment in this case under *28 U.S. C. § 1295(a)(1)*, since the action is not one "arising under" the patent statutes for purposes of *§ 1338(a)*. Pp. 807-813.

(a) In order to demonstrate that a case **[****4]** is one "arising under" federal patent law the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of those laws. *Section 1338(a)* jurisdiction extends only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims. A case raising a federal patent-law defense does not, for that reason alone, "arise under" patent law, even if the defense is anticipated in the complaint, and even if both parties admit that the defense is the only question truly at issue in the case. Nor is it necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question is essential. If on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not **[****5]** be entitled to the relief it seeks, then the claim does not "arise under" those laws. Pp. 807-810.

(b) Petitioners' antitrust count can readily be understood to encompass both a monopolization claim under *§ 2* of the Sherman Act and a group-boycott claim under *§ 1*. The patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim. Even assuming, without deciding, that the validity of Colt's patents is an essential element of petitioners' monopolization theory rather than merely an argument in anticipation of a defense, the well-pleaded complaint rule focuses on claims, not theories, and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim "arises under" patent law. Examination of the complaint reveals that the monopolization theory (on which petitioners ultimately prevailed in the District Court) is only one of several involved, and the only one for which the patent-law issue is even arguably essential. Since there are reasons completely unrelated to the provisions and purposes of federal patent law **[****6]** why petitioners may or may not be entitled to the relief sought under their monopolization claim, the claim does not "arise under" federal patent law. The same analysis obtains as to petitioners' group-boycott claim under *§ 1* of the Sherman Act. Pp. 810-813.

2. Nor does reference to congressional policy compel a finding of Federal Circuit jurisdiction. One of Congress' objectives in creating the Federal Circuit was to reduce the lack of uniformity and uncertainty of legal doctrine in the administration of patent law. Although arguably Congress' goals might be better served if the Federal Circuit's jurisdiction were to be fixed by reference to the case actually litigated, nevertheless, Congress determined the relevant focus when it granted Federal Circuit jurisdiction on the basis of the district courts' jurisdiction. Since the latter courts' jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, the referent for the Federal Circuit's jurisdiction must be the same. The legislative history of the Federal Circuit's jurisdictional provisions confirms that focus. Pp. 813-814.

3. Federal Circuit jurisdiction here cannot be based on *Federal **[****7]** Rule of Civil Procedure 15(b)* by deeming the complaint amended to encompass a new and independent cause of action -- an implied cause of action under the patent laws. Even assuming that a court of appeals could furnish itself a jurisdictional basis under such theory, there is simply no evidence of any "express or implied consent" among the parties, as required by the Rule, to litigate a new patent-law claim. Although the summary judgment papers focused almost entirely on patent-law issues that petitioners deemed fundamental to the lawsuit, those issues fell squarely within the purview of the theories of recovery, defenses, and counterclaims that the pleadings already encompassed. Pp. 814-815.

4. There is no merit to the contention that the Federal Circuit was obliged to adopt the Seventh Circuit's analysis of the jurisdictional issue as the law of the case. The law-of-the-case doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions, and the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law. However, the Federal Circuit, in transferring the case to the **[****8]** Seventh Circuit, was the first to decide the jurisdictional issue. That the Federal Circuit did not explain its rationale is irrelevant. Thus, the law of the case was that the Seventh Circuit had jurisdiction, and it was the Seventh Circuit that departed from the law of the case. Moreover, the doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power. Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to

decline jurisdiction. Most importantly, law of the case cannot bind this Court in reviewing decisions below. Pp. 815-818.

5. The Federal Circuit, after concluding that it lacked jurisdiction, erred in deciding to reach the merits anyway "in the interest of justice." Courts created by statute only have such jurisdiction as the statute confers. Upon concluding that it lacked jurisdiction, the Federal Circuit had authority, under *28 U.S. C. § 1631*, to make a single decision -- whether to dismiss the case or, **[****9]** "in the interest of justice," to transfer it to a court of appeals that has jurisdiction. The rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases -- especially in the situation where, as here, the litigants are bandied back and forth between two courts, each of which insists that the other has jurisdiction. Such situations inhere in the very nature of jurisdictional lines, for few jurisdictional lines can be so finely drawn as to leave no room for disagreement on close cases. However, the courts of appeals should achieve the end of quick settlement of questions of transfer by adhering strictly to principles of law of the case. Under those principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end. Pp. 818-819.

Counsel: Stuart R. Lefstein argued the cause for petitioners. With him on the briefs were Spiro Bereveskos and John C. McNett.

Anthony M. Radice argued the cause for respondent. With him on the brief were Joseph C. Markowitz, Kim J. Landsman, and Robert L. Harmon.

Judges: BRENNAN, J., delivered the opinion for **[****10]** a unanimous Court. STEVENS, J., filed a concurring opinion, in which BLACKMUN, J., joined, post, p. 819.

Opinion by: BRENNAN

Opinion

[*803] **[***822]** **[**2171]** JUSTICE BRENNAN delivered the opinion of the Court.

[1111] ***LEdHN[1A]***[] [1A]This case requires that we decide a peculiar jurisdictional battle between the Court of Appeals for the Federal Circuit and the Court of Appeals for the Seventh Circuit. Each court has adamantly disavowed jurisdiction over this case. Each has transferred the case to the other. And each insists that the other's jurisdictional decision is "clearly wrong." **[*804]** *798 F.2d 1051, 1056-1057 (CA7 1986)*; *822 F.2d 1544, 1551, n. 7 (CA Fed. 1987)*. The parties therefore have been forced to shuttle their appeal back and forth between Chicago and the District of Columbia in search of a hospitable forum, ultimately to have the merits decided, after two years, by a Court of Appeals that still insists it lacks jurisdiction to do so.

I

Respondent Colt Industries Operating Corp. is the leading manufacturer, seller, and marketer of M16 rifles and their parts and accessories. **[****11]** Colt's dominant market position dates back to 1959, when it acquired a license for 16 patents to manufacture the M16's precursor. Colt continued to develop the rifle, which the United States Army adopted as its standard assault rifle, and patented additional improvements. Through various devices, Colt has also maintained a shroud of secrecy around certain specifications essential to the mass production of interchangeable M16 parts. For example, Colt's patents conceal many of the manufacturing specifications that might otherwise be revealed by its engineering drawings, and when Colt licenses others to manufacture M16 parts or hires employees with access to proprietary information, it contractually obligates them not to disclose specifications.

Petitioner Christianson is a former Colt employee who acceded to such a nondisclosure agreement. Upon leaving respondent's employ in 1975, Christianson established petitioner International Trade Services, Inc. (ITS), and began selling M16 parts to various customers domestically and abroad. Petitioners' business depended on information that Colt considers proprietary. Colt expressly waived its proprietary rights **[**2172]** at least as to some **[****12]** of petitioners' **[***823]** early transactions. The precise scope of Colt's waiver is a matter of considerable dispute. In 1983, however, Colt joined petitioners as defendants in a patent-infringement lawsuit against two companies that had arranged a sale of M16's to El Salvador. **[*805]** Evidence suggested that petitioners supplied the companies with certain M16 **[1112]** specifications, and Colt sought a court order enjoining petitioners from any further disclosures. When the District Court declined the motion, Colt voluntarily dismissed its claims against petitioners. In the meantime, Colt notified several of petitioners' current and potential customers that petitioners were illegally misappropriating Colt's trade secrets, and urged them to refrain from doing business with petitioners.

Three days after their dismissal from the lawsuit, petitioners brought this lawsuit in the District Court against Colt "pursuant to Section 4 . . . (*15 U.S. C. § 15*) and Section 16 of the Clayton Act (*15 U.S. C. § 26*) for damages, injunctive and equitable relief by reason of its violations of *Sections 1* and *2* of the Sherman Act (*15 U.S. C. §§ 1* **[****13]** & *2*) . . . ." App. 7. The complaint alleged that Colt's letters, litigation tactics, and "othe[r] . . . conduct" drove petitioners out of business. In that context, petitioners included the following obscure passage:

> "18. The validity of the Colt patents had been assumed throughout the life of the Colt patents through 1980. Unless such patents were invalid through the wrongful retention of proprietary information in contravention of United States Patent Law (*35 U.S. C. § 112*), in 1980, when such patents expired, anyone 'who has ordinary skill in the rifle-making art' is able to use the technology of such expired patents for which Colt earlier had a monopoly position for 17 years.
>
> "19. ITS and anyone else has the right to manufacture, contract for the manufacture, supply, market and sell the M-16 and M-16 parts and accessories thereof at the present time." *Id.*, at 9.

Petitioners later amended their complaint to assert a second cause of action under state law for tortious interference with their business relationships. Colt interposed a defense that **[*806]** its conduct was justified by a need to protect its trade secrets and countersued **[****14]** on a variety of claims arising out of petitioners' alleged misappropriation of M16 specifications.

Petitioners' motion for summary judgment raised only a patent-law issue obliquely hinted at in the above-quoted paragraphs -- that Colt's patents were invalid from their inception for failure to disclose sufficient information to "enable any person skilled in the art . . . to make and use the same" as well as a description of "the best mode contemplated by the inventor of carrying out his invention." *35 U.S. C. § 112*. Since Colt benefited from the protection of the invalid patents, the argument continues, the "trade secrets" that the patents should have disclosed lost any state-law protection. Petitioners therefore argued that the District Court should hold that "Colt's trade secrets are invalid and that [their] claim of invalidity shall be taken as established with respect to all claims **[***824]** and counterclaims to which said issue is material." App. 58.

The District Court awarded petitioners summary judgment as to liability on both the antitrust and the tortious-interference claims, essentially relying on the *§ 112* theory articulated above. In the process, **[****15]** the District Court invalidated nine of Colt's patents, declared all trade secrets relating to the M16 unenforceable, enjoined Colt from enforcing "any form of trade secret right in any technical information relating to the M16," and ordered Colt to disgorge to petitioners all such information. *613 F. Supp. 330, 332 (CD Ill. 1985)*.

Respondent appealed to the Court of Appeals for the Federal Circuit, which, after full briefing and argument, concluded that it lacked jurisdiction and issued an unpublished order transferring the appeal to the Court of Appeals for the Seventh Circuit. See *28 U.S. C. § 1631*. The Seventh Circuit, **[**2173]** however, raising the jurisdictional issue *sua sponte*, concluded that the Federal Circuit was "clearly wrong" and transferred the case back. *798 F.2d at 1056-1057, 1062*. **[*807]** The Federal Circuit, for its part, adhered to its prior jurisdictional ruling, concluding that the Seventh Circuit exhibited "a monumental misunderstanding of the patent jurisdiction granted this court," *822 F.2d at 1547*, and was "clearly wrong," *id., at 1551, n. 7*. Nevertheless, the **[****16]** Federal Circuit proceeded to address the merits in the "interest of justice," *id., at 1559-1560*, and reversed the District Court. We granted certiorari, *484 U.S. 985 (1987)*, and now vacate the judgment of the Federal Circuit.

II

LEdHN[1B][] [1B]As relevant here, *28 U.S. C. § 1295(a)(1)* ***HN1***[] grants the Court of Appeals for the Federal Circuit exclusive jurisdiction over "an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on [*28 U.S. C.] section 1338* . . . ." [1] *Section 1338(a)*, **[1113]** in turn, provides in relevant part that "the district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . ." Thus, the jurisdictional issue before us turns on whether this is a case "arising under" a federal patent statute, for if it is then the jurisdiction of the District Court was based at least "in part" on *§ 1338*.

[**17]** A

LEdHN[2][] [2] ***LEdHN[3]***[] [3]In interpreting *§ 1338*'s precursor, we held long ago that ***HN2***[] in order to demonstrate that a case is one "arising under" federal patent law "the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, **[*808]** or sustained by the opposite construction of these laws." *Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255, 259, 42 L. Ed. 458, 18 S. Ct. 62 (1897)*. See **[***825]** *Henry v. A. B. Dick Co., 224 U.S. 1, 16, 56 L. Ed. 645, 32 S. Ct. 364 (1912)*. Our cases interpreting identical language in other jurisdictional provisions, particularly the general federal-question provision, *28 U.S. C. § 1331* ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"), have quite naturally **[****18]** applied the same test. [2] See *Gully v. First National Bank in Meridian, 299 U.S. 109, 112, 81 L. Ed. 70, 57 S. Ct. 96 (1936)* (the claim alleged in the complaint "must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another") (citations omitted). ***HN3***[] A district court's federal-question jurisdiction, we recently explained, extends over "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question **[**2174]** of federal law," *Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)*, in that "federal law is a necessary element of one of the well-pleaded . . . claims," *id., at 13*. Linguistic consistency, to which we have historically adhered, demands that **[****19]** *§ 1338(a)* jurisdiction likewise extend **[*809]** only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims. See *822 F.2d at 1553-1556*; *798 F.2d at 1059-1061*.

[**20]** ***LEdHN[4]***[] [4] ***LEdHN[5A]***[] [5A]The most superficial perusal of petitioners' complaint establishes, and no one disputes, that patent law did not in any sense create petitioners' antitrust or intentional-interference claims. Since no one asserts that federal jurisdiction rests on petitioners' state-law claims, the dispute centers around whether patent law "is a necessary element of one of the well-pleaded [antitrust] claims." See *Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 813, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986)*. Our cases, again

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[1] Colt's appeal to the Federal Circuit actually invoked *28 U.S. C. §§ 1292(a)(1)* and *(c)(1)*, which together grant the Federal Circuit exclusive jurisdiction over appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving [an] injunctio[n]," *§ 1292(a)(1)*, "in any case over which the court would have jurisdiction over an appeal under *section 1295*," *§ 1292(c)(1)*.

[2] Colt correctly points out that in this case our interpretation of *§ 1338(a)*'s "arising under" language will merely determine which of two federal appellate courts will decide the appeal, and suggests that our "arising under" jurisprudence might therefore be inapposite. Since, however, *§ 1338(a)* delineates the jurisdiction of the federal and state courts over cases involving patent issues, the phrase (like the identical phrase in *§ 1331*) "masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." See *Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 8, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)* (footnote omitted). See also *Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 810, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986)* ("Determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system").

mostly in the § 1331 context, establish principles for both defining the "well-pleaded . . . claims" and discerning which elements are "necessary" or "essential" to them. HN4[] Under the well-pleaded complaint rule, as appropriately adapted to § 1338(a), whether a claim "arises under" patent law "'must be determined from what necessarily appears in the plaintiff's statement of his own claim in the **[****21]** bill or declaration, unaided by anything **[***826]** alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.'" Franchise Tax Board, supra, at 10 (quoting Taylor v. Anderson, 234 U.S. 74, 75-76, 58 L. Ed. 1218, 34 S. Ct. 724 (1914)). See Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 53 L. Ed. 126, 29 S. Ct. 42 (1908). Thus, HN5[] a case raising a federal patent-law defense does not, for that reason alone, "arise under" patent law, "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Franchise Tax Board, supra, at 14. [3] See also Merrell Dow, supra, at 808.

[1114] **[****22]** **[*810]** LEdHN[6][] [6]Nor is it necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question is essential. If "on the face of a well-pleaded complaint there are . . . reasons completely unrelated to the provisions and purposes of [the patent laws] why the [plaintiff] may or may not be entitled to the relief it seeks," Franchise Tax Board, 463 U.S. at 26 (footnote omitted), then the claim does not "arise under" those laws. See id., at 26, n. 29. Thus, a claim supported by alternative theories in the complaint may not form the basis for § 1338(a) jurisdiction unless patent law is essential to each of those theories.

B

LEdHN[1C][] [1C] LEdHN[7A][] [7A] LEdHN[8A][] [8A]Framed in these terms, our resolution of the jurisdictional issue in this case is straightforward. Petitioners' antitrust count can readily be understood to encompass **[****23]** both a monopolization claim under § 2 of the Sherman Act and a group boycott claim under § 1. The patent-law issue, while arguably necessary to at least one **[**2175]** theory under each claim, is not necessary to the overall success of either claim.

LEdHN[7B][] [7B]Section 2 of the Sherman Act HN6[] condemns " every person who shall monopolize, or attempt to monopolize . . . ." 15 U.S. C. § 2. The thrust of petitioners' monopolization claim is that Colt has "embarked on a course of conduct to illegally extend its monopoly position with respect to the described patents and to prevent ITS from engaging in any business with respect to parts and accessories of the M-16." App. 10. The complaint specifies several acts, most of which relate either to Colt's prosecution of the lawsuit against petitioners or to letters Colt sent to petitioners' potential and existing customers. To make out a § 2 claim, petitioners would **[*811]** have to present a theory under which the identified conduct amounted to a "willful **[****24]** acquisition or maintenance of [monopoly] power as distinguished from growth or development **[***827]** as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). Both the Seventh Circuit and Colt focus entirely on what they perceive to be "the only basis Christianson asserted in the complaint for the alleged antitrust violation, " 798 F.2d at 1061; see Brief for Respondent 32 -- namely, that Colt made false assertions in its letters and pleadings that petitioners were violating its trade secrets, when those trade secrets were not protected under state law because Colt's patents were invalid under § 112. Thus, Colt concludes, the validity of the patents is an essential element of petitioners' prima facie monopolization theory and the case "arises under" patent law.

LEdHN[9][] [9]We can assume without deciding that the invalidity of Colt's patents is an essential element of the foregoing monopolization theory rather than merely an argument in anticipation of a defense. **[****25]** But see 822 F.2d at 1547. The well-pleaded complaint rule, however, focuses on claims, not theories, see Franchise Tax Board,

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[3] LEdHN[5B][] [5B]

On the other hand, merely because a claim makes no reference to federal patent law does not necessarily mean the claim does not "arise under" patent law. Just as "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint," Franchise Tax Board, supra, at 22 (citations omitted); see Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397, n. 2, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981); id., at 408, n. 3 (BRENNAN, J., dissenting), so a plaintiff may not defeat § 1338(a) jurisdiction by omitting to plead necessary federal patent-law questions.

supra, at 26, and n. 29; *Gully, 299 U.S. at 117*, and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim "arises under" patent law.

LEdHN[7C][] [7C]Examination of the complaint reveals that the monopolization theory that Colt singles out (and on which petitioners ultimately prevailed in the District Court) is only one of several, and the only one for which the patent-law issue is even arguably essential. So far as appears from the complaint, for example, petitioners might have attempted to prove that Colt's accusations of trade-secret infringement were false not because Colt had no trade secrets, but because Colt authorized petitioners to use them. App. 9-10 ("Contrary to the permission extended to ITS to sell Colt parts and accessories **[*812]** and in violation of the anti-trust laws . . . Colt has embarked upon a course of conduct . . **[****26]** . to prevent ITS from engaging in any business with respect to parts and accessories of the M-16"). In fact, most of the conduct alleged in the complaint could be deemed wrongful quite apart from the truth or falsity of Colt's accusations. According to the complaint, Colt's letters also (1) contained "copies of inapplicable court orders" and "suggest[ed] that these court orders prohibited [the recipients] from doing business with" petitioners; and (2) "falsely stat[ed] that 'Colt's right' to proprietary data had been 'consistently upheld in various courts.'" *Id., at 10*. Similarly, the complaint alleges that Colt's lawsuit against petitioners (1) was designed "to contravene the permission previously given"; (2) was "pursued . . . in bad faith by subjecting [petitioners] to substantial expense in extended discovery procedures"; and (3) was **[1115]** brought only to enable Colt "to urge customers and potential customers of [petitioners] to refrain from doing business with them." *Id., at 10-11*. Since there are "reasons completely unrelated to the provisions and purposes" of federal patent law why petitioners "may or may not be entitled to the **[**2176]** relief [they] see[k]" **[****27]** under their monopolization claim, *Franchise Tax Board, supra, at 26* **[***828]** (footnote omitted), the claim does not "arise under" federal patent law.

LEdHN[8B][] [8B]The same analysis obtains as to petitioners' group-boycott claim under *§ 1* of the Sherman Act, which provides that ***HN7***[] "every contract, combination . . ., or conspiracy, in restraint of trade or commerce . . . is declared to be illegal," *15 U.S. C. § 1*. This claim is set forth in the allegation that "virtually all suppliers of ITS and customers of ITS have agreed with Colt to refrain from supplying and purchasing M-16 parts and accessories to or from ITS, which has had the effect of requiring ITS to close its doors and no longer transact business." App. 11. As this case unfolded, petitioners attempted to prove that the alleged agreement was unreasonable because its purpose was to protect Colt's trade secrets from petitioners' infringement and, given the patents' **[*813]** invalidity under *§ 112*, Colt had no trade secrets **[****28]** to infringe. Whether or not the patent-law issue was an "essential" element of that group-boycott *theory*, however, petitioners could have supported their group-boycott *claim* with any of several theories having nothing to do with the validity of Colt's patents. Equally prominent in the complaint, for example, is a theory that the alleged agreement was unreasonable not because Colt had no trade secrets to protect, but because Colt authorized petitioners to use them. Once again, the appearance on the complaint's face of an alternative, nonpatent theory compels the conclusion that the group-boycott claim does not "arise under" patent law.

III

LEdHN[10A][] [10A] ***LEdHN[11A]***[] [11A] ***LEdHN[12A]***[] [12A]Colt offers three arguments for finding jurisdiction in the Federal Circuit, notwithstanding the well-pleaded complaint rule. The first derives from congressional policy; the second is based on *Federal Rule of Civil Procedure 15(b)*; and the third is grounded in principles of the law of the case. We **[****29]** find none of them persuasive.

A

LEdHN[10B][] [10B]Colt correctly observes that one of Congress' objectives in creating a Federal Circuit with exclusive jurisdiction over certain patent cases was "to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist[ed] in the administration of patent law." H. R. Rep. No. 97-312, p. 23 (1981). Colt might be correct (although not clearly so) that Congress' goals would be better served if the Federal Circuit's jurisdiction were to be fixed "by reference to the case actually litigated," rather than by an *ex ante* hypothetical assessment of the elements of the complaint that might have been dispositive. Brief for Respondent 31. Congress determined the relevant focus, however, when it granted jurisdiction to the Federal Circuit over "an appeal from . . . a **[*814]**

district court . . . if the jurisdiction of *that court* was based . . . on *section 1338*." *28 U.S. C. § 1295 (a)(1)* (emphasis added). Since the district court's jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, **[****30]** the referent for the Federal Circuit's jurisdiction must be the same. The legislative history of the Federal Circuit's jurisdictional provisions confirms that focus. See, *e. g.*, H. R. Rep. No. 97-312, *supra, at 41* (cases fall within the Federal Circuit's patent jurisdiction "in the **[***829]** same sense that cases are said to 'arise under' federal law for purposes of federal question jurisdiction"). In view of that clear congressional intent, we have no more authority to read *§ 1295(a)(1)* as granting the Federal Circuit jurisdiction over an appeal where the well-pleaded complaint does not depend on patent law, than to read *§ 1338(a)* as granting a district court jurisdiction over such a complaint. See *Pratt, 168 U.S. at 259*.

B

LEdHN[11B][] [11B]Colt suggests alternatively that under **[**2177]** *Federal Rule of Civil Procedure 15(b)* [4] we should deem the complaint amended to encompass a new and independent cause of action -- "an implied cause of action under *section 112* of the patent laws." Brief for Respondent 28. Such a cause of action, which Colt finds in petitioners' summary judgment **[****31]** papers, would plainly "arise under" **[1116]** the patent laws, regardless of its merit. See *822 F.2d at 1566* (Nichols, J., concurring and dissenting).

We need not decide under what circumstances, if any, a court of appeals could furnish itself a jurisdictional basis unsupported by the pleadings by deeming the complaint **[*815]** amended in light of the parties' "express or implied consent" to litigate a claim. *Fed. Rule Civ. **[****32]** Proc. 15(b)*. In this case there is simply no evidence of any consent among the parties to litigate the new patent-law claim that Colt imputes to petitioners. Colt points to nothing in petitioners' summary judgment motion expressly raising such a new cause of action, much less anything in its own motion papers suggesting consent to one. See App. 57-58. True, the summary judgment papers focused almost entirely on the patent-law issues, which petitioners deemed "basic and fundamental to the subject lawsuit." *Id., at 57*. But those issues fell squarely within the purview of the theories of recovery, defenses, and counterclaims that the pleadings already encompassed. Petitioners recognized as much when they moved the District Court to hold that their "claim of [patent] invalidity shall be taken as established with respect to all claims and counter-claims to which said issue is material." *Id., at 58*. Thus, the patent-law focus of the summary judgment papers hardly heralded the assertion of a new patent-law claim. See, *e. g., Quillen v. International Playtex, Inc., 789 F.2d 1041, 1044 (CA4 1986)*; 6 C. Wright & A. Miller, Federal Practice and Procedure § 1493, **[****33]** p. 466 (1971). Moreover, the District Court never intimated that the patent issues were relevant to any cause of action other than the antitrust and intentional-interference claims raised expressly in the complaint; the court four times linked its judgment to "liability on Counts I and II," without any reference to the hypothetical Count III that Colt imputes to petitioners. *609 F. Supp. 1174, 1185 (CD Ill. 1985)* See also *613 F. Supp. at 332*.

[*830]** C

LEdHN[13][] [13]Colt's final argument is that the Federal Circuit was obliged not to revisit the Seventh Circuit's thorough analysis of the jurisdictional issue, but merely to adopt it as the law of the case. See also *822 F.2d at 1565* (Nichols, J., concurring and dissenting). "As most commonly defined, ***HN9***[] the doctrine **[*816]** [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California, 460 U.S. 605, 618, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983)* **[****34]** (dictum). This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice P0.404[1], p. 118 (1984) (hereinafter Moore's).

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[4] ***HN8***[] *Rule 15(b)* provides in relevant part:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues."

Colt is correct that the doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions. See, *e. g.,* *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc., 761 F.2d 649, 657* (CA Fed.), cert. denied, *474 U.S. 902, 88 L. Ed. 2d 229, 106 S. Ct. 230 (1985)*; *Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 900-901* **[**2178]** (CA Fed.), cert. denied, *469 U.S. 857, 83 L. Ed. 2d 120, 105 S. Ct. 187 (1984)*. Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts. See, *e. g., Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 164-170 (CA3 1982)* (transfer under *28 U.S. C. § 1406 (a)*); *Skil Corp. v. Millers Falls Co., 541 F.2d 554, 558-559* (CA6) (alternative holding) (transfer under *28 U.S. C. § 1404* **[****35]** *(a)*), cert. denied, *429 U.S. 1029, 50 L. Ed. 2d 631, 97 S. Ct. 653 (1976)*; 1B Moore's PP0.404[4.-5], 0.404[8]. Cf. *Hoffman v. Blaski, 363 U.S. 335, 340-341, n. 9, 4 L. Ed. 2d 1254, 80 S. Ct. 1084 (1960)* (res judicata principles did not limit power of Court of Appeals to reconsider transfer decision not upset by coordinate court). Indeed, the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation. See *Hayman, supra, at 169*; *Chicago & N. W. Transp. Co. v. United States, 574 F.2d 926, 930 (CA7 1978)*. Cf. *Blaski, supra, at 348-349* (Frankfurter, J., dissenting). [5]

[**36]** **[*817]** ***LEdHN[12B]***[] [12B] ***LEdHN[14]***[] [14] ***LEdHN[15]***[] [15]Colt's conclusion that jurisdiction therefore lay in the Federal Circuit is flawed, however, for three reasons. First, the Federal Circuit, in transferring the case to the Seventh Circuit, was the first to decide the **[1117]** jurisdictional issue. That the Federal Circuit did not explicate its rationale is irrelevant, for the law of the case turns on whether a court previously "decide[d] upon a rule of law" -- which the Federal Circuit necessarily did -- not on whether, or how well, it explained the decision. Thus, the law of the case was that the Seventh Circuit had jurisdiction, and it was the Seventh **[***831]** Circuit, not the Federal Circuit, that departed from the law of the case. Second, ***HN10***[] the law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. **[****37]** " *Messenger v. Anderson, 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912)* (Holmes, J.) (citations omitted). A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice." *Arizona v. California, supra, at 618, n. 8* (citation omitted). Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to decline jurisdiction. Most importantly, law of the case cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review. *Panama R. Co. v. Napier Shipping Co., 166 U.S. 280, 283-284, 41 L. Ed. 1004, 17 S. Ct. 572 (1897)*. Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the **[****38]** law of the case cannot insulate an issue from this Court's review. See *Messenger, **[*818]** supra, at 444*; *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 257-259, 60 L. Ed. 629, 36 S. Ct. 269 (1916)*.

IV

LEdHN[1D][] [1D] ***LEdHN[16]***[] [16] ***LEdHN[17]***[] [17]Our agreement with the Federal Circuit's conclusion that it lacked jurisdiction, compels us to disapprove of its decision to reach the merits anyway "in the interest of justice." *822 F.2d at 1559*. ***HN11***[] " **[**2179]** Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill, 49 U.S. 441, 8 HOW 441, 449, 12 L. Ed. 1147 (1850)*. See also *Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379-380, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981)*. The statute confers on the Federal Circuit authority to make a single **[****39]** decision upon concluding that it lacks jurisdiction -- whether to dismiss the case or, "in the interest of justice," to transfer it to a court of appeals that has jurisdiction. *28 U.S. C. § 1631*.

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[5] There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue -- jurisdictional or nonjurisdictional -- delays, and therefore threatens to deny, justice. But cf. *Potomac Passengers Assn. v. Chesapeake & Ohio R. Co., 171 U.S. App. D.C. 359, 363, n. 22, 520 F.2d 91, 95, n. 22 (1975)*.

The age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases. Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction. Even more exasperating for the litigants (and wasteful for all concerned) is a situation where, as here, the litigants are bandied back and forth helplessly between two courts, each of which insists the other has jurisdiction. Such situations inhere in the very nature of jurisdictional lines, for as our cases aptly illustrate, few jurisdictional lines can be so finely drawn as to leave no room for disagreement on close cases. See, *e. g., K mart* Corp. v. Cartier, Inc., 485 U.S. 176, 99 L. Ed. 2d 151, 108 S. Ct. 950 (1988); United States v. Hohri, 482 U.S. 64, 96 L. Ed. 2d 51, 107 S. Ct. 2246 (1987).

[**40]** ***LEdHN[18]***[] [18]That does not mean, however, **[***832]** that every borderline case must inevitably culminate in a perpetual game of jurisdictional ping-pong until this Court intervenes to resolve the underlying jurisdictional dispute, or (more likely) until one of the parties surrenders to futility. Such a state of affairs would undermine public confidence in our judiciary, squander **[*819]** private and public resources, and commit far too much of this Court's calendar to the resolution of fact-specific jurisdictional disputes that lack national importance. "Surely a seemly system of judicial remedies . . . regarding controverted transfer provisions of the United States Code should encourage, not discourage, quick settlement of questions of transfer . . . ." *Blaski, 363 U.S. at 349* (Frankfurter, J., dissenting). The courts of appeals should achieve this end by adhering strictly to principles of law of the case. See *supra, at 816*. Situations might arise, of course, in which the transferee court considers the transfer "clearly erroneous." *Arizona v. California, 460 U.S. at 618, n. 8*. But **[****41]** as "the doctrine of the law of the case is . . . a heavy deterrent to vacillation on arguable issues," 1B Moore's P0.404[1], at 124, such reversals should necessarily be exceptional; courts will rarely transfer cases over which they have clear jurisdiction, and close questions, by definition, never have clearly correct answers. Under law-of-the-case principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end. See *Fogel v. Chestnutt, 668 F.2d 100, 109 (CA2 1981)* ("The law of the case will be disregarded only when the court has 'a clear conviction of error'") (citation omitted), cert. denied, *459 U.S. 828* ***[1118]*** *(1982)*. While adherence to the law of the case will not shield an incorrect jurisdictional decision should this Court choose to grant review, see *supra, at 817-818*, it will obviate the necessity for us to resolve every marginal jurisdictional dispute.

LEdHN[1E][] [1E]We vacate the judgment of the Court of Appeals for the Federal Circuit and remand with instructions to transfer the case to the Court of Appeals for the **[****42]** Seventh Circuit. See *28 U.S. C. § 1631*.

It is so ordered.

Concur by: STEVENS

Concur

JUSTICE **STEVENS**, with whom JUSTICE BLACKMUN joins, concurring.

In a seminal case construing federal-question jurisdiction, Justice Cardozo wrote that "what is needed is something of **[*820]** that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of **[**2180]** problems of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Gully v. First National Bank in Meridian, 299 U.S. 109, 117-118, 81 L. Ed. 70, 57 S. Ct. 96 (1936)*. Although I agree with the Court's conclusion in this case that appellate jurisdiction is in the Seventh Circuit rather than the Federal Circuit, I write separately to emphasize that a common-sense application of Justice Cardozo's dictum requires that the answer to the question whether a claim arises under the patent laws **[***833]** may depend on the time when the question is asked. More specifically, if the question is asked at the end of a trial in order to decide whether the Federal Circuit has appellate **[****43]** jurisdiction, the answer may be different than if it had been asked at the outset to decide whether a federal district court has jurisdiction to try the case.

When Congress passed the Federal Courts Improvement Act in 1982 and vested exclusive jurisdiction in the Court of Appeals for the Federal Circuit to resolve appeals of claims that had arisen under the patent laws in the federal district courts, it was responding to concerns about both the lack of uniformity in federal appellate construction of the patent laws and the forum-shopping that such divergent appellate views had generated. Nonetheless, its definition of the Federal Circuit's jurisdiction did not embrace all cases in which a district court had decided a patent-law question. Instead, it adopted a standard that requires the appellate court to decide whether the jurisdiction of the district court was based, in whole or in part, on a claim "arising under" the patent laws. [1]

[**44]** **[*821]** The question whether a claim arises under the patent laws is similar to the question whether a claim arises under federal law. Although there is no single, precise, all-embracing definition of either body of law, the "vast majority" of cases that come within either "grant of jurisdiction are covered by Justice Holmes' statement that a 'suit arises under the law that creates the cause of action.' Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986)* (citation omitted). In this case it is clear that the causes of action asserted by petitioners were created by the antitrust laws and not the patent laws. Congress did not create an express cause of action to enforce *§ 112* of the patent laws, and I find no merit in respondent's suggestion that we should recognize an implied cause of action under *§ 112*. Accordingly, I agree with the Court's conclusion that the issue of wrongful retention of proprietary information that became the focus **[****45]** of this case under *§ 112* of the patent laws could not confer appellate jurisdiction in the Federal Circuit, because the issue **[***834]** arose as a defense rather than as a claim. [2]

[**46]** **[*822]** **[**2181]** **[1119]** To the extent that Part III-A of the Court's opinion does nothing more than abjure the notion that the Federal Circuit has jurisdiction over patent-law issues as well as claims, I am thus in complete agreement. However, in rejecting respondent's contention that "Congress' goals would be better served if the Federal Circuit's jurisdiction were to be fixed 'by reference to the case actually litigated,' rather than by an *ex ante* hypothetical assessment of the elements of the complaint that might have been dispositive," *ante*, at 813, the Court's opinion might be read as suggesting that whether patent claims are properly before the Federal Circuit on

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[1] Title *28 U. S. C. § 1295(a)(1)* grants the Federal Circuit appellate jurisdiction over final decisions of federal district courts whose jurisdiction "was based, in whole or in part, on *section 1338* of this title." Title *28 U.S. C. § 1338(a)*, in turn, grants the federal district courts "original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . ." As the Court correctly states, *ante*, at 807-810, *§ 1338* jurisdiction, like *§ 1331* jurisdiction, is over claims, not issues. See H. R. Rep. No. 97-312, p. 41 (1981) ("Cases will be within the jurisdiction of the Court of Appeals for the Federal Circuit in the same sense that cases are said to 'arise under' federal law for purposes of federal question jurisdiction. *Contrast, Coastal States Marketing, Inc. v. New England Petroleum Corp., 604 F.2d 179* (2d Cir., 1979) [Temporary Emergency Court of Appeals properly has jurisdiction over *issues*, not *claims*, arising under the Economic Stabilization Act]").

In this context, it is important to note that the "well-pleaded complaint" rule helps ferret out claims from issues, and says nothing about whether such separation should be made only on the basis of the original complaint.

[2] Indeed, since it seems plain that no implied cause of action exists under *§ 112* -- which, after all, merely describes the nature of the specifications that must be included with a patent application -- a plaintiff's attempt at gaining federal-court jurisdiction through a claim arising under *§ 112* would be properly rejected under the "artful pleading" doctrine. See, *e. g., Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673-674, 94 L. Ed. 1194, 70 S. Ct. 876 (1950)* ("To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act"); *Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397, n. 2, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981)* (District Court properly found that respondents "had attempted to avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state-law claims"); *Caterpillar Inc. v. Williams, 482 U.S. 386, 397, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987)* ("artful pleading" doctrine cannot be invoked by party attempting to justify removal on the basis of facts not alleged in the complaint); 14A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 266-276 (1985); see also *Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986)* (incorporation of federal standard in state-law private action, when no cause of action, either express or implied, exists for violations of that federal standard, does not make the action one "arising under the Constitution, laws, or treaties of the United States").

appeal should be determined by examining only the initial complaint and not by ascertaining whether a patent claim in fact was litigated in the case. Such an approach would assume that whether a case "arises under" the patent laws turns on the same considerations whether one is determining the Federal Circuit's appellate jurisdiction or a federal district court's original jurisdiction. But although *28 U.S. C. **[*823]** § 1338(a)* provides the basis for both types of jurisdictional **[****47]** assessment, I think it clear that Congress could not have intended precisely the same analysis in both instances. Two simple examples will illustrate the point.

If a patentee should file a two-count complaint seeking damages (1) under the antitrust laws and (2) for patent infringement, the district court's jurisdiction would unquestionably be based, at least in part, on *§ 1338(a)*. If, however, pretrial discovery convinced the plaintiff that no infringement had occurred, and Count 2 was therefore dismissed voluntarily in advance of trial, the case that would actually be litigated would certainly not arise under the patent laws for purposes of appellate jurisdiction. Even though the district court's original jurisdiction when the complaint was filed had been based, in part, on *§ 1338(a)*, the case would no longer be one arising under the patent laws for purposes of Federal **[***835]** Circuit review when the district court's judgment was entered. Conversely, if an original complaint alleging only an antitrust violation should be amended after discovery to add a patent-law claim, and if the plaintiff should be successful in proving that its patent was valid and infringed but unsuccessful **[****48]** in proving any basis for recovery under the antitrust laws, the district court's judgment would sustain a claim arising under the patent laws even though the complaint initially invoking its jurisdiction had not mentioned it, and an appeal would properly lie in the Federal Circuit.

Whether the complaint is actually amended, as in the previous example, or constructively amended to conform to the proof, see *Fed. Rule Civ. Proc. 15(b)*, [3] Congress' goal of ensuring **[*824]** that appeals of patent-law **[**2182]** claims go to the Federal Circuit would be thwarted by determining that court's appellate jurisdiction only through an examination of the complaint as initially filed. That approach would enable an unscrupulous plaintiff to manipulate appellate court jurisdiction by the timing of the amendments to its complaint. The Court expressly leaves open the question whether a constructive amendment could provide the foundation for Federal Circuit patent-law jurisdiction, see *ante*, at 814-815, [4] and says nothing on the subject whether actual amendments to the complaint can **[1120]** so suffice. But since respondent has asked us to rule in its favor on the ground that petitioners' complaint **[****49]** added a patent-law claim through constructive amendment, I think we should make it perfectly clear that even though respondent's approach to the jurisdictional question is sound, its application of that approach to this case fails because the claim that was actually litigated did not arise under the patent laws. Nevertheless, since what the Court has written is not inconsistent with this view, I join its opinion.

[**50]**

References

60 Am Jur 2d, Patents 1131-1133

2 Federal Procedure, L Ed, Appeal, Certiorari, and Review 3:301.5; 26 Federal Procedure, L Ed, Patents 60:1062

28 USCS 1295(a)(1), *1338(a)*

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[3] "*Rule 15*. Amended and Supplemental Pleadings.

"(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . ."

[4] "We need not decide under what circumstances, if any, a court of appeals could furnish itself a jurisdictional basis unsupported by the pleadings by deeming the complaint amended in light of the parties' 'express or implied consent' to litigate a claim. *Fed. Rule Civ. Proc. 15(b)*."

US L Ed Digest, Appeal 228

Index to Annotations, Court of Appeals; Patents

Annotation References:

Application of doctrine of law of the case to review by one federal Court of Appeals of determination by another federal Court of Appeals. 74 ALR Fed 878.

Erroneous decision as law of the case on subsequent appellate review. 87 ALR2d 271.

Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs.

United States Court of Appeals for the Second Circuit

November 30, 1987, Argued ; June 22, 1988, Decided

No. 87-7710

Reporter

850 F.2d 904 *; 1988 U.S. App. LEXIS 8710 **; 7 U.S.P.Q.2D (BNA) 1530 ***; 1988-1 Trade Cas. (CCH) P68,113; 11 Fed. R. Serv. 3d (Callaghan) 547

The National Association of Pharmaceutical Manufacturers, Inc., and Zenith Laboratories, Inc., Plaintiffs-Appellants, v. Ayerst Laboratories, Division of/and American Home Products Corporation, Pharmacists Planning Service, Inc. and Frederick S. Mayer, Defendants, Ayerst Laboratories, Division of/and American Home Products Corporation, Defendant-Appellee

Subsequent History: As Amended.

Prior History: [1]** Appeal from a judgment of the United States District Court for the Southern District of New York, Kram, Judge, following an order entered by Buchwald, Magistrate, dismissing appellants' complaint, which charged antitrust and Lanham Act violations.

Disposition: Reversed and remanded.

Core Terms

propranolol, generic, pharmacists, post-MI, Lanham Act, dispense, monopolization, summary judgment, antitrust, motion to dismiss, indications, Sherman Act, manufacturers, monopoly, anti trust law, matter of law, advertising, lack standing, pharmaceutical, substitution, deceptive, pleadings, labeling, damages, factors, matters, patient, drugs, sales, anticompetitive conduct

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

To determine whether the district court properly converted a *Fed. R. Civ. P. 12(b)(6)* or *Rule 12(c)* motion into a motion for summary judgment, the essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Summary Judgment, Supporting Materials**

Even where only the party moving to dismiss has submitted extrinsic material such as depositions or affidavits, the opposing party may be deemed to have had adequate notice that the motion to dismiss would be converted.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN3[] **Remedies, Damages**

See *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 26*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN5[] **Private Actions, Standing**

To recover damages under *15 U.S.C.S. § 15* or to qualify for injunctive relief under *15 U.S.C.S. § 26*, a plaintiff must show more than simply an injury causally linked to an antitrust violation; instead, plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN6[] **Private Actions, Standing**

A demonstration of antitrust injury is necessary, but not always sufficient, to establish standing under *15 U.S.C.S.§§ 15*, *26*, because a party who has suffered or is threatened with antitrust injury may not be a proper plaintiff for other reasons. Among the "other reasons" that might limit a plaintiff's right to recover are the directness or indirectness of the asserted injury; the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; the speculativeness of the alleged injury; and the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN7[ ] **Private Actions, Standing**

An organization can claim standing on behalf of its members if it meets three conditions: (1) if its members would otherwise have standing to sue in their own right; (2) if the interests it seeks to protect are germane to the organization's purpose; and (3) if neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

HN8[ ] **False Designation of Origin, Elements of False Designation of Origin**

See *15 U.S.C.S. § 1125(a)*.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN9[ ] **Consumer Protection, False Advertising**

A plaintiff must allege more than "mere subjective belief" about damages; what matters is whether a commercial party has a reasonable interest to be protected against the alleged false advertising.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN10[] Monopolies & Monopolization, Attempts to Monopolize

Monopoly in and of itself is not unlawful. Instead, the offense of monopoly under the Sherman Act, 15 U.S.C.S. § 2, consists of two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN11[] Monopolies & Monopolization, Attempts to Monopolize

To prevail on an attempted monopolization claim, a plaintiff must prove three elements: (1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a dangerous probability" that the attempt would have succeeded. Proof of the first element of an attempted monopolization claim, anticompetitive conduct, may be used to infer the second element, specific intent to monopolize; and when coupled with proof of monopoly power, evidence of anticompetitive conduct may also prove a dangerous probability of success.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN12[] Antitrust & Trade Law, Sherman Act

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 the Sherman Act, 15 U.S.C.S. § 2.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN13[] Antitrust & Trade Law, Sherman Act

A plaintiff asserting a monopolization claim based on misleading advertising must overcome a presumption that the effect on competition of such a practice was de minimis. The presumption is based on the perception that, while there is no redeeming virtue in deception, there is a social cost in litigation over it.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN14[] Antitrust & Trade Law, Sherman Act

A plaintiff may overcome the de minimis presumption by cumulative proof that the representations were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

HN15[] **False Designation of Origin, Elements of False Designation of Origin**

To prevail on a misrepresentation claim under the Lanham Act, *15 U.S.C.S. § 1125(a)*, a plaintiff must prove that the defendant misrepresented an inherent quality or characteristic of the defendant's product.

Counsel: Milton A. Bass, Esq., New York, New York, (I. Scott Bass, Leslie B. Levine, Bass & Ullman, New York, New York, of Counsel), for Plaintiffs-Appellants.

Mark J. Spooner, Esq., Washington, District of Columbia, (Stuart J. Land, Louis M. Bograd, Rebecca E. Swenson, Arnold & Porter, Washington, District of Columbia, John C. Fleming, Jr., Bruce J. Banks, American Home Products Corporation, New York, New York, of Counsel), for Defendant-Appellee.

Judges: Pierce, Miner, and Davis, * Circuit Judges.

Opinion by: PIERCE

Opinion

[*1531]** **[*906]** PIERCE, Circuit Judge:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Kram, *Judge*, **[***1532]** entered pursuant **[**2]** to an order of United States Magistrate Buchwald, dismissing appellants' complaint. The underlying dispute began in January, 1986, when appellee Ayerst Laboratories, Inc. ("Ayerst"), a division of American Home Products Corporation engaged in the manufacture and sale of brand name pharmaceuticals, sent a letter (the "January 1986 Letter" or the "Letter") to pharmacists throughout the United States discussing the merits of substituting a generic drug, propranolol hydrochloride ("propranolol"), for Ayerst's brand name product, Inderal. In response, appellants Zenith Laboratories, Inc. ("Zenith"), a manufacturer of generic drug products, and the National Association of Pharmaceutical Manufacturers ("NAPM"), an organization that represents generic drug companies, commenced the present action, alleging that Ayerst's publication of the January 1986 Letter constituted an unfair trade practice in violation of § 43(a) of the Lanham Act, *15 U.S.C. § 1125(a) (1982)*. Zenith also claimed separately that publication of the Letter constituted an unlawful act of

* Honorable Oscar H. Davis, United States Circuit Judge, United States Court of Appeals for the Federal Circuit, sitting by designation. Judge Davis participated in oral argument in this case and voted, before his death on June 19, 1988, in favor of the result reached in this opinion.

monopolization, in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2 (1982)*. Ayerst moved to dismiss or, in the alternative, for summary **[**3]** judgment. Upon consideration thereof, Magistrate Buchwald held that appellants lacked standing to assert their claims under both federal ***antitrust law*** and the Lanham Act. In the alternative, **[*907]** the magistrate held that, on the basis of the undisputed facts of the case, appellants could not prevail on either claim as a matter of law. For the reasons stated below, we reverse and remand.

BACKGROUND

In 1967, the Food and Drug Administration ("FDA") first authorized Ayerst to market Inderal, the active ingredient of which is propranolol, for the treatment of arrythmia, a heart condition. Ayerst later obtained approval to market Inderal for the treatment of several other conditions, including hypertension and angina. In September 1983, Ayerst obtained approval to label and market Inderal for the treatment of persons who have suffered a prior heart attack; this is known as "post-myocardial infarction" or "post-MI" treatment. Until 1984, Ayerst was the only company authorized by the FDA to market propranolol for medicinal purposes.

In 1984, Congress amended the Food, Drug and Cosmetic Act ("FD & C Act"), *21 U.S.C. § 355 et seq.*, and the federal patent laws, Title 35, U.S.C., by enacting **[**4]** the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585, also known as the Waxman-Hatch Act (the "Act"). The main purpose of the Act was to make available more low cost generic drugs by establishing a procedure for FDA approval of generic drugs. *See* *21 U.S.C. § 355(j) (Supp. III 1985)*; H.R. No. 98-857. In addition, the Act extended the effective patent term available for companies that suffer the effect of delays incurred by product testing and regulatory approvals. *35 U.S.C. § 156 (Supp. III 1985)*. Further, the Act provided that, if the FDA authorized any new use for an existing drug between January 1, 1982, and the date of enactment of the statute (September 24, 1984), the creator of the drug would have the exclusive right to label and market the drug for that indication until two years after the enactment date (that is, until September 24, 1986) -- regardless of whether the underlying patent otherwise would have expired, and regardless of whether generic competitors could market the drug for other uses. *See* *21 U.S.C. § 355(j)(4)(D)(v) (Supp. III 1985)*. Thus, when Ayerst's patent on propranolol expired in 1984, its competitors, including **[**5]** Zenith, began marketing generic propranolol for medicinal purposes. However, since Ayerst had obtained approval to market Inderal for a new use -- post-MI treatment -- between January 1982 and September 1984, Ayerst had the exclusive right under the Act to market its propranolol product *for this use* until September 1986.

According to Joseph Mahady, who served as American Home Products' Group Product Director for Inderal, Ayerst's January 1986 Letter was part of an ongoing "public debate within the pharmaceutical and medical communities regarding the merits of substitution" of generic products for brand name drugs. In October 1985, Martec Pharmaceuticals, the company for which Zenith distributes propranolol, sent a letter to California pharmacists stating that Martec/Zenith generic propranolol was "therapeutically equivalent" to Inderal, and that pharmacists could dispense Martec's propranolol "without fear." Soon afterwards, Lederle Laboratories, a division of American Cyanamid Company, sent a letter to pharmacists throughout the United States stating that "Lederle propranolol 'is considered to be therapeutically equivalent to Inderal registered.'" In response, Ayerst sent the January 1986 **[**6]** Letter, which reads as follows:

> Dear Pharmacist:
>
> As you know, INDERAL registered is the only brand of propranolol HC1 tablets indicated to reduce mortality post-MI. Recently, **[***1533]** questions have been raised on the significance of this exclusive claim to practicing pharmacists, particularly as it relates to potential liability resulting from substitution on INDERAL prescriptions.
>
> Some generic manufacturers may tell you that the indication for which a drug is prescribed is confidential between the physician and the patient. We feel that the pharmacist is an equal member of the health care team, a respected professional who shares in protecting the **[*908]** health of the patient. Therefore, a brief review of the implications of exclusive labeling is appropriate.

> The issue of possible liability associated with dispensing a generic drug for an indication not included in its labeling has not been resolved in the courts. It's not possible to determine, in advance, the outcome of a suit which may arise from such a situation. It is clear, however, that litigation is troublesome, expensive and will generate adverse publicity. Although some generic product manufacturers may be willing to indemnify for monetary **[**7]** awards, no company could adequately compensate you for the trouble and negative publicity that may result from a court case.
> We believe that, consistent with prudent pharmacy practice, you will want to dispense INDERAL tablets, the only propranolol product with the approved indication for reduction of mortality post-MI. * If you know the patient is being treated for this condition, dispense only INDERAL. If you are considering substitution and don't know the condition being treated, take a few minutes to discuss the subject with your patient and the prescribing physician. Ayerst Laboratories considers pharmacists to be important members of the health-care profession. We support your need to be informed about critical issues regarding drug selection, and hope that we've helped to clarify the important issue of exclusive labeling.
> Sincerely,
> Marvin A. Heuer, MD
> * See enclosed for prescribing information.

In response to the January 1986 Letter, William V. Purvis, an official at the FDA's Office of Drug Standards, Division of Drug Advertising and Labeling, sent a letter (the "FDA Letter") to Ayerst in February 1986, claiming that the FDA regarded the January 1986 Letter to be **[**8]** false and misleading, in violation of § 502(a) of the FD & C Act, *21 U.S.C. § 352(a) (1982)*. The FDA raised three objections to the January 1986 Letter. First, the agency charged that Ayerst's use of the word "approved" (as in "We believe . . . you will want to dispense INDERAL tablets, the only propranolol . . . with the approved indication") violated § 301 (*l*) of the FD & C Act, *21 U.S.C. § 331* (*l*) (1982), which prohibits in any advertisement relating to a drug any representation or suggestion that the drug is approved or meets the requirements of § 505 of the FD & C Act, *21 U.S.C. § 355 (1982)*. Second, the agency stated that it regarded the January 1986 Letter's discussion of pharmacists' liability to be "an attempt to intimidate pharmacists to always dispense Inderal." The agency also took issue with the Letter's failure to "inform[] pharmacists that many states have enacted legislation that exempt [sic] pharmacists from liability through 'good faith' practice of generic substitution." Finally, the FDA Letter disputed Ayerst's suggestion that "If you know the patient is being treated for [post-MI], dispense only INDERAL." The FDA viewed this statement "as falsely suggesting **[**9]** that pharmacists must dispense Inderal for this condition," even though "there are no laws, that we [the FDA] are aware of, requiring the pharmacists to take such action."

In June 1986, NAPM and Zenith commenced an action for damages and injunctive relief in the United States District Court for the Southern District of New York, alleging, *inter alia*, that Ayerst's publication of the January 1986 Letter constituted an unfair trade practice, in violation of § 43 (a) of the Lanham Act, because (1) the Letter was false and misleading, and (2) Ayerst intended that the Letter would impair the sales of generic propranolol. Appellants also claimed that Ayerst violated the Lanham Act by participating in the funding of "CUREP," an organization that allegedly "falsely describ[ed] propranolol," and that Ayerst engaged in other "attempts to falsely compare Inderal and generic competitors to an extent and at such times as are not presently known to plaintiffs." In addition, Zenith separately claimed that Ayerst engaged in the foregoing acts (1) to monopolize the sale of propranolol; (2) to eliminate and suppress competition in propranolol; (3) to inhibit potential competitors from entering the **[**10]** **[*909]** market for propranolol; and (4) to perpetuate unlawfully a patent monopoly, in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*. [1] By stipulation **[***1534]** of the parties, Judge Kram ordered all pretrial matters, including motions of a substantive nature, referred to Magistrate Buchwald.

In October 1986, Ayerst moved to dismiss or, in the alternative, for summary judgment on both the Lanham Act and antitrust claims. Following a pretrial conference in January 1987, Magistrate Buchwald denied Ayerst's motion for summary judgment on the Sherman Act claim, on the ground that there remained genuine issues of material fact as

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[1] Ayerst initially sought injunctive relief against and damages from two other parties as well, Pharmacists Planning Service, Inc. and its president, Frederick S. Mayer. Pursuant to a stipulation among the parties, Judge Kram dismissed the action as to each without prejudice on June 23, 1987.

to the characteristics of the market in which Inderal competes. The magistrate reserved judgment on all other issues, however, and later, on April 30, 1987, issued an opinion and order granting judgment in favor of Ayerst. The magistrate held, first, that Zenith lacked standing **[**11]** to assert its antitrust claim because it "d[id] not have a protectable [sic] interest in the sale of propranolol for post-MI indications." Second, the magistrate held that appellants lacked standing to assert their Lanham Act claim, because they lacked a "reasonable interest to be protected." In addition, the magistrate reasoned that "Ayerst's alleged conduct does not amount to anticompetitive conduct as a matter of law," and that the "allegations in plaintiffs' complaint simply do not allege a misrepresentation" sufficient for purposes of the Lanham Act claim. Judge Kram subsequently entered a judgment in favor of Ayerst pursuant to the magistrate's order. All causes of action having been dismissed herein and final judgment entered, this appeal followed.

DISCUSSION

I. Consideration of Matters Outside the Complaint

On appeal Zenith and NAPM argue that the magistrate erred by considering certain matters outside the complaint in deciding Ayerst's motion. According to appellants, the *complaint* "clearly alleges that: (a) the [January 1986] Letter effectively said to pharmacists that Ayerst's product was therapeutically superior to the generic and that they should not dispense generic **[**12]** propranolol for *any* indications (not just [post-]MI); and (b) the Letter was . . . false and misleading." Appellants object to the magistrate's conclusions that the January 1986 Letter (1) "fairly states that the issues discussed are open ones"; (2) was sent "in the context of an ongoing public debate"; (3) was part of Ayerst's efforts "to compete aggressively on the merits"; (4) was in response to other letters; and (5) was, as a matter of law, not deceptive. Before we can address appellants' argument, we must discuss at some length precisely what extrinsic materials the magistrate considered.

On October 29, 1986, Ayerst filed a "notice of motion and motion to dismiss or, in the alternative, for summary judgment." The notice of motion stated, first, that "since the Complaint fails to state a claim against defendant upon which relief can be granted, this action should be dismissed pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*.'" [2] In the alternative, the notice of motion claimed that "since there are no genuine issues as to any material facts regarding this action, and since defendant is entitled to judgment on this action as a matter of law, summary judgment **[**13]** should be granted pursuant to **[*910]** *Rule 56 of the Federal Rules of Civil Procedure*."

Accompanying the notice of motion were two affidavits. The first affidavit (the "Mahady Affidavit"), which was signed by the aforementioned Joseph Mahady, claimed that the January 1986 Letter was merely part of an ongoing public debate relating to generic drugs. Copies of the letters sent by Martec Pharmaceuticals and Lederle Laboratories, as well as Ayerst's January 1986 Letter, were appended as exhibits to the Mahady Affidavit. **[**14]** The second affidavit (the "Gooen Affidavit"), which was signed by Ayerst executive Steven M. Gooen, was submitted as evidence of Ayerst's lack of monopoly power. The Gooen Affidavit claimed that Inderal competed with many other drugs, including "other beta-blockers and drugs from many other therapeutic classes," and concluded that Inderal had between an 8.5% and 29.2% share of the relevant market.

In support of its motion, Ayerst filed a memorandum of law and, in accordance with **[***1535]** Local Rule 3(g) of the Civil Rules of the Southern District of New York, a "Statement of Material Facts as to Which There is No Genuine Issue to be Tried" ("Rule 3(g) Statement"). With respect to the Lanham Act claim, Ayerst's memorandum of law argued that: (1) the injury alleged in the complaint was not legally cognizable under the Lanham Act; (2) the January 1986 Letter made no false representations; and (3) the January 1986 Letter made no representations relating to the inherent quality or characteristics of Inderal. With respect to the antitrust claim, Ayerst argued that (1)

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[2] As Ayerst notes on appeal, technically the motion should have been styled as a *Rule 12(c)* motion for judgment on the pleadings, because the notice of motion was filed *after* Ayerst had filed its answer to the complaint. *See* *Fed. R. Civ. P. 12(b)*; *Falls Riverway Realty v. Niagara Falls, 754 F.2d 49, 53 (2d Cir. 1985)*. Pursuant to *Fed. R. Civ. P. 12(h)(2)*, however, a defense of failure to state a claim may be raised in a *Rule 12(c)* motion for judgment on the pleadings, and when this occurs the court simply treats the motion as if it were a motion to dismiss. *See, e.g.,* *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 & n.2 (2d Cir. 1977)*.

Zenith had failed to allege two of the essential elements of a monopolization claim: (a) what the relevant market was, and (b) that **[**15]** Ayerst possessed monopoly power; and (2) in the alternative, summary judgment was appropriate because the undisputed facts demonstrated that Ayerst did not possess monopoly power. Finally, Ayerst's Rule 3(g) Statement claimed that there was no genuine issue of material fact as to Inderal's market share in the various markets in which Inderal competes. In response, appellants submitted, *inter alia*, a motion to compel discovery on the issue of Inderal's market share, and two memoranda of law in opposition to Ayerst's motion.

As noted above, in February, 1987, Magistrate Buchwald denied summary judgment on the antitrust claim, reasoning that, despite the allegations set forth in the Gooen Affidavit and the Rule 3(g) Statement, the determination of the relevant market in which Inderal competes raised a disputed factual issue. While Zenith claimed that the relevant market was the market for propranolol, Ayerst argued that the relevant market was the market for all "beta blockers," a class of pharmaceutical products that includes propranolol as well as certain other drugs. In denying summary judgment on this aspect of Zenith's claim, the magistrate also denied Ayerst's motion to compel **[**16]** discovery on this issue as moot. Given that the magistrate denied Ayerst's motion for summary judgment on the market share issue, we do not understand Zenith to be arguing on appeal that the magistrate erred by considering the allegations set forth in the Gooen Affidavit.

In all other respects, however, appellants claim that "the Complaint [was] the only document that should have been examined." [3] In response, Ayerst claims that the magistrate's consideration of matters outside the pleadings in effect converted the motion to dismiss into a motion for summary judgment. Ayerst notes that, in connection with a motion to dismiss pursuant **[*911]** to *Fed. R. Civ. P. 12(b)(6)*, or a motion for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)*, when "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in *Rule 56*, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by *Rule 56*." *See, e.g., Villante v. Department of Corrections, 786 F.2d 516, 521 (2d Cir. 1986)*; *Goldman v. Belden*, 754 F.2d at 1066 (2nd Cir. 1985). ***HN1***[] To determine whether the district court **[**17]** properly converted a 12(b)(6) or 12(c) motion into a motion for summary judgment, "the essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings." *In re G. & A. Books, Inc., 770 F.2d 288, 295 (2d Cir. 1985)*, *cert. denied*, *475 U.S. 1015, 106 S. Ct. 1195, 89 L. Ed. 2d 310 (1986)*. Resolution of this issue depends largely on the facts and circumstances of each case. *In re G. & A. Books, 770 F.2d at 295*.

[18]** Several factors suggest that appellants should have been on notice that Ayerst's motion to dismiss might be converted into a motion for summary judgment. As this court has noted previously, "even ***HN2***[] where only the party moving to dismiss has submitted extrinsic material such as depositions or affidavits, the opposing party may be deemed to have had adequate notice that the motion to dismiss would be converted." *Id.* (citing *Condon v. Local 2944, United Steelworkers of America, 683 F.2d 590, 593-94 (1st Cir. 1982)*, and *Cook v. Hirschberg, 258 F.2d 56, 57-58 (2d Cir. 1958))*. Among the factors suggesting that appellants were on notice are the following: (1) Ayerst styled its motion as **[***1536]** a "motion to dismiss *or, in the alternative, for summary judgment*" (emphasis added); (2) the Mahady and Gooen affidavits were filed on the very same date as the notice of motion; and (3) Ayerst argued, in its memorandum of law, that as a matter of law the January 1986 Letter was not deceptive, and in so arguing Ayerst quoted extensively from the Letter itself and the other exhibits attached to the Mahady Affidavit. Additionally, we note that appellants have been represented by counsel throughout this **[**19]** litigation and are therefore not entitled to the deference which on occasion we have extended to pro se litigants who have claimed

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[3] Technically, the January 1986 Letter, which was submitted as an exhibit to the Mahady Affidavit, was a matter outside the pleadings. If appellants had appended the Letter as an exhibit to the complaint, however, or had expressly incorporated the Letter by reference into the complaint, the pleadings would be deemed to include the Letter. *See* *Fed. R. Civ. P. 10(c)*; *Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir. 1985)*. Nonetheless the complaint clearly refers to the Letter, and there is no dispute as to the Letter's terms. Moreover, appellants *did* quote the entire text of the Letter in one of their memoranda of law in opposition to Ayerst's motion. Under these circumstances, we believe that the magistrate was authorized to treat the Letter as if it had been incorporated by reference into the complaint.

that a summary judgment conversion caught them by surprise. *See, e.g., Chandler v. Coughlin, 763 F.2d 110, 113 (2d Cir. 1985)*; *Beacon Enters. v. Menzies, 715 F.2d 757, 767 (2d Cir. 1983)*.

Nevertheless, despite the foregoing considerations, certain other factors lead us to conclude that appellants were not adequately notified that the magistrate would consider matters outside the pleadings. We note first that Ayerst's Rule 3(g) Statement addressed only the issue of Inderal's market share. Accordingly, appellants might reasonably have believed that Ayerst would not seek summary judgment on the other issues. Second, an affidavit Ayerst submitted on December 17, 1986, in opposition to appellants' motion to compel discovery stated that "the only facts beyond the pleadings raised by Ayerst's pending motion are certain facts identifying Ayerst's share of the market in which Inderal competes." Again, we conclude that appellants might reasonably have understood this statement to mean that Ayerst was seeking summary judgment on the market share issue only. **[**20]** Third, we note that appellants stated in their memorandum of law in opposition to Ayerst's motion to dismiss the Lanham Act claim that they planned "to take discovery as to the impression Ayerst intended as a factor in determining whether the falsity [of the January 1986 Letter] did not relate to Inderal," but only if they survived the pending motion to dismiss. In other words, appellants made clear that they did not consider the motion then before the court to be a motion for summary judgment, except with respect to the market share issue. Accordingly, in our view conversion of the motion into a motion for summary judgment would have been inappropriate unless appellants had been timely notified that their impression was mistaken. We therefore hold that the **[*912]** magistrate erred by failing to notify appellants that she would be considering the contents of the Mahady Affidavit in connection with Ayerst's motion to dismiss.

II. Standing

A. *Antitrust Standing*

In relevant part, § 4 of the Clayton Act, *15 U.S.C. § 15 (1982)*, states that ***HN3***[] "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 **[**21]** of the United States . . ., and shall recover threefold the damages by him sustained. . . ." Likewise, § 16 of the Clayton Act, *15 U.S.C. § 26 (1982)*, states that ***HN4***[] "any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ." Although a literal reading of these sections would provide a remedy to "any person" injured by an antitrust violation, courts have limited the scope of these provisions to particular classes of plaintiffs and for the redress of particular forms of injury. Thus, ***HN5***[] to recover damages under § 4 or to qualify for injunctive relief under § 16, a plaintiff "must show more than simply an 'injury causally linked' to" an antitrust violation; "instead, 'plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 489, 93 L. Ed. 2d 427 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-0-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (emphasis in original)). Moreover, ***HN6***[] a demonstration of antitrust injury is necessary, **[**22]** but not always sufficient, to establish standing under § 4 or § 16, because a party who has suffered or is threatened with antitrust injury may not be a proper plaintiff for other reasons. *Cargill, 107 S. Ct. at 489* nn. 5-6. Among the "other reasons" that might limit a plaintiff's right to recover are the directness or indirectness of the asserted injury; the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; the speculativeness of the alleged injury; and the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. *See Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 540-45, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*.

In the present case, Zenith claims that "Ayerst intended by the [January 1986 Letter] to cause pharmacists to refrain from dispensing generic propranolol, to the benefit of sales of Inderal." Thus, according to the magistrate, the complaint states that the January 1986 Letter caused Zenith financial injury in two ways: first, by discouraging pharmacists from dispensing Zenith's generic **[***1537]** **[**23]** propranolol for post-MI treatment; and second, by discouraging pharmacists from dispensing the drug for indications other than post-MI treatment. The magistrate reasoned, however, that Zenith lacked standing to assert a claim based on Ayerst's alleged disparagement of the use of propranolol for post-MI treatment, because the Waxman-Hatch Act specifically prohibited Zenith from labeling or advertising its generic propranolol for post-MI indications until September, 1986. Thus, "even assuming *arguendo* a physician's right to dispense generic propranolol for post-MI patients and a pharmacists's right to substitute generic propranolol," the magistrate stated that Zenith would be "merely the incidental beneficiary of the acts of those third parties" with no legal right to recover for lost sales under § 4. In addition, the magistrate held that Zenith lacked standing to assert a claim based on the effect of the January 1986 Letter on the sale of propranolol for indications other than post-MI treatment, because "the causal connection between the Ayerst letter which states only dispense Inderal *for post-MI* patients, and Zenith's sales of generic propranolol *for other purposes* is too slender **[**24]** as a matter of law to allow plaintiffs [sic] standing (emphasis in original)."

[*913] We disagree with the magistrate's conclusion that Zenith lacks standing to assert its antitrust claim. With respect to Zenith's claim that the Letter discouraged pharmacists from dispensing generic propranolol for post-MI treatment, we note that the magistrate was correct in stating that federal law prohibited Zenith from *promoting* or *labeling* its generic propranolol for post-MI indications. Nevertheless, nothing in the Waxman-Hatch Act prohibited Zenith from *benefiting* from the decisions of pharmacists to prescribe the generic drug for post-MI use. Indeed, Zenith's complaint states that, under the laws of all fifty states and the District of Columbia, "a pharmacist may or must dispense a generic substitute for a prescription drug unless the physician indicates that substitution is prohibited." If this allegation is true, then in our view Zenith's loss of revenue from sales of propranolol for post-MI indications constitutes an injury "of the type the antitrust laws were intended to prevent." In other words, so long as neither federal nor state law prohibited the substitution of generic propranolol for post-MI **[**25]** indications, we believe that Zenith had a protectible interest in deriving revenue from the sale of propanolol for this use.

The cases cited by the magistrate and by Ayerst in support of the opposite view are distinguishable because, in each case, the alleged antitrust violations would have prevented the plaintiffs from receiving income to which they had no legal right. For example, in *[Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36, 38](#)* (10th Cir.), *cert. denied*, *404 U.S. 857, 30 L. Ed. 2d 99, 92 S. Ct. 107 (1971)*, the court held that the operator of a shopping center could not assert an antitrust claim that an electrical utility had attempted to monopolize the market for electrical power at the center and had interfered with the operator's contracts to furnish electrical power on its own to mall tenants, but only because the operator itself had no right to provide electrical service until it had received permission from the state public service commission. Likewise, in *[Heath v. Aspen Skiing Corp., 325 F. Supp. 223, 232-33 (D. Colo. 1971)](#)*, the court held that a skiing instructor lacked antitrust standing to assert a right to conduct an independent ski school on lands to which **[**26]** the defendant corporations held Forest Service permits, but only because the instructor himself had no right to use the lands until he had obtained his own Forest Service permit. By contrast, in the present case, Zenith has alleged that it had a legal right to *derive income* from the sale of generic propranolol for post-MI treatment during the relevant time period, even though it had no right to *market* its product for this use. Under these unusual circumstances, we believe that *Cottonwood Mall* and *Heath* are inapposite.

In addition, we believe that Zenith's claim relating to sales of propranolol for post-MI treatment satisfies the second prong of the antitrust standing requirement under the "additional factors" set forth in *Associated General Contractors*. Given the allegation that the January 1986 Letter discouraged the use of propranolol for post-MI treatment, we think the resulting injury to generic manufacturers would be "direct," rather than speculative; we perceive no identifiable class of persons, apart from generic manufacturers, whose self-interest would motivate them to file suit against Ayerst; and we perceive no insurmountable problem in apportioning damages, in the event **[**27]** that Zenith were to prevail, so as to avoid duplicative recoveries.

Finally, we conclude that the magistrate erred by concluding that Zenith lacked standing to assert its claim that Ayerst violated the Sherman Act by discouraging pharmacists from dispensing generic propranolol for indications other than post-MI treatment. According to Magistrate Buchwald, the factors enunciated in *Associated General Contractors* weighed against Zenith because: (1) the causal connection between the alleged violation and the resulting injury was **[***1538]** too remote, given that the Letter only directed pharmacists to avoid substitution for post-MI treatment; (2) the alleged injury was "indirect" and speculative; and (3) permitting the claim to **[*914]** go forward would risk duplicative recovery or complex damages apportionment. We disagree. Zenith claims that the Letter discouraged pharmacists from dispensing the generic drug altogether because, in many instances, pharmacists are not aware of the condition for which a physician has prescribed a given drug. Assuming, *arguendo*, that publication of the Letter violated the antitrust laws, we believe that Zenith has standing to assert that the Letter injured it in the manner **[**28]** alleged. We do not find Zenith's alleged loss of sales for conditions other than post-MI treatment so inherently "remote," "speculative, " "indirect" or duplicative as to justify a finding that Zenith lacks antitrust standing to challenge the Letter.

B. *Lanham Act Standing*

1. Organizational Standing

As the magistrate noted, NAPM is a trade association for the generic pharmaceutical industry, and ***HN7***[] can therefore claim standing on behalf of its members if it meets three conditions: (1) if its members would otherwise have standing to sue in their own right; (2) if the interests it seeks to protect are germane to the organization's purpose; and (3) if neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See International Union, United Automobile Workers v. Brock, 477 U.S. 274, 282, 91 L. Ed. 2d 228, 106 S. Ct. 2523 (1986)* (citing *Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977))*. We agree with the magistrate's conclusion that NAPM meets the second prong of this test, because "any violation of law which infringed on the use of generic drugs would certainly harm the membership of NAPM and damage the interests germane to **[**29]** its purpose." We also agree that NAPM satisfies the third condition stated above, because "the plaintiffs have requested injunctive relief [and] there is no requirement of participation by individual members of NAPM in this lawsuit." NAPM's standing to litigate its claim therefore hinges on the first condition noted above, whether the members of NAPM have standing to sue in their own right. Consequently, since Zenith is a member of NAPM, NAPM has standing to the same extent that Zenith does. We turn now to consider whether Zenith, and concomitantly NAPM, has standing to assert the Lanham Act claim.

2. Zenith's Lanham Act Standing

Under § 43(a) of the Lanham Act, *15 U.S.C. § 1125(a) (1982)*, ***HN8***[] "any person who shall . . . use in connection with any goods or services . . . any false description . . . 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." Although the statute is intended to be broadly construed, *see, e.g., PPX Enters. v. Audiofidelity, Inc., 746 F.2d 120, 124 (2d Cir. 1984)*, ***HN9***[] a plaintiff must **[**30]** allege more than "mere subjective belief" about damages; "what matters is whether a commercial party has a 'reasonable interest to be protected' against the alleged false advertising." *Id. at 125*.

For essentially the same reasons that lead us to disagree with the magistrate's decision that Zenith lacked antitrust standing, we disagree with her ruling that appellants lack standing to assert their Lanham Act claim. The magistrate concluded that her "discussion of standing under the anti-trust laws [was] equally applicable" to the issue of Lanham Act standing, because appellants had no "reasonable interest to be protected" under either the Clayton or Lanham Acts. For the reasons stated above, however, we conclude that appellants' alleged interest in benefiting from sales of generic propranolol is a legally protectible interest, even though appellants had no legal right to market their product for post-MI treatment. We therefore hold that appellants have standing under the Lanham Act, and we turn now to consider whether appellants have alleged sufficient facts in support of their claims.

III. Zenith's Monopolization Claim

Although Magistrate Buchwald ruled that the complaint should **[**31]** be dismissed for lack of antitrust and Lanham **[*915]** Act standing, she considered in the alternative the merits of appellants' claims. Turning first to the Sherman Act claim, the magistrate correctly noted that ***HN10***[] monopoly in and of itself is not unlawful. Instead, the offense of monopoly under *§ 2* of the Sherman Act consists of two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966))*. Alternatively, ***HN11***[] to prevail on an attempted monopolization claim, a plaintiff must prove three elements: (1) anticompetitive **[***1539]** or exclusionary conduct; (2) specific intent to monopolize; and (3) a "dangerous probability" that the attempt would have succeeded. *International Distrib. Centers v. Walsh Trucking Co., 812 F.2d 786, 790 (2d Cir. 1987)*. Proof of the first element of an attempted monopolization claim, anticompetitive conduct, may be used to infer **[**32]** the second element, specific intent to monopolize; and when coupled with proof of monopoly power, evidence of anticompetitive conduct may also prove a dangerous probability of success. *Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 85 (2d Cir. 1981)*, *cert. denied*, *455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982)*.

Applying the foregoing standards to the present case, the magistrate held that Zenith's *§ 2* claim was deficient in two respects. First, the magistrate stated "that Ayerst's alleged conduct does not amount to anticompetitive conduct," or the willful maintenance of a monopoly, because the January 26 Letter was not deceptive "as a matter of law." Second, she concluded that Zenith had failed to allege that Ayerst possessed monopoly power, as is required to state a claim for monopolization, or that Ayerst posed a dangerous probability of successfully implementing a monopoly, as is required to state a claim for attempted monopolization. For purposes of our analysis, we address these conclusions in reverse order.

Considering first the issue of monopoly power, we note that the magistrate made the following observations:

> While plaintiffs [sic] allege that the intent of Ayerst's conduct **[**33]** was to obtain or maintain a monopoly in the manufacture and sale of propranolol, plaintiffs do not allege its success. Absent this allegation, we can only proceed on an attempted monopolization theory. However, to prevail on that theory, plaintiffs must demonstrate "that the defendant has a dangerous probability of monopolizing the market." . . . Plaintiffs have failed to make this necessary allegation of Ayerst's probable success in monopolizing the propranolol market.

We disagree. Paragraph 61(d) of the complaint clearly alleges that Ayerst engaged in certain anticompetitive acts to "unlawfully *perpetuate* a patent monopoly in the sale of propranolol." (Emphasis added.) Ayerst could not "perpetuate" a monopoly unless the monopoly already was in existence. *See Webster's Third New Int'l Dictionary* 1685 (1981) (defining "perpetuate" as "to . . . preserve from extinction [or] cause to last indefinitely").

Turning next to the element of anticompetitive conduct, we note that the magistrate concluded, after considering several factors, that Ayerst had not willfully maintained a monopoly. First, she noted that "Ayerst was the recipient of exclusivity protection afforded by the Government and **[**34]** designed to encourage its research efforts" during the period at issue. She observed that, until September 1986, Inderal was "admittedly the only propranolol which [was] indicated for the treatment of post-MI patients." From these facts the magistrate concluded that Ayerst's efforts to distinguish itself on this basis were merely competition on the merits. Second, in response to appellants' contention that the January 1986 Letter was false and misleading, and thus could *not* be characterized as competition on the merits, Magistrate Buchwald **[*916]** noted that only deceptive advertising can constitute anticompetitive conduct. According to the magistrate, however, the January 1986 Letter was not deceptive as a matter of law, and therefore Ayerst's decision to send the Letter was not anticompetitive. Finally, the magistrate concluded that "one letter sent in the context of an ongoing debate between the generic pharmaceutical manufacturers and brand name manufacturers . . . is insufficient to violate the antitrust laws."

In response to the foregoing conclusions Zenith argues, first, that the magistrate erred to the extent she considered matters outside the pleadings. For the reasons stated in Section **[**35]** I of this opinion, we agree. In our view, Magistrate Buchwald should not have relied, as she did, on the Mahady Affidavit to conclude that the January 1986 Letter was "sent in the context of an ongoing debate" and therefore was insufficient to constitute a violation of the antitrust laws.

Zenith's claim that the magistrate erred in holding that the January 1986 Letter was not deceptive is somewhat more difficult to assess. As Zenith notes, the complaint alleges that the January 1986 Letter was false and misleading because it effectively told pharmacists that Inderal was therapeutically superior to generic propranolol, and that generic propranolol should not be dispensed for *any* indications. As noted above, however, we deem the January 1986 Letter to be part of the pleadings. We therefore cannot fault the magistrate for *considering* whether the Letter was false and misleading in the manner alleged in the complaint; the question before us is whether the magistrate was correct in concluding, as a matter of law, that publication of the Letter did not violate the Sherman Act.

As this court has recognized, ***HN12***[] "Advertising that emphasizes a product's strengths and minimizes its weaknesses does **[**36]** not, at least unless it amounts to deception, constitute **[***1540]** anticompetitive conduct violative of *§ 2* [of the Sherman Act]." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 287-88 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. Accordingly, ***HN13***[] a plaintiff asserting a monopolization claim based on misleading advertising must "overcome a presumption that the effect on competition of such a practice was *de minimis."* *Id. at 288 n.41* (citing 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 738a, at 278-79 (1978) ("Areeda & Turner")). The presumption is based on the perception that, while "there is no redeeming virtue in deception, . . . there is a social cost in litigation over it." Areeda & Turner para. 738a, at 278. Thus, "because the likelihood of a significant impact upon the opportunities of rivals is so small in most observed instances -- and because the prevalence of arguably improper utterance is so great -- the courts would be wise to regard misrepresentations as presumptively de minimis for *§ 2* purposes." *Id. at 279*. Professors Areeda and Turner suggest that ***HN14***[] a plaintiff may overcome the *de minimis* presumption "by cumulative proof that the representations **[**37]** were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals." *Id.; see also International Travel Arrangers, Inc. v. Western Airlines, 623 F.2d 1255, 1262-64, 1268 (8th Cir. 1980)* (publication of advertisement that was directed at general public and that was materially false and misleading, and that was part of a campaign against travel agents organizing charter flights, held to violate the Sherman Act).

Taking the above factors into consideration, we believe that the magistrate should not have dismissed Zenith's claim that publication of the Letter violated *§ 2*. As noted, the FDA found the Letter to be false and misleading in certain respects; and, in our view, Zenith should be allowed to go forward with the discovery process to substantiate its claim that the Letter was clearly false, clearly material, and clearly likely to induce reasonable reliance. Moreover, Zenith might yet be able to be prove that the Letter was not readily susceptible of neutralization or other offset. **[**38]** On the **[*917]** other hand, we are inclined to agree with Ayerst that pharmacists are likely to have some knowledge of the subject matter discussed in the Letter, and that the representations set forth in the Letter were made, and could only have been made, for the short period of time during which Ayerst retained an exclusivity right under the Waxman-Hatch Act. Nevertheless, we believe that in the present case the several factors we have noted above cannot be adequately evaluated until the discovery process has moved forward to a greater extent than it has thus far. We therefore reverse the dismissal of Zenith's claim that publication of the January 1986 Letter violated the Sherman Act, though without prejudice to the filing of a motion for summary judgment at some future stage of the litigation. [4]

[39]** IV. The Lanham Act Claim

As appellants note, § 43(a) of the Lanham Act encompasses more than than literal falsehoods. "The truth or falsity of the advertisement usually should be tested by the reactions of the public." *American Home Prods. v. Johnson & Johnson, 577 F.2d 160, 165 (2d Cir. 1978)*. Nevertheless, ***HN15***[] to prevail on a misrepresentation claim under § 43(a) of the Lanham Act, a plaintiff must prove that the defendant misrepresented an "inherent quality or characteristic" of the defendant's product. *See, e.g., Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 278 (2d Cir. 1981)*.

[4] The magistrate also held that Zenith's antitrust claim relating to Ayerst's funding of CUREP "falls woefully short of the use of 'third-party advertising,' which, in this context, by itself would not 'constitute a violation of the Sherman Act.' *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 141, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*." In our view, this finding was inappropriate on a motion to dismiss. Summary judgment may be appropriate, however, if discovery indicates that this "advertising" does not overcome the *de minimis* presumption.

In our view, appellants should be given the opportunity to develop their evidence that the January 1986 Letter misrepresented the inherent quality or characteristics of Inderal. Appellants claim that the Letter conveyed the false impression that Inderal is therapeutically superior to generic propranolol; whether or not pharmacists construed the Letter in this manner cannot be determined on consideration of a motion to dismiss. We therefore reverse the judgment in favor of Ayerst on the Lanham Act claim.

CONCLUSION

For the reasons stated above, the judgment of the district court is reversed **[**40]** and this case is remanded for further proceedings consistent with this opinion.

In re Super Premium Ice Cream Distribution Antitrust Litigation

United States District Court for the Northern District of California

June 23, 1988, Decided ; June 23, 1988, Filed

MDL Docket No. 682, No. C-85-6553 CAL 218

Reporter

691 F. Supp. 1262 *; 1988 U.S. Dist. LEXIS 12553 **; 1988-2 Trade Cas. (CCH) P68,162

In Re Super Premium Ice Cream Distribution Antitrust Litigation; This document relates to: ALL CASES

Core Terms

ice cream, distributor, termination, summary judgment, products, brands, summary judgment motion, cause of action, parties, relevant market, manufacturers, antitrust, genuine, monopoly power, conspiracy, distribute, geographic, interbrand, dealer, material fact, Sherman Act, customers, marketing, compete, retail, cases, alleged conspiracy, antitrust claim, anti trust law, allegations

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Summary Judgment, Opposing Materials**

The parties opposing summary judgment must do more than simply show that there is some doubt as to material facts. They must come forward with specific facts showing that there is a genuine issue for trial. And where the record taken as a whole could not lead a rational trier of fact to find for the opposing parties, there is no genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Entitlement as Matter of Law, Genuine Disputes**

The inquiry in determining whether to grant summary judgment is whether there is a genuine issue of material fact to be tried.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN3[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

The per se illegality rule does not apply to non-price vertical restraints.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The applicable analysis in a case involving the termination of a dealer is under the rule of reason, and not under the per se rule.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

Injury to competition, rather than injury to a competitor, is indispensable to a claim under the Sherman Act § 1. Harm to a terminated distributor can result from termination, but that harm does not necessarily mean that there has been an antitrust violation.

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN6[] Sherman Act, Defenses

Once allegations of conspiracy made in the complaint are rebutted in a summary judgment motion by probative evidence supporting an alternative interpretation of a defendant's conduct, the plaintiff must come forward with specific factual support of its allegations of conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN7[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

A manufacturer is free to impose a non-price restraint on a dealer so long as there is no pernicious economic effect on interbrand competition. A manufacturer's attempt to prevent "free riding" on its marketing efforts for the benefit of other lines which the distributor is selling is both legitimate and lawful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN8[] Monopolies & Monopolization, Actual Monopolization

The elements of a monopolization claim are: (1) possession of monopoly power in the relevant market, (2) willful acquisition or maintenance of that power, and (3) causal antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN9[] Monopolies & Monopolization, Attempts to Monopolize

The elements of a claim of attempted monopolization are: (1) specific intent to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] Regulated Practices, Market Definition

In analyzing the relevant product market, the appraisal is one of cross-elasticity of demand or the reasonable interchangeability of commodities.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN11[] Regulated Practices, Market Definition

Gradations among various qualities of ice cream are not sufficient to establish separate relevant markets for the purposes of determining market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN12[] **Monopolies & Monopolization, Conspiracy to Monopolize**

An alleged conspiracy between a corporate parent and its wholly owned subsidiary is legally insufficient.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Interference With Business Relations

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN13[] **Distributorships & Franchises, Franchise Relationships**

General expectations of relationships with potential distributors, retail customers, or franchisees do not constitute economic relationships sufficient for protection under the common law of interference with prospective advantages and interference with contractual relationships.

Judges: [1]** Charles A. Legge, United States District Judge.

Opinion by: LEGGE

Opinion

[*1263] OPINION AND ORDER FOR SUMMARY JUDGMENT

CHARLES A. LEGGE, UNITED STATES DISTRICT JUDGE.

Cross motions for summary judgment have been made by all of the present parties **[*1264]** to this litigation, Haagen-Dazs, Double Rainbow and Two Count. The motions were briefed, argued and submitted. The court has reviewed the moving and opposing papers, the factual record on which the motions and oppositions are based, the record in the case, the arguments of counsel, and the applicable authorities. The court directs that summary judgment be entered in favor of Haagen-Dazs and against Double Rainbow and Two Count, as discussed below.

The Cases

This multi-district litigation presently consists of three actions. No. C-85-6553 is brought by Haagen-Dazs against Double Rainbow and Two Count. Haagen-Dazs seeks a declaration that its arrangements with its distributors do not violate law, and that certain acts of Double Rainbow constitute unfair competition under California law. No. C-

86-0853 is brought by Double Rainbow against Haagen-Dazs. It alleges violations of sections 1 and 2 of the Sherman Act and two common law torts. Action No. C-87-2471 is brought by Two Count against Haagen-Dazs. It alleges **[**2]** violations of California's Cartwright Act, breach of contract, unfair business practices under California statute, and three state law torts.

All three of these actions have one central issue: Whether Haagen-Dazs can lawfully have exclusive distribution. That is, whether Haagen-Dazs can sell only to distributors who agree not to sell competing brands of ice cream. The central facts are simple and undisputed. Two Count was formerly a Haagen-Dazs distributor. When Two Count decided to sell other brands of ice cream competing with Haagen-Dazs, including Double Rainbow ice cream, Haagen-Dazs advised Two Count that it would terminate Two Count as a distributor unless Two Count agreed to handle only Haagen-Dazs. Two Count declined to do so. Haagen-Dazs then terminated Two Count and obtained another distributor. Haagen-Dazs believes that exclusive distribution is in compliance with law, while Two Count and Double Rainbow contend that exclusive distribution violates state and federal antitrust laws.

The Summary Judgment Motions

Discovery is virtually completed. A trial date had been set, but was vacated for the making and determination of these summary judgment motions.

In its summary **[**3]** judgment motion, Haagen-Dazs in essence seeks complete summary judgment against Double Rainbow and Two Count on their claims against Haagen-Dazs. In No. C-86-0853, it seeks summary judgment on Double Rainbows' three antitrust claims and two common law claims. It also seeks summary judgment in No. C-87-2471 on Two Count's state antitrust claims, breach of contract claim, and three common law claims. In its own action, No. C-85-6553, Haagen-Dazs seeks a declaration that its distribution arrangements do not violate law. [1] Double Rainbow and Two Count oppose Haagen-Dazs' motion, and seek summary judgment of their own declaring (a) that the relevant market is "super premium" ice cream, and (b) that by virtue of collateral estoppel, Haagen-Dazs' policy of exclusive distribution is coercive.

The Factual Record

Since discovery has been completed, the parties have been able to submit to the court an extensive factual record. In evaluating that factual record, and its effect on these summary judgment motions, the court is guided by the principles for evaluating **[**4]** summary judgment motions in antitrust cases stated by the United States Supreme Court in *Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 585-588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. ***HN1***[] The parties opposing summary judgment, here primarily Double Rainbow and Two Count, must do more than simply show that there is some doubt **[*1265]** as to material facts. They must come forward with "specific facts showing that there is a *genuine issue for trial*." *Id. at 587* (emphasis in original). And where the record taken as a whole could not lead a rational trier of fact to find for the opposing parties, there is no genuine issue for trial. [2] Id. The record in this case demonstrates that most of the material facts are indeed undisputed.

Haagen-Dazs [3] manufactures and sells ice cream products and other frozen deserts, including Haagen-Dazs brand ice cream. Its products are sold to distributors, who in turn resell them to grocery **[**5]** stores, restaurants and other retailers. Haagen-Dazs ice cream is (a) made of high quality natural ingredients, (b) contains a low volume of

[1] The court does not interpret Haagen-Dazs' motion to seek summary judgment on its second cause of action in No. C-85-6553.

[2] Haagen-Dazs has filed objections to certain portions of Double Rainbow's and Two Count's factual record. The objections are based on various evidentiary grounds. The court has reviewed each of the objections, and believes that each is well taken. The objections are therefore sustained.

[3] Haagen-Dazs is a wholly owned subsidiary of The Pillsbury Company. Haagen-Dazs and The Pillsbury Company are collectively referred to here as Haagen-Dazs.

air, and (c) is high in butterfat. These three characteristics cause Haagen-Dazs' ice cream to be referred to in the industry as "super premium" or "luxury" ice cream. Haagen-Dazs was the first such high quality ice cream to be distributed throughout the United States.

Two Count is a wholesale distributor of ice cream. It sells to retail outlets located throughout Northern California. It buys products from various manufacturers and resells them to retailers for Two Count's own account.

Double Rainbow manufacturers and sells its own brands of ice cream products, which are of a quality that competes with Haagen-Dazs' ice cream.

Haagen-Dazs' marketing strategy is that its products be distributed only in accordance with its announced marketing policies and procedures. Pursuant to its marketing policies, Haagen-Dazs refuses to sell its products to any distributor who also sells another brand **[**6]** of ice cream that Haagen-Dazs regards as comparable and competitive, based on such considerations as quality, image, packaging, price, and public perception. Haagen-Dazs' policy of distributor loyalty, or exclusive distribution, was announced to its distributors as early as 1981.

Two Count became a distributor of Haagen-Dazs ice cream in Northern California in 1976. The arrangements between Two Count and Haagen-Dazs were oral. No term of duration was stated or agreed upon by implication. For many years, Two Count exercised its best efforts to establish and build sales of Haagen-Dazs products in Northern California. However, in February 1985 Two Count entered into a written distribution agreement with Double Rainbow, providing for Two Count's distribution of Double Rainbow's ice cream. Two Count was aware of Haagen-Dazs' policy that if a distributor represents brands competing with Haagen-Dazs, that would create a conflict of interests unacceptable to Haagen-Dazs. Two Count was aware, prior to agreeing to distribute Double Rainbow's products, of Haagen-Dazs' distribution policies and that Haagen-Dazs was concerned about Two Count's handling competitive lines such as Double Rainbow. **[**7]** The agreement between Two Count and Double Rainbow required Two Count to exert its best efforts in distributing Double Rainbow products, and contained a minimum purchase requirement of one million pints in the years 1985 and following. Two Count did not inform Haagen-Dazs of this arrangement until after Two Count and Double Rainbow executed their written contract. Two Count then advised Haagen-Dazs that it intended to distribute Double Rainbow products, in order to generate additional sales volume for Two Count.

In March 1985, Haagen-Dazs confirmed that Two Count was undertaking distribution of Double Rainbow products. In May 1985 Haagen-Dazs notified Two Count that effective August 1, 1985, the distribution arrangements between Haagen-Dazs and Two Count would end. The distribution **[*1266]** arrangements did end on that day. Haagen-Dazs terminated Two Count because, in Haagen-Dazs' opinion, Two Count's distribution of Double Rainbow created a conflict of interests that impaired Haagen-Dazs' ability to effectively compete, and permitted Double Rainbow to "free ride" on Haagen-Dazs' goodwill, reputation, and distribution.

Haagen-Dazs initially replaced Two Count with another distributor, but **[**8]** that arrangement was terminated in 1986, and Haagen-Dazs now does its own distributing in this area. Two Count has continued to represent Double Rainbow. Two Count also handles Steve's, Perche No!, and Bud's brands of quality ice creams. Two Count's sales have substantially increased since Haagen-Dazs ceased dealing with Two Count and Two Count has devoted itself to the other brands. Double Rainbow has also been able to find distributors in other areas of the United States where it competes with Haagen-Dazs.

Haagen-Dazs makes other assertions of fact which Double Rainbow and Two Count oppose. It is therefore necessary to examine the record of those asserted facts, using the standard defined by the U.S. Supreme Court in *Matsushita*. ***HN2***[] The inquiry is of course whether there is a genuine issue of material fact to be tried. Most of Haagen-Dazs' record is based upon documents and witness testimony which it obtained from Double Rainbow and Two Count. In addition, Haagen-Dazs has submitted an affidavit of Jerry A. Hausman, a professor of economics, which sets forth his findings from the record that he reviewed. Double Rainbow and Two Count have not submitted an affidavit by an expert witness, **[**9]** and they base their opposition upon testimony and documents obtained in discovery.

Vertical Restraints and Dealer Terminations

Subsequent to the filing of these cases, several important appellate decisions have been made regarding vertical restraints under the antitrust laws.

The United States Supreme Court recently discussed the issue in *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. The Court reaffirmed its position that alleged vertical restraints which do not constitute price fixing are to be judged under the rule of reason. The Court said that ***HN3***[] the *per se* illegality rule does not apply to such non-price restraints. [4] The Court also noted that in such a setting *interbrand* competition is the primary concern of the antitrust laws.

This court also has the guidance of the recent Ninth Circuit decision *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729 (9th Cir. 1987)*. *Rutman* was a dealer termination case, involving non-price commercial activities, which were alleged to be violations of sections 1 and 2 of the Sherman Act. The court of appeals affirmed the district **[**10]** court's dismissal of the action for failure to state a cause of action. The court of appeals stated that ***HN4***[] the applicable analysis was under the rule of reason, and not under the *per se* rule. *Id. at 734*. The court also reaffirmed the principle that ***HN5***[] injury to *competition*, rather than injury to a *competitor*, is indispensable to a claim under section 1. *Id*. The court recognized that harm to a terminated distributor can result from termination, but that harm does not necessarily mean that there has been an antitrust violation. The court also affirmed dismissal of the section 2 allegations, because the defendant did not possess monopoly power in the relevant geographic market, and the plaintiff had not sufficiently alleged a specific intent to monopolize. *Id. at 736*. The analysis of the Ninth Circuit in *Rutman* is particularly relevant to the antitrust claims between Haagen-Dazs and Two Count, and this court is particularly guided by the discussion on pages 734-736 of *Rutman*.

In another recent decision, *OSC Corp. v. Apple Computer Inc., 792 F.2d 1464 (9th Cir. 1986)*, the Ninth Circuit again affirmed a summary judgment in a dealer termination case. The termination was **[**11]** challenged under section 1 of the Sherman Act. **[*1267]** Summary judgment was granted and was affirmed on the ground that the claimants had not presented a record sufficient to support a reasonable finding in their favor. In regard to the burden of proof, the court stated: ***HN6***[] "Once allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, the plaintiff must come forward with specific factual support of its allegations of conspiracy." *Id. at 1467*. The court reaffirmed that dealer termination cases involve the rule of reason and not the *per se* rule, and that injury to the terminated dealer is not enough to prove injury to competition. *Id. at 1469*.

The Ninth Circuit specifically stated in *OSC* that ***HN7***[] a manufacturer "is free to impose a non-price restraint on a dealer so long as there is no pernicious economic effect on interbrand competition." *Id*. The court also stated that a manufacturer's attempt to prevent "free riding" on its marketing efforts for the benefit of other lines which the distributor is selling is "both legitimate and lawful" *Id. at 1468*.

In addition, in *A. H. Cox Co. v. Star Machinery **[**12]** Co., 653 F.2d 1302, 1306-1307 (9th Cir. 1981)*, the Ninth Circuit affirmed a summary judgment against a distributor, stating that it is widely recognized that in most circumstances dealer terminations or substitutions do not adversely affect competition in a market.

Two Count and Double Rainbow attempt to avoid the application of the above principles by reliance on *Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1971)*. From that case they contend that this court should look beyond the termination of the distributorship and view the charges in the context of an attempt to monopolize and a conspiracy. However, as will be discussed below, there is no evidence to support the allegation of conspiracy. In addition, the insufficiency of the monopoly charges are also discussed below.

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[4] Price restraints are not involved in this case.

In any event, it is clear from a reading of the Ninth Circuit cases together that the mere discharge of a distributor is not itself a violation of the antitrust laws. Double Rainbow and Two Count must establish more. Basically they must establish an injury to competition. However, they have not done so. They have not made a sufficient showing of a genuine issue of fact regarding **[**13]** an antitrust injury. In fact, the record establishes that there is increasing interbrand competition. Two Count continues to represent Double Rainbow and other manufacturers, and has prospered. Double Rainbow has been able to obtain other distributors nationwide. Haagen-Dazs' market share, on the other hand, has declined in several respects. Two Count and Double Rainbow have not established that competition has suffered because Haagen-Dazs terminated Two Count, whether the relevant geographic market is a nationwide market or the San Francisco Bay Area. Separate distribution has led to increased and successful interbrand competition.

Monopoly

Two Count and Double Rainbow argue that Haagen-Dazs has a monopoly, or is attempting to monopolize, in violation of section 2 of the Sherman Act and the California Cartwright Act.

HN8[] The elements of a monopolization claim are: (1) possession of monopoly power in the relevant market, (2) willful acquisition or maintenance of that power, and (3) causal "antitrust" injury. *Rutman, 829 F.2d at 736*. ***HN9***[] The elements of a claim of attempted monopolization are: (1) specific intent to control prices or destroy competition in the relevant market, (2) **[**14]** predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success. *Id*. The claims of Two Count and Double Rainbow fail here because there is no genuine issue of material fact that Haagen-Dazs has monopoly power in a relevant market, or any intent to control prices or destroy competition in a relevant market, or any dangerous probability of success.

The first factor is the necessity to define the relevant product market. Haagen-Dazs **[*1268]** contends that the relevant product market is all frozen desserts, or at least all ice creams. Two Count and Double Rainbow contend that it is super premium ice creams. While the issue of relevant market is generally a fact question for a jury, *Syufy Enterprises v. American Multi Cinema Inc., 783 F.2d 878, 882 (9th Cir. 1986)* in this case there is no genuine issue of material fact for the jury in that regard.

The U.S. Supreme Court has said that ***HN10***[] in analyzing the relevant product market, the appraisal is one of cross-elasticity of demand; that is, the reasonable interchangeability of commodities. *United States v. DuPont & Co., 351 U.S. 377, 394-95, 404, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *Brown Shoe Co. v. United **[**15]** States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. As stated, Haagen-Dazs ice creams are distinguishable, at least for purposes of marketing, by the fact that they have higher butterfat content, lower air volume, and more natural ingredients. Haagen-Dazs' internal documents support the claim that its products have high customer recognition and sales because of those characteristics. However, it is clear from the record that ***HN11***[] gradations among various qualities of ice cream are not sufficient to establish separate relevant markets for the purposes of determining market power. Courts have repeatedly rejected efforts to define markets by price variances or product quality variances. Such distinctions are economically meaningless where the differences are actually a *spectrum* of price and quality differences. *See, e.g., Brown Shoe, 370 U.S. at 326*; *United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129, 145-6 (N.D. Cal. 1966)*, *affm'd 385 U.S. 37, 17 L. Ed. 2d 35, 87 S. Ct. 240 (1967)*; *Ron Tonkin Grand Turismo v. Fiat, 637 F.2d 1376, 1379-80 (9th Cir. 1981) cert. denied, 454 U.S. 831, 70 L. Ed. 2d 109, 102 S. Ct. 128 (1981)*; *JBL Enterprises v. Jhirmack Enterprises, Inc., 509 F. Supp. 357, 371-2 (N.D. Cal. 1981)*; *Beatrice Foods v. FTC, **[**16]** 540 F.2d 303, 309-310 (7th Cir. 1976)*.

That is this case. The record demonstrates that all grades of ice creams compete with one another for customer preference and for space in the retailers' freezers. Double Rainbow and Two Count have not shown that any of the differences among ice cream products, such as physical or price differences, have antitrust significance. They have not presented sufficient facts to create an issue of fact that people who buy so called "super premium" or "luxury" ice creams do not buy others which are lower in the spectrum of price or quality. And to the contrary, Haagen-Dazs has established a record that permits no reasonable inference other than that the relevant market is ice cream generally. There is significant overlap among the various grades and brands. All grades of ice cream compete for both retail shelf space and for consumers' attention. The various adjectives used to describe brands of ice creams do not alone establish separate markets.

Because of this conclusion regarding the product market, the court need not discuss the relevant geographic market extensively. In fact, the parties mention the geographic market only in passing. Since the relevant **[**17]** product market is all ice creams, what evidence there is before this court establishes no meaningful distinctions in result depending upon whether the geographic market is nationwide or the San Francisco Bay Area. That is, Haagen-Dazs has too small a share of either geographic market to approach monopoly power or to establish any dangerous probability of such monopoly power. For example, Haagen-Dazs' statistics indicate that its share of the ice cream market in the San Francisco area is only four to five percent. The parties present no direct statistics on a nationwide market. And Two Count and Double Rainbow's statistics do not demonstrate any monopoly power, or reasonable probability of monopoly power, in any geographic market. [5]

[*1269] The record also demonstrates the absence of any power on the part of Haagen-Dazs **[**18]** to exclude competitors. It instead affirmatively demonstrates that competitors are entering the market and obtaining significant market shares. These facts are evidenced in part by the success which Two Count, Double Rainbow, and other manufacturers of alleged super premium ice cream have had in obtaining market shares. As noted from the above authorities, one of the key elements for analysis is the degree of interbrand competition. The record is abundantly clear, beyond any contrary determination which could reasonably be made by a jury, that there is extensive interbrand competition, and that such competition has been increasing.

Estoppel

Double Rainbow and Two Count argue that Haagen-Dazs is collaterally estopped from denying that its exclusive distribution policy is illegal, and from denying that its conduct is coercive. In doing so, they rely upon a decision of the United States District Court for the District of Massachusetts, *Ben and Jerry's Homemade v. Haagen-Dazs, 693 F. Supp. 1256 (D.Mass. 1987)*. However, that decision does not have the collateral estoppel effect that Two Count and Double Rainbow seek. First, that decision was made on the application by that plaintiff **[**19]** for a preliminary injunction. It was not a final adjudication which is entitled to collateral estoppel effect. *Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1350-51 (9th Cir. 1982)*. In addition, the decision was based primarily, if not entirely, upon the breach of a written settlement agreement between the plaintiff there and Haagen-Dazs. It was not an adjudication of alleged violations of the antitrust laws. The settlement agreement at issue there is not at issue in this case.

Conspiracy

Two Count and Double Rainbow also argue that there was a conspiracy between Haagen-Dazs and other parties, and that the existence of a conspiracy is a defense to Haagen-Dazs' summary judgment motion.

However, the record does not establish any genuine issue of material fact on the existence of any conspiracy. One argument is that there was a conspiracy between Haagen-Dazs and its parent Pillsbury. However, ***HN12***[] an alleged conspiracy between a corporate parent and its wholly owned subsidiary is legally insufficient. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. In addition, Double Rainbow and Two Count have apparently conceded in their briefs that there is insufficient **[**20]** evidence to establish any conspiracy between Haagen-Dazs and any other manufacturer or distributor to keep Double Rainbow or Two Count out of the market. Two Count and Double Rainbow have simply not come forward with a specific

[5] Double Rainbow's and Two Count's statistics refer to the San Francisco Bay Area, using only super premium ice creams as the product market. Those statistics appear to be flawed, because of their exclusion of some alleged super premium brands. And even those statistics show that Haagen-Dazs' share of the alleged super premium market has dropped from 1984 through 1987.

factual showing to support their allegations of conspiracy, as required by the Ninth Circuit's holding in *OSC. 792 F.2d at 1467*.

Based upon the relevant authorities, and upon the record in this case, which establishes either undisputed facts or facts as to which there is no genuine issue, the court concludes that summary judgment should be granted (a) in favor of Haagen-Dazs and against Two Count on Two Count's two antitrust claims, and against Double Rainbow on Double Rainbow's three antitrust claims, (b) and in favor of Haagen-Dazs against Two Count and Double Rainbow on the first cause of action in C-85-6553.

Common Law Claims

Two Count has also alleged common law claims. One is an alleged breach of the distribution agreement between Haagen-Dazs and Two Count. However, that contract was oral, contained no term of duration, and was terminable at will. Two Count argues that the agreement was **[*1270]** to last in perpetuity because Two Count was "assured that it would **[**21]** grow with Haagen-Dazs." But that is legally insufficient. *See Alpha Distrib. Co. v. Jack Daniel Distillery, 454 F.2d 442, 447-8 (9th Cir. 1972) cert. denied*, *419 U.S. 842, 42 L. Ed. 2d 70, 95 S. Ct. 74 (1974)*; *Connelly v. Venus Foods, Inc., 174 Cal. App. 2d 582, 585-6, 345 P.2d 117 (1959)*. Even if the agreement were interpreted as being more than "at will," and required good cause for termination, the record establishes that there was good cause. Two Count's taking on competitive lines of ice cream was good cause. Two Count's obligation was at least to use its best efforts on behalf of Haagen-Dazs, and when Two Count agreed to also use its best efforts on behalf of competitor Double Rainbow, Haagen-Dazs was justified in terminating the distribution agreement. There is no doubt that Haagen-Dazs gave reasonable notice to Two Count of the termination, and the court does not understand Two Count to be complaining about the method or reasonableness of the notice of termination.

Two Count's other state law allegations are unfair business practices, interference with prospective advantages, interference with contractual relationships, and breach of the covenant of good faith. They are based upon Two Count's allegation that **[**22]** Haagen-Dazs somehow interfered with Two Count's relationships with its customers and suppliers. However, discovery has not substantiated those allegations. There is not sufficient evidence in the record to support an allegation of such interference. And as stated, Two Count has increased its number of brands, its customers and its revenues.

Double Rainbow also makes common law allegations of interference with prospective advantages and interference with contractual relationships. Again, however, there is not sufficient evidence to support those allegations. [6] The undisputed record shows that although Haagen-Dazs is in competition with Double Rainbow, it has not unlawfully interfered with Double Rainbow's contractual relationships or its prospective business advantages. There is no material evidence that the contract between Double Rainbow and Two Count has been interfered with by Haagen-Dazs Nor is there any evidence of interference with any contract that Double Rainbow had with any other customers. Double Rainbow's general argument of possible inference with *potential* distributors, retail customers or franchisees is not legally sufficient. ***HN13***[] Such general expectations do not constitute **[**23]** economic relationships sufficient for protection. *Blank v. Kirwan, 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58 (1985)*; *Buckaloo v. Johnson, 14 Cal. 3d 815, 828, 122 Cal. Rptr. 745, 537 P.2d 865 (1975)*.

Conclusion

In summary, Haagen-Dazs terminated Two Count because Haagen-Dazs has a marketing policy of requiring exclusive distribution, which Two Count violated by agreeing to distribute the ice creams of Double Rainbow, as well as other brands that compete with Haagen-Dazs. Haagen-Dazs was legally entitled to terminate Two Count.

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[6] From the briefs in the summary judgment motions, the court does not understand Double Rainbow to argue that it has shown sufficient facts to contest Haagen-Dazs' motion on these common law claims.

Double Rainbow and Two Count have not provided sufficient evidence from which a reasonable trier of fact could find any violation of Section 1 of the Sherman Act, Section 2 of the Sherman Act, or the California Cartwright Act, or could find in favor of Double Rainbow and Two Count on their state law claims.

Competition in the ice cream market is flourishing, and interbrand competition is intense. Antitrust lawsuits are no substitute for such true competition. The public interest is protected by such competition, **[**24]** and antitrust suits are only an adjunct to promoting that public interest in cases where competition has been improperly curtailed. When there is, as here, real and intense competition, antitrust suits are simply not for the purpose of protecting a distributor's or a competitor's economic desires.

[*1271] IT IS THEREFORE ORDERED as follows:

(1) The motion for summary judgment by Double Rainbow in action C-86-0853 is denied.

(2) The motion for summary judgment by Two Count in action C-87-2471 is denied.

(3) The motion of Haagen-Dazs for summary judgment is granted as follows:

(a) In C-86-0853, in favor of Haagen-Dazs and against Double Rainbow on all causes of action.

(b) In C-87-2471, in favor of Haagen-Dazs and against Two Count on all causes of action.

(c) In C-85-6553, in favor of Haagen-Dazs and against Double Rainbow and Two Count on the first cause of action.

(4) The court understands that there is a second cause of action in C-85-6553 by Haagen-Dazs alleging unfair competition. But the court does not interpret Haagen-Dazs' motion for summary judgment to address that cause of action. If Haagen-Dazs wishes to proceed with that cause of action, it should advise the court and the parties, **[**25]** and a status conference will be scheduled to set dates for the prosecution of that cause of action. If, in view of the above rulings, Haagen-Dazs wishes to abandon that cause of action, it should file with this court and serve on the parties a proposed form of judgment which is consistent with this opinion and which states that Haagen-Dazs is dismissing the second cause of action of C-85-6553.

Health Care Equalization Committee of Iowa Chiropractic Soc. v. Iowa Medical Soc.

United States Court of Appeals for the Eighth Circuit

August 31, 1987, Submitted ; June 24, 1988, Filed

Nos. 86-2588, 87-1015

Reporter
851 F.2d 1020 *; 1988 U.S. App. LEXIS 8783 **; 1988-1 Trade Cas. (CCH) P68,107; 11 Fed. R. Serv. 3d (Callaghan) 647

Health Care Equalization Committee of the Iowa Chiropractic Society as assignee of its members, Appellant, v. Iowa Medical Society, Iowa Hospital Association; Blue Shield of Iowa; Blue Cross of Iowa, Appellees. American Medical Association, American Hospital Association, Joint Commission on Accreditation of Hospitals; Clarence H. Denser, Jr., M.D.; Joseph A. Sabatier, Jr., M.D.; H. Doyl Taylor; Donald C. Young, M.D.; and Nelson H. Chesney, M.D., American College of Radiology, Appellee. Health Care Equalization Committee of the Iowa Chiropractic Society as assignee of its members, Appellee, v. Iowa Medical Society, Iowa Hospital Association; Blue Shield of Iowa; Blue Cross of Iowa; Appellants. American Medical Association; American Hospital Association; Joint Commission on Accreditation of Hospitals; Clarence H. Denser, Jr., M.D.; Joseph A. Sabatier, Jr., M.D.; H. Doyl Taylor; Donald C. Young, M.D.; and Nelson H. Chesney, M.D.

Subsequent History: Petition for Rehearing and Petition for Rehearing En Banc Denied September 20, 1988.

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of Iowa.

Core Terms

contracts, subscribers, healthcare services, district court, chiropractors, state action doctrine, provider, chiropractic, monopolize, insurance business, McCarran-Ferguson Act, insured, contacts, group boycott, allegations, supervision, antitrust, factors, osteopathic physician, hospital service, Sherman Act, summary judgment motion, personal jurisdiction, healthcare, participating, coverage, boycott, exempt, physicians and surgeons, surgical services

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Federal Government > US Congress

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

The court finds nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

Only two factors make up the test for protection under the state action doctrine: First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN3[] **Exemptions & Immunities, Parker State Action Doctrine**

The active supervision prong of the test for protection under the state action doctrine requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

Healthcare Law > Managed Healthcare > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN4[] **Healthcare Law, Managed Healthcare**

See Iowa Code § 514.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN5[] **Antitrust Actions, Insurers**

Iowa Code § 514 on its face removes any discretion or business judgment with respect to coverage by health care service corporations of chiropractic services.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN6[] Antitrust Actions, Facilities

It is not necessary for Iowa Code § 514 to expressly compel health care service corporations to exclude chiropractors from their service plans in order for the corporations to be protected by the state action doctrine. A private party acting pursuant to an anticompetitive regulatory program need not point to a specific, detailed legislative authorization for its challenged conduct.

Healthcare Law > Managed Healthcare > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN7[] Healthcare Law, Managed Healthcare

It is clear from the language and history of Iowa Code § 514 that the exclusion of chiropractors from health care service plans was not merely contemplated by the State of Iowa, but compelled.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN8[] Exemptions & Immunities, Parker State Action Doctrine

Iowa Code § 514 satisfies both prongs of the state action test.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

HN9[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

15 U.S.C.S. § 1013(b) of the McCarran-Ferguson Act does not express a congressional intent to subject state-authorized boycott activity to the antitrust laws where conducted as part of a state-regulated "business of insurance."

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN10[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The McCarran-Ferguson Act, *15 U.S.C.S. §§ 1011-1015*, removes from antitrust scrutiny all conduct which is (1) part of the "business of insurance," (2) regulated by state law, and (3) not in the form of coercion, intimidation, or boycott.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN11[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The Supreme Court sets forth three factors to examine in determining whether a particular practice is part of the "business of insurance": (1) whether the practice has the effect of transferring or spreading a policyholder's risk, (2) whether the practice is an integral part of the policy relationship between the insurer and the insured, and (3) whether the practice is limited to entities within the insurance industry. While each of these factors is a relevant consideration in evaluating whether a practice is part of the "business of insurance," none of these criteria is necessarily determinative in itself.

Civil Procedure > ... > Service of Process > Methods of Service > Foreign Service

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Service on Corporations

HN12[] Methods of Service, Foreign Service

If a foreign corporation commits a tort in whole or in part in Iowa against a resident of Iowa, such acts shall be deemed to be doing business in Iowa by such foreign corporation for the purpose of service of process or original notice on such foreign corporation under this section, and, if the corporation does not have a registered agent or agents in the state of Iowa, shall be deemed to constitute the appointment of the secretary of state of the state of Iowa to be its true and lawful attorney upon whom may be served all lawful process or original notice in actions or proceedings arising from or growing out of such tort. *Iowa Code § 617.3*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN13[] In Rem & Personal Jurisdiction, In Personam Actions

In determining whether there are sufficient minimum contacts to satisfy due process, the court focuses on the relationship among the defendant, the forum, and the litigation. This inquiry involves a consideration of five factors: (1) the nature and quality of the defendant's contacts with the forum state; (2) the quantity of the defendant's contacts with the forum state; (3) the relation of the cause of action to the defendant's contacts with the forum state; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN14[] **Entitlement as Matter of Law, Appropriateness**

Pursuant to *Fed. R. Civ. P. 56(e)*, when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Administrative Proceedings > Fraud

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN15[] **Workers' Compensation, Fraud**

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action. To survive a motion for summary judgment, the non-moving party must establish that there is a genuine issue of material fact as to whether the moving party entered into an illegal conspiracy that caused the non-moving party to suffer a cognizable injury. Second, the issue of fact must be genuine. When the moving party has carried its burden of demonstrating the absence of a genuine issue of material fact, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. The non-moving party must come forward with specific facts showing that there is a genuine issue for trial.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *15 U.S.C.S. § 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Most significantly for this case, the non-moving party must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" the non-moving party.

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For Appellee, Craig Graziano, Des Moines, Iowa, for Blue Cross/Blue Shield.

Bennett A. Webster, Des Moines, Iowa, for Iowa Hospital Assn.

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Judges: McMillian, John R. Gibson and Fagg, Circuit Judges.

Opinion by: McMILLIAN

Opinion

[*1021] McMILLIAN, Circuit Judge.

The Health Care Equalization Committee (HCEC) appeals from a final judgment entered in the District Court [1] for the Southern District of Iowa dismissing its antitrust claims against Blue Cross and Blue Shield of Iowa (the Blues) and the American College of Radiology (the ACR), granting summary judgment in favor of the Iowa Hospital Association (the IHA), and denying its motion for summary judgment on its group boycott claim. *Health Care Equalization **[*1022]** Comm. v. Iowa Medical Society, 501 F. Supp. 970, 984-86, 988-91, 993-95 (S.D. Iowa 1980)* (*HCEC v. IMS*); *id.*, Civ. No. 79-381-A, slip op. at 2-5, 8-10 (Aug. 4, 1986). For reversal, HCEC argues that the district court erred in (1) dismissing its antitrust claims against the Blues by finding them exempt from the **[**2]** antitrust laws under the state action doctrine and the McCarran-Ferguson Act; (2) dismissing the ACR for lack of personal jurisdiction; (3) granting summary judgment in favor of the IHA; and (4) denying its motion for summary judgment on its group boycott claim. For the reasons discussed below, we affirm.

I

HCEC is a committee of the Iowa Chiropractic Society, and an assignee of the claims of one hundred and twenty Iowa chiropractors. In 1979 HCEC brought this action against the Blues, the ACR, the IHA, and other defendants [2] alleging violations of *sections 1* and *2* of the Sherman Act. *15 U.S.C. §§ 1*, *2*. [3] HCEC charged that the defendants had conspired in violation of *§ 1* of the Sherman Act to eliminate or prevent the growth of the chiropractic profession through a group boycott or concerted refusal to deal with chiropractors. HCEC alleged that the boycott was manifested in many ways, including (1) refusal to permit medical doctors to refer patients to chiropractors, to accept patient referrals from chiropractors, or to treat patients in cooperation with chiropractors; (2) **[**3]** denial of access to hospitals and hospital services to chiropractors; (3) attempts to block accreditation of chiropractic educational institutions; (4) promotion of public statements critical of chiropractors; and (5) refusal to include coverage for chiropractic services in health care service plans. Additionally, HCEC alleged that the Blues monopolized, attempted to monopolize, and conspired to monopolize the "health care insurance business in Iowa" in violation of *§ 2* of the Sherman Act.

[4]** After approximately eight months of discovery, the Blues filed a motion to dismiss the antitrust allegations as to them. The Blues claimed to be exempt from the federal antitrust laws under the McCarran-Ferguson Act, *15 U.S.C. §§ 1011-1015*, and the state action doctrine of *Parker v. Brown, 317 U.S. 341, 350-52, 87 L. Ed. 315, 63 S.*

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[1] The Honorable William C. Stuart, United States Senior District Judge for the Southern District of Iowa.

[2] HCEC also named as defendants the American Medical Association, the American Hospital Association, the Iowa Medical Society, the Joint Commission on Accreditation of Hospitals, then Iowa Commissioner of Public Health Norman L. Pawlewski, H. Doyl Taylor, Donald C. Young, M.D., Nelson H. Chesney, M.D., Clarence R. Denser, Jr., M.D., and Joseph Sabatier, Jr., M.D. As a result of various settlement agreements and unappealed orders of the district court, these defendants are no longer parties to this lawsuit.

[3] HCEC also alleged violations of (1) the Iowa common law of tort due to interference with prospective business relations, and (2) *42 U.S.C. § 1983*. In 1986 the district court granted HCEC's motion to dismiss its tortious interference claim, *Health Care Equalization Comm. v. Iowa Medical Soc'y*, Civ. No. 79-381-A (S.D. Iowa Aug. 4, 1986) (*HCEC v. IMS*), and entered summary judgment in favor of all defendants on the *§ 1983* claim. *Id.* (Aug. 8, 1986) (the Blues); *id.* (Aug. 13, 1986) (remaining defendants). HCEC does not appeal from these orders.

Ct. 307 (1943). The ACR filed a motion to dismiss for lack of personal jurisdiction. [4] In a comprehensive ruling, the district court held that the Blues were exempt from the *§ 1* group boycott claim due to the state action doctrine, *HCEC v. IMS*, 501 F. Supp. at 988-91, and from the *§ 2* monopolization claim on the basis of the McCarran-Ferguson Act, *15 U.S.C. §§ 1011-1015*. *Id. at 993-95*. The district court also granted the ACR's motion to dismiss for lack of personal jurisdiction because the ACR did not have sufficient minimum contacts with Iowa to satisfy the requirements **[*1023]** of the *due process clause of the fourteenth amendment*. *Id. at 980-82*.

[5]** Discovery involving the remaining defendants and claims proceeded throughout the early 1980s and ended in January 1986. Both HCEC and the IHA then moved for summary judgment on the group boycott claim. On August 4, 1986, the district court denied HCEC's motion for summary judgment, adopting a rule of reason approach to group boycott claims involving professional associations, and granted the IHA's motion for summary judgment because the undisputed facts revealed that the IHA was not involved in the alleged group boycott. [5] This appeal followed.

II

HCEC's first point on appeal is that the district court erred in dismissing its group boycott and monopolization claims against the Blues under the state action doctrine and the McCarran-Ferguson Act. We turn first to the state action doctrine.

A

The Blues are non-profit health care service corporations organized under Iowa Code Chapters **[**6]** 504 and 504A and governed by Iowa Code Chapter 514 in the administration of their health care service plans. These plans provide an alternative to traditional health insurance plans and revolve around two sets of contracts: provider contracts and subscriber contracts. Subscriber contracts obligate the Blues to provide to subscribers for a fixed fee various health care services through participating health care providers. Through the provider contracts, the Blues are obligated to reimburse participating health care providers for their fees and expenses in providing health care services to the Blues' subscribers. The history and development of the Blues is described in greater detail in *Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 239-243, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)* (Brennan, J., dissenting). HCEC focuses its group boycott claim on the failure of the Blues to include chiropractors within their health care service plans--that is, the failure to include chiropractic services among those health care services which the Blues are obligated to provide under their subscriber contracts.

The Blues defend this exclusion by pointing to the regulatory framework governing health care service **[**7]** corporations set forth in Iowa Code Chapter 514, which the Blues assert mandates the exclusion of chiropractors. Thus, the Blues argue that the actions complained of by HCEC are actually those of the State of Iowa and therefore not subject to the Sherman Act under the state action doctrine.

In analyzing the Blues' defense under the state action doctrine, we begin with *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. There, a raisin producer sought to enjoin the enforcement of an agricultural marketing program administered pursuant to state legislation intended to create price supports for various commodities, including raisins. The Court assumed for purposes of analysis that the program would have anti-competitive effects, but nevertheless concluded that Congress did not intend the Sherman Act to apply to the

[4] All defendants joined in a motion to dismiss on the ground that HCEC lacked standing and the capacity to bring this lawsuit. The district court denied this motion. *HCEC v. IMS*, 501 F. Supp. at 976-80. Appellees assert that the district court erred in denying this motion and raise this point of error in what purports to be a cross-appeal (No. 87-1015). Because it would be unnecessary to reach this argument if we affirm the district court on all aspects of appellant's appeal, we construe appellees' argument to be in the nature of an alternative basis for affirmance. We dispose of this issue *infra*, note 16.

[5] The district court certified its November 5, 1980, and August 4, 1986, rulings for interlocutory appeal. *See* *28 U.S.C. § 1292(b)*. Because all other defendants have been dismissed, these rulings have become final; accordingly, we exercise jurisdiction over this appeal pursuant to *28 U.S.C. § 1291*.

program because it "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." *Id. at 350*. The Court based its decision both on federalism concerns and the legislative history of the Sherman Act.

> ***HN1***[] We find nothing in the language of the Sherman Act or in its history which suggests that its **[**8]** purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, **[*1024]** an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-51.

After more than thirty years, the Court returned to the state action doctrine in a series of cases. *Goldfarb v. Virginia State Bar, 421 U.S. 773, 791, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)* (minimum fee schedule issued by county bar association and enforced by state bar, an administrative agency, not protected by state action doctrine because fee schedule not "compelled by direction of the State acting as a sovereign"); *Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)* (state's neutral acceptance of public utility's program of providing free light bulbs not protected by state action doctrine); *Bates v. State Bar of Arizona, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977)* (state action doctrine protects state supreme court enforcement of disciplinary rules prohibiting attorney advertising); *City of Lafayette v. Louisiana Power & Light **[**9]** Co., 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)* (state action doctrine protects acts of municipalities only where undertaken pursuant to clearly articulated state policy of displacing competition by regulation); *New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978)* (same); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)* (*Midcal*) (state legislated resale wine-pricing maintenance program not protected by state action doctrine because, although restraint clearly articulated and affirmatively expressed as state policy, not actively supervised by the state itself).

In *Sound, Inc. v. American Telephone & Telegraph Co., 631 F.2d 1324 (8th Cir. 1980)*, this court distilled from the above cases four factors relevant to the application of the state action doctrine. [6] These factors were applied by the district court in its 1980 ruling that the Blues' conduct was protected under the state action doctrine.

[10]** The law regarding the state action doctrine has not remained static since the district court's rulings. In *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)* (*Southern Motor Carriers*), and *324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987)* (*324 Liquor Corp.*), the Court clarified the doctrine by holding that ***HN2***[] only the two factors considered in *Midcal* make up the test for protection under the state action doctrine: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal, 445 U.S. at 105* (quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)* (plurality opinion)); *see also 324 Liquor Corp.*, 107 S. Ct. at 725; *Southern Motor Carriers, 471 U.S. at 57*. Most recently in *Patrick v. Burget, 486 U.S. 94, 56 U.S.L.W. 4430, 4432, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)* (*Patrick*), the Court noted that "the ***HN3***[] active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private

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[6] The four factors set forth in *Sound, Inc.* were:

> [1] The existence and nature of any relevant statutorily expressed policy; [2] the nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator; [3] the fairness of subjecting a regulated private defendant to the mandates of ***antitrust law***; and [4] the nature and extent of the state's interest in the specific subject matter of the challenged activity.

Id. at 1334.

parties and disapprove those that fail **[**11]** to accord with state policy." Although the four-factor test of *Sound, Inc.* applied by the district court has been superseded, we conclude that the Blues are protected by the state action doctrine under the current two-pronged test.

Turning first to state policy, we conclude that ***HN4***[] Iowa Code Chapter 514 [7] reflects a **[*1025]** clearly articulated and affirmatively expressed state policy to displace competition with regulation in the health care service corporation industry, and provides an extensive and complex regulatory framework for the activities of health care service corporations such as the Blues. Section 514.1 authorizes such corporations to administer four types of plans: (1) a hospital service plan "whereby hospital service may be provided by the said corporation or by a hospital with which it has a contract for such service, to such of the public who become subscribers to said plan under a contract which entitles each subscriber to hospital service"; (2) a medical and surgical service plan "whereby medical and surgical service may be provided at the expense of said corporation, by duly licensed physicians and surgeons, dentists, podiatrists, osteopathic physicians, or osteopathic **[**12]** physicians and surgeons, to subscribers under contract, entitling each subscriber to medical and surgical service, as provided in said contract"; (3) a pharmaceutical plan; and (4) an optometric plan.

Under § 514.5, hospital service corporations are authorized to contract with subscribers "for the rendering of hospital service to any of its subscribers with hospitals maintained and operated by the state or any of its political subdivisions, or by any corporation, association, or individual." This section also authorizes medical service corporations to "enter into contracts with subscribers to furnish medical and surgical service through physicians and surgeons, dentists, podiatrists, osteopathic physicians, or osteopathic physicians and surgeons."

Chapter 514 does not stop at merely specifying the types of contracts that health care service corporations may enter into. Under § 514.7, any contracts between a health care service corporation and its subscribers are "at all times" subject to the **[**13]** approval of the Iowa Commissioner of Insurance (the Commissioner). Similarly, § 514.8 provides:

> The contracts by any [health care service] corporation with participating hospitals for hospital service or with participating physicians and surgeons, dentists, podiatrists, osteopathic physicians, or osteopathic physicians and surgeons for medical and surgical service, or with participating pharmacies for pharmaceutical service, or with participating optometrists for optometric service shall at all times be subject to the approval of the commissioner of insurance.

The articles of incorporation of the health care service corporation itself, as well as any subsequent amendments thereto, are subject to the approval of the Commissioner. § 514.3. The Commissioner must also approve the rates charged to subscribers, *§ 514.6*, approve all acquisition and administrative costs of the corporations, § 514.11, arbitrate any disputes between a corporation and its providers, § 514.13, and supervise any dissolution, merger or liquidation of a health care service corporation, § 514.14. Under § 514.17, the legislature has further specified the minimum number of each type of health care provider which **[**14]** must be under contract with the corporation. Finally, all health care service corporations must report annually to the Commissioner under § 514.9, and are subject to examination under § 514.10. In sum, Chapter 514 regulates every aspect of the health care service corporation industry from the structure, expenditures, and contracts of the corporations to the rates that they may charge their subscribers.

HCEC argues, however, that even if the Blues are protected by the state action doctrine to the extent that their conduct is pursuant to the provisions of Chapter 514, they are nevertheless liable for their boycott of chiropractors because the exclusion of chiropractors from health care service plans is not contemplated or compelled by Chapter 514. [8] We agree with the district **[*1026]** court's reasoning in rejecting this argument because "Chapter ***HN5***[]

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[7] All discussions of Iowa Code Chapter 514, unless otherwise noted, refer to the Chapter as it read in 1979 at the time of HCEC's suit. Subsequent amendments are discussed where relevant.

[8] HCEC also appears to argue that the Blues were not obligated to exclude chiropractors because they sometimes made reimbursements to their subscribers for services performed by nonparticipating providers. The district court rejected this argument because, in its view, such reimbursements are permissible under Chapter 514. *HCEC v. IMS*, 501 F. Supp. at 990-91.

514 on its face removes any discretion or business judgment with respect to coverage by health care service corporations of chiropractic services." *HCEC v. IMS*, 501 F. Supp. at 990.

[15]** As a threshold matter, we note that ***HN6***[] it is not necessary for Chapter 514 to expressly compel health care service corporations to exclude chiropractors from their service plans in order for the corporations to be protected by the state action doctrine. *Southern Motor Carriers, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721*. "A private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." *Id., 471 U.S. at 64* (quoting *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)* (plurality opinion)) It is sufficient that the legislature "'contemplated the kind of action complained of.'" *Lafayette, 435 U.S. at 415* (plurality opinion) (citation omitted); *see also Capital Telephone Co. v. New York Telephone Co., 750 F.2d 1154, 1162 (2d Cir. 1984)*. Here, however, ***HN7***[] it is clear from the language and history of Chapter 514 that the exclusion of chiropractors from health care service plans was not merely contemplated by the State of Iowa, but compelled.

Health care service corporations were first authorized to provide medical and surgical service plans to subscribers in 1945. [9] 1945 Iowa Acts Ch. 209, **[**16]** *§ 1*. This law limited the authorized plans to the services of "physicians and surgeons, osteopathic physicians, or posteopathic physicians and surgeons." *Id.* The legislature on several occasions has expanded this authorization to include other services. Dental services were added in 1955. 1955 Iowa Acts Ch. 244, *§ 1*. In 1965 podiatric services were added. 1965 Iowa Acts Ch. 397, *§ 1*. Pharmaceutical services were added in 1967, 1967 Iowa Acts Ch. 369, *§ 1*, and two years later optometric services were added. 1969 Iowa Acts Ch. 271, *§ 1*. It was not until 1986, however, that the Iowa legislature chose to include chiropractic services within those services authorized to be provided by health care service corporations. 1986 Iowa Acts Ch. 1180, § 3. We agree with the district court that "the omission of any mention of chiropractic coverage [until 1986] in Chapter 514 directly suggests that the legislature intended to prohibit coverage of their activities by health care service corporations." *HCEC v. IMS*, 501 F. Supp. at 990.

This interpretation of Chapter 514 is **[**17]** supported by opinions issued by both the Attorney General and the Governor of Iowa. In March 1979 the Iowa Attorney General stated:

> Being creatures of statutes, service corporations under Section 514.1 can contract for these services only and only with those persons or entities listed in Chapter 514; hospitals or corporations, associations, or individuals providing hospital service; physicians and surgeons; dentists; podiatrists; osteopathic physicians and surgeons; pharmacies; and optometrists.

Op. Att'y Gen. (Mar. 31, 1979). Later that year, Governor Robert D. Ray opined that "eligibility for [chiropractic] benefit under Chapter 514 is prevented as a matter of law" and "eligibility for Blue Cross and Blue Shield benefits must be by statutory revision." II Iowa Admin. Bull., No. 9, at 527 (1979). Iowa law as of 1980 clearly excluded chiropractic services from coverage in health care service corporations. We therefore conclude that the Blues' conduct in excluding chiropractors from their health care service plans was undertaken pursuant to a clearly articulated and affirmatively expressed policy of the State of Iowa.

Turning to the second prong under *Midcal*, active state supervision, **[**18]** we conclude **[*1027]** that Iowa actively supervises the health care service corporations' conduct under its regulatory scheme. Not only does the statute require each corporation to report annually to the Commissioner and remain subject to examination, but the Commissioner also approves every contract entered into by the corporations, including the actual rates charged to the subscribers. The Commissioner's role and authority in reviewing contracts and rates is quite different from the regulatory programs considered in *Midcal, 324 Liquor Corp.*, and *Patrick*, where the Court found no active state supervision. In those cases, the state neither established nor reviewed the alleged anticompetitive conduct, and did not "monitor market conditions or engage in any 'pointed reexamination' of the program." *Midcal, 445 U.S. at 106* (quoting *Bates v. State Bar, 433 U.S. 350, 362, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977))*; *see Patrick, 56 U.S.L.W.*

We do not find the question of whether the Blues in practice reimbursed their subscribers for the services of nonparticipating providers to be particularly relevant to the question of whether Chapter 514 authorizes the Blues to include chiropractors within their plans.

[9] Chapter 514, as originally enacted in 1939, authorized hospital service plans only. 1939 Iowa Acts Ch. 222, *§ 1*.

at 4432; *324 Liquor Corp.*, 107 S. Ct. at 726 (1987). Here, by contrast, the Commissioner's supervision is extensive and continuing, and is much more than a "gauzy cloak of state involvement" cast over the health care service corporations' activities. *Cf.* *Midcal, 445 U.S.* ***[**19]*** *at 106* (state legislated resale wine-pricing maintenance program not actively supervised by state itself). The Commissioner reviews all contracts of the Blues and has the authority to disapprove any provider contracts between the Blues and chiropractors. We thus conclude that ***HN8***[] Iowa Code Chapter 514 satisfies both prongs of the *Midcal* state action test. The district court did not err in holding that the Blues' compliance with the legislative mandate of Iowa to "refuse to deal" with chiropractors is exempt from antitrust scrutiny under the state action doctrine. [10]

[20]** B

We next consider HCEC's argument that the district court erred in dismissing its *§ 2* monopolization claim against the Blues under the McCarran-Ferguson Act. HCEC alleged that the Blues had monopolized, attempted to monopolize, and conspired to monopolize "the health care insurance business in Iowa." Specifically, HCEC alleged that the Blues "have taken over coverage of groups of patients previously afforded third party coverage for chiropractic services by private insurers, thereby creating an economic bias favoring competing medical doctors, depriving the insured Iowans of a reasonable election between chiropractic and medical health care, and depriving [HCEC's assignors] of patients and income." The district court dismissed these allegations, concluding that the Blues were exempt from scrutiny under *§ 2* of the Sherman Act pursuant to the McCarran-Ferguson Act, *15 U.S.C. §§ 1011-1015*, because the Blues were engaged in the "business of insurance" and regulated by state law. *HCEC v. IMS*, 501 F. Supp. at 993-95.

[*1028] The ***HN10***[] McCarran-Ferguson Act removes from antitrust scrutiny all conduct which is (1) part of the "business of insurance," (2) regulated by state law, and (3) not in the **[**21]** form of coercion, intimidation, or boycott. *15 U.S.C. §§ 1012(b)*, *1013(b)*; *Hahn v. Oregon Physicians Service, 689 F.2d 840, 841-42 (9th Cir. 1982)*; *Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 483 (4th Cir. 1980)*, *cert. denied*, *450 U.S. 916, 67 L. Ed. 2d 342, 101 S. Ct. 1360 (1981)*. The first question is thus whether the Blues' conduct in allegedly monopolizing the market for health care services in Iowa is part of the "business of insurance." The Supreme Court has set forth ***HN11***[] three factors to examine in determining whether a particular practice is part of the "business of insurance": (1) whether the practice has the effect of transferring or spreading a policyholder's risk, (2) whether the practice is an integral part of the policy relationship between the insurer and the insured, and (3) whether the practice is limited to entities within the insurance industry. *Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129, 73 L. Ed. 2d 647, 102 S. Ct. 3002 (1982)*; *Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)*. While each of these factors is a relevant consideration in evaluating whether a practice is part of the "business of insurance," "none of these criteria is necessarily determinative **[**22]** in itself." *Pireno, 458 U.S. at 129*.

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[10] Implicit in this holding is our view that ***HN9***[] *§ 1013(b)* of the McCarran-Ferguson Act does not express a congressional intent to subject state-authorized boycott activity to the antitrust laws where conducted as part of a state-regulated "business of insurance." This question was left open by the Supreme Court in *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 554, 57 L. Ed. 2d 932, 98 S. Ct. 2923 n.27 (1978)* ("We have no occasion here to decide whether the element of state regulatory direction or authorization of the particular practice, absent in this case, is a factor to be considered in the definition of 'boycott' within the meaning of [*15 U.S.C. § 1013(b)*], or whether it comes into play as part of a possible defense under the 'state action' doctrine as elaborated in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, and its progeny"). *But see* *Ballard v. Blue Shield, 543 F.2d 1075, 1079 (4th Cir. 1976)* ("*Section 1013(b)* of the McCarran-Ferguson Act expresses congressional intention to subject boycotts by insurance companies to the Sherman Act. Consequently, there can be no justification for utilizing the principles of *Parker v. Brown* to impute a contrary intent to Congress.") (footnote omitted). *Ballard* made clear that West Virginia law specifically authorizes the defendant companies to insure the costs of chiropractic treatment, but the defendants elected not to provide this coverage. *543 F.2d at 1079*. It seems to us unduly anomalous to suggest that Congress, in a statute intended to exempt state-regulated insurance practices from the antitrust laws, *see* *Royal Drug, 440 U.S. at 218 n.18*, intended to subject to the antitrust laws conduct by insurance companies that would be exempt from scrutiny if engaged in by any other entity.

In applying these three factors to the present case, we emphasize that we consider only the *§ 2* aspect of HCEC's complaint which alleges that the Blues have monopolized the Iowa health insurance market, thereby injuring HCEC by reducing the market share of those insurance companies who cover chiropractic services. These allegations are essentially aimed at the contractual relationship between the Blues as insurers and their Iowa subscribers as insureds. We conclude that these contracts with subscribers, and the extent to which the Blues may have attained a dominant position in the market for these contracts, are an integral part of the "business of insurance" within the meaning of the McCarran-Ferguson Act.

The contracts between the Blues and their subscribers clearly have the effect of transferring or spreading a subscriber's risk. Subscribers pay a fixed premium to the Blues, unrelated to the actual health care expenses which are borne by the Blues. This is a classic insurance relationship. In this respect, the Blues' contracts with their subscribers may be sharply contrasted with their contracts with participating health care providers. **[**23]** In *Royal Drug*, the Court characterized the Blues' contracts with their providers as "merely arrangements for the purchase of goods and services by Blue Shield." *Royal Drug, 440 U.S. at 214*. The Court also observed that provider contracts were not between the insurer and the insured, but rather involved the insurer and a third party. *Id. at 215-16*. Accordingly, the Court concluded that the provider contracts were not a part of the "business of insurance" under the McCarran-Ferguson Act. *Id.* The Court was careful, however, to distinguish the Blues' provider contracts from their subscriber contracts: "This is not to say that the contracts offered by Blue Shield to its policyholders, as distinguished from its provider agreements . . ., may not be the 'business of insurance' within the meaning of the [McCarran-Ferguson] Act." *Id. at 230 n.37*. This distinction was also noted in the dissenting opinion of Justice Brennan:

> I start with common ground. Neither the Court nor the parties challenge the fact that the . . . policy offered by Blue Shield to its policyholders -- as distinguished from the contract between Blue Shield and the [providers] -- is the "business of insurance." **[**24]** 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 **[*1029]** costs of benefits above the premiums of those who do.

Id. at 239 (Brennan, J., dissenting) (citation omitted). We find this distinction to be of critical importance in assessing whether the Blues' subscriber contracts are the "business of insurance." Unlike the provider contracts, pursuant to which the Blues merely procure services from providers for their subscribers, the subscriber contracts involve the sharing and spreading of risk.

Turning to the second and third factors under *Pireno*, it is clear that the contracts between the Blues and their subscribers are "an integral part of the policy relationship between the insurer and the insured" and that these contracts are "limited to entities within the insurance industry." Indeed, these contracts *are* the policy relationship between the insurer and insured, and, by definition, are limited **[**25]** to insurance entities. We conclude that the contractual relationship between the Blues and their subscribers is part of the "business of insurance" within the meaning of the McCarran-Ferguson Act.

Focusing on the second aspect of exemption under the McCarran-Ferguson Act, we have little difficulty in concluding that the contractual relationship between the Blues and their subscribers is regulated by state law. As discussed above, these contracts, as well as the rates contained in them, are approved by the Iowa Commissioner of Insurance. *See* *Iowa Code, §§ 514.6*,.7. Finally, HCEC's claim that the Blues monopolized, attempted, and conspired to monopolize the Iowa health care insurance market does not allege that the Blues' conduct took the form of coercion, intimidation, or boycott within the meaning of the McCarran-Ferguson Act, *15 U.S.C. § 1013(b)*. [11] Accordingly, we conclude that the district court did not err in dismissing HCEC's *§ 2* monopolization claim against the Blues as exempt under the McCarran-Ferguson Act.

[26]** III

HCEC's next point on appeal is that the district court erred in granting the ACR's motion to dismiss for lack of personal jurisdiction. HCEC asserted jurisdiction over the ACR pursuant to the Iowa long-arm statute, [12] which provides in relevant part:

> ***HN12***[] If a foreign corporation . . . commits a tort in whole or in part in Iowa against a resident of Iowa, such acts shall be deemed to be doing business in Iowa by such foreign corporation for the purpose of service of process or original notice on such foreign corporation under this section, and, if the corporation does not have a registered agent or agents in the state of Iowa, shall be deemed to constitute the appointment of the secretary of state of the state of Iowa to be its true and lawful attorney upon whom may be served all lawful process or original notice in actions or proceedings arising from or growing out of such . . . tort.

Iowa Code § 617.3 (Supp. 1988). The district court assumed, for purposes of its analysis, that the ACR's alleged conduct fell within the Iowa long-arm statute, but concluded that the exercise of personal jurisdiction over the ACR would not be consistent with due process. *HCEC v. IMS*, 501 F. Supp. at **[**27]** 984-86.

On the basis of unrebutted testimony, the district court found the following facts regarding the ACR's contacts with Iowa:

> **[*1030]** ACR has no office in Iowa, is not licensed to do business in Iowa, has no agent or property in Iowa, makes no purchases in Iowa, and has held no seminars, workshops or other meetings in Iowa. The governing body of the organization, the Board of Chancellors, has never met in Iowa and no employees of ACR reside in Iowa. Even though [HCEC] alleges in its resistance that ACR is involved in an ongoing process of certifying radiologists and hospitals, it offers no supporting evidence. The Court finds on the basis of [a] supplemental affidavit attached to ACR's reply memorandum that ACR is not involved in the licensing, certifying or accreditation of hospitals or radiologists. ACR has less than 1% of its membership residing in Iowa. It makes membership mailings but does not "solicit, **[**28]** advertise, promote, or otherwise conduct any of its activities in Iowa", although some of its mailings go to persons who are not members.

Id. at 980-81. [13] The district court concluded that these facts did not demonstrate sufficient "minimum contacts" between the ACR and the State of Iowa so that the assertion of personal jurisdiction over the ACR would be

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[11] HCEC did not allege that the Blues' boycott of chiropractors was related to the alleged monopolization by the Blues of the health care *insurance* market. We also understand HCEC to allege that the Blues attempted and conspired with their co-defendants to monopolize the health care *provider* market by refusing to include chiropractors within their health care service plans. In view of our holding in Part IIA that this conduct was exempted from liability on HCEC's boycott claim under *§ 1* of the Sherman Act due to the state action doctrine, we similarly conclude that the allegations under *§ 2* of the Sherman Act of attempt and conspiracy to monopolize by the same conduct were also properly dismissed under the state action doctrine.

[12] HCEC also asserted jurisdiction over the ACR pursuant to § 12 of the Clayton Act, *15 U.S.C. § 22*. The district court concluded that this provision did not support jurisdiction over the ACR, *HCEC v. IMS*, 501 F. Supp. at 980-82, and HCEC has not appealed from this ruling.

[13] Although HCEC was allowed eight months in which to conduct discovery relevant to its assertion of jurisdiction over the ACR, HCEC apparently presented no evidence in opposition to the ACR's motion to dismiss. Although HCEC argues that evidence discovered several years after the district court dismissed the ACR as a party suggests that it had jurisdiction over the ACR, we will not consider on appeal a theory of jurisdiction or evidence which was not before the district court and which was developed

consistent with "traditional notions of fair play and substantial justice." *Id.; see* *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*.

[29]** ***HN13***[] In determining whether there are sufficient minimum contacts to satisfy due process, we focus on the "'relationship among the defendant, the forum, and the litigation.'" *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984)* (quoting *Shaffer v. Heitner, 433 U.S. 186, 204, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977))*; *Institutional Food Marketing Assocs., Ltd. v. Golden State Strawberries, Inc., 747 F.2d 448, 455 (8th Cir. 1984)*. This inquiry involves a consideration of five factors: (1) the nature and quality of the defendant's contacts with the forum state; (2) the quantity of the defendant's contacts with the forum state; (3) the relation of the cause of action to the defendant's contacts with the forum state; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. *Institutional Food Marketing, 747 F.2d at 455*; *Scullin Steel Co. v. National Ry. Utilization Corp., 676 F.2d 309, 313 n.4 (8th Cir. 1982)*. The first three factors are of paramount importance. *Id.;* *Aaron Ferer & Sons Co. v. American Compressed Steel Co., 564 F.2d 1206, 1210 n.5 (8th Cir. 1977)*.

Reviewing the nature and quality of the ACR's contacts with **[**30]** Iowa, we agree with the district court that "the only contacts ACR had established with Iowa related to the existence and servicing of resident members" of the ACR. *HCEC v. IMS*, 501 F. Supp. at 985. The quality of these contacts was nothing more than the residence of ACR members in Iowa and the mailing of materials related to membership into the state. Under the second factor, the ACR's contacts with Iowa were also quite limited. About one hundred and twenty ACR members reside in Iowa, making up less than one percent of the total ACR membership. The third factor is equally unsupportive of jurisdiction because the ACR's contacts with Iowa, *i.e.*, the residence of members and membership mailings, are greatly attenuated from HCEC's allegations against the ACR. These allegations center on the ACR's adoption of a code of ethical principles for its members based upon the Principles of Medical Ethics of the American Medical Association, which prohibits professional association with chiropractors. HCEC draws no direct connection between the **[*1031]** ACR's adoption of its code of ethical principles and the ACR's limited activities in Iowa. We do not find any considerations that suggest that the **[**31]** ACR's "'conduct and connection with the forum State are such that [the ACR] should reasonably [have] anticipate[d] being haled into court there.'" *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)* (quoting *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980))*. We hold that the district court did not err in concluding that it could not exercise personal jurisdiction over the ACR on HCEC's allegations. [14]

IV

HCEC's third argument is that the district court erred in granting summary judgment to the IHA. HCEC alleged in its complaint that the IHA, as a "state-wide trade association in the health care field" and "an affiliated constituent society of the AMA composed of hospitals in the State of Iowa," conspired to boycott chiropractors by refusing to permit its member hospitals "to deal in goods or services with chiropractic doctors operating within the terms of their Iowa licenses." The IHA denied **[**32]** these allegations in an affidavit asserting that (1) the IHA is not affiliated with the AMA, (2) the IHA has absolutely no authority or control over its member hospitals either in promulgating rules for its member hospitals or in determining the policies of its member hospitals with regard to staff or clinical privileges, and (3) the IHA has no rules or policies against the granting of staff or clinical privileges to chiropractors. HCEC, which failed to depose any representative of the *IHA*, attempted to rebut the IHA's affidavit with evidence tending to show that on one occasion a representative of one hospital met with a representative of the IHA regarding an application by a chiropractor for hospital privileges. The district court concluded that this evidence

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after the ACR had been dismissed as a party. ***Universe Tankships, Inc. v. United States, 528 F.2d 73, 76 (3d Cir. 1975)***; *Ludwig v. Marion Laboratories, Inc., 465 F.2d 114, 117 (8th Cir. 1972)*.

[14] Because we conclude that the ACR did not have sufficient minimum contacts with Iowa to satisfy due process requirements, we do not reach the district court's assumption that the ACR's alleged conduct fell within the Iowa long-arm statute, *Iowa Code § 617.3*.

failed to raise a genuine issue of material fact precluding the entry of judgment under *Fed. R. Civ. P. 56* [15] in favor of the IHA.

[33]** We begin our consideration of the district court's application of *Rule 56* with a review of recent Supreme Court decisions on the legal standards applicable to motions for summary judgment in antitrust cases. The Court has said that "summary ***HN15***[] judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)* (quoting *Fed. R. Civ. P. 1*). To survive a motion for summary judgment, the non-moving party "must establish that there is a genuine issue of material fact as to whether [the moving party] entered into an illegal conspiracy that caused [the non-moving party] to suffer a cognizable injury." *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (citations omitted). "Second, the issue of fact must be 'genuine.' When the moving party has carried its burden [of demonstrating the absence of a genuine issue of material fact], its opponent must do more than simply show that there is some metaphysical doubt as to the material **[**34]** facts." *Id. at 586* (citations omitted). "The non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Id. at 587* (quoting *Fed. R. Civ. P. 56(e)*) (emphasis in *Matsushita*). **[*1032]** ***HN16***[] Finally, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case. . . . To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id. at 588* (quoting *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984))*. Most significantly for this case, the non-moving party "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" the non-moving party. *Id.*

In applying the above principles to the facts before us, we conclude that summary judgment was properly entered. HCEC's evidence to the effect that an IHA-member hospital once consulted the IHA about a chiropractor seeking staff privileges does not rise above the level of **[**35]** a "metaphysical doubt" as to whether IHA, an entity with no other connections to the other members of the alleged conspiracy, was actually engaged in a conspiracy to boycott chiropractors. HCEC's evidence certainly did not tend to exclude the possibility that the IHA acted independently or in a manner that could not have harmed HCEC. On the evidence in the record, an inference of conspiracy is no more reasonable than an inference that the IHA was not a part of any concerted activity to boycott chiropractors. The district court did not err in "secur[ing] the just, speedy and inexpensive determination" of this action by granting summary judgment in favor of the IHA.

V

The judgment of the district court is affirmed. [16]

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[15] *Fed. R. Civ. P. 56(e)* provides, in relevant part:

> ***HN14***[] When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[16] Because our disposition of this case leaves no defendants remaining in the case, HCEC's allegation that the district court erred in denying its motion for summary judgment is moot. We similarly have no occasion to consider appellees' argument as an alternative ground for affirmance that HCEC lacks standing or the capacity to bring this suit. Accordingly, "cross-appeal" No. 87-1015 is dismissed. **[**36]**

LexisNexis®

Drabbant Enterprises, Inc. v. Great Atlantic & Pacific Tea Co.

United States District Court for the District of Delaware

June 27, 1988

Civil Action No. 88-215 LON

Reporter
688 F. Supp. 1567 *; 1988 U.S. Dist. LEXIS 7236 **; 1988-2 Trade Cas. (CCH) P68,175

DRABBANT ENTERPRISES, INC., a Delaware corporation, t/a PAREE CLAREE BEAUTY SALON, and FRONT STREET PROPERTIES, a New York general partnership, and DEPARTMENT OF JUSTICE OF THE STATE OF DELAWARE, as Parens Patriae of the Citizens of the State of Delaware Residing In and Around the Milford Area, and on behalf of the Town of Milford, Plaintiffs, v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Maryland corporation, Defendant

Disposition: [1]** The motion for a preliminary injunction is denied.

Core Terms

shopping center, lease, restrictive covenant, supermarket, market share, premises, geographic, monopoly, tenants, monopolization, preliminary injunction, Fresh, probability of success, probability, departure, covenant, food, consumers, interstate commerce, deposition, memorandum, Sherman Act, imminent, markets, concerted action, anticompetitive, distance, argues, occupy, irreparable injury

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN1[] **Types of Contracts, Covenants**

Covenants to restrict land use are enforced only if reasonable and equitable. Under certain circumstances, restrictive covenants that protect the grantee from competition from competitors will be upheld so long as they are reasonable in both scope and geography.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

The Delaware Antitrust Act, *Del. Code Ann. tit. 6, § 2113*, requires that the state law be construed in harmony with the interpretation of the federal ***antitrust law***.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Injunctions, Grounds for Injunctions**

The standards for granting or denying a motion for a preliminary injunction are well established. A preliminary injunction is not granted as a matter of right. It is an extraordinary remedy and must be sparingly granted. In order to obtain a preliminary injunction, the moving party must show (1) a reasonable probability of eventual success in the litigation, and (2) that irreparable injury will ensue if relief is not granted. In addition, the court may consider (3) the possibility of harm to other interested persons from the grant or denial of relief, and (4) the public interest. Merely establishing a risk of irreparable harm is not enough. Rather, the moving party has the burden of proving a clear showing of immediate irreparable injury.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Injunctions, Grounds for Injunctions**

Where the moving party is asserting what is essentially economic injury, he must meet a more stringent standard to show that the harm is peculiar or special. Where the alleged harm is economic, the threshold of peculiarity that the proposed action threatens must be high, because purely economic injuries are generally compensable and do not require injunctive relief. The court went on to note that particularized proof of the direct harm caused by the defendant was necessary in order for the plaintiffs to demonstrate that the threatened injury was sufficiently peculiar.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Torts > ... > General Premises Liability > Types of Premises > Stores

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5[] **Injunctions, Grounds for Injunctions**

Purely economic injuries are generally compensable and do not require injunctive relief.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

In order for the court to have jurisdiction over a federal antitrust claim, the allegedly illegal conduct must either be in the flow of interstate commerce or, though occurring on a local level, substantially affect interstate commerce. The second test is considered from the perspective of whether the local activity has a significant impact on competition in commerce and whether the commerce so affected is substantial in volume.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Conspiracy to Monopolize, 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 is declared to be illegal. Although the statute's language seems all encompassing, the court construes it as prohibiting only those contracts or combinations which unreasonably restrain competition. Consequently, plaintiffs must prove: (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant products and geographic markets; (3) that the objects of and the conduct pursuant to the contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of the conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Sherman Act, Claims**

In order for the plaintiffs to be granted relief based upon a Sherman Act violation under *15 U.S.C.S. § 1*, the plaintiffs must show a probability of success of establishing all of the requisite elements of such a claim. In particular, the plaintiffs must establish that the defendant was involved in concerted action in its attempt to restrain trade. In order to do this, the plaintiffs must present evidence from which the trier of fact could reasonably infer that the defendant and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. There must be direct or circumstantial evidence that reasonably tends to prove that the defendants and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

For purposes of evaluating a Sherman Act claim under *15 U.S.C.S. § 2*, the relevant geographic and product markets must be established.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Sherman Act, Claims**

In order for the plaintiffs to establish that the defendant violated the Sherman Act, *15 U.S.C.S. § 2*, by achieving a monopoly, the plaintiffs must show: (1) the possession of monopoly power in the relevant geographic and product markets; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident. The court recognizes that market share is a primary indication of whether monopoly power exists.

Antitrust & Trade Law > Sherman Act > Claims

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

HN11[] **Sherman Act, Claims**

In order for the plaintiffs to establish a Sherman Act claim under *15 U.S.C.S. § 2* for attempted monopolization, they must show: (1) a specific intent to monopolize; and (2) the consequent dangerous probability of success within the relevant geographic and product markets. As to proving the requisite intent, the court explains that a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not predominately motivated by legitimate business aims.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

While market share may be considered by a court in determining whether there is a dangerous probability of monopoly under the Sherman Act, *15 U.S.C.S. § 2*, it is not determinative. The court may also consider other market characteristics such as the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand.

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Michael F. Foster, Esquire, State Solicitor, and William W. Erhart, Esquire (argued), Department of Justice, Wilmington, Delaware, as Parens Patriae of the Citizens of the State of Delaware, residing in and around the Milford Area, Town of Milford.

Judges: Longobardi, United States District Judge.

Opinion by: LONGOBARDI

Opinion

[*1568] LONGOBARDI, UNITED STATES DISTRICT JUDGE

I. NATURE OF THE PROCEEDINGS

On April 21, 1988, Front Street Properties, a New York general partnership, ("Front Street") and Drabbant Enterprises, Inc. ("Drabbant") filed a lawsuit against the Great Atlantic & Pacific Tea Company ("A&P") seeking a preliminary injunction and declaratory relief. Plaintiffs seek to enjoin A&P from enforcing a restrictive covenant in its lease. In addition, Plaintiffs are also seeking a declaration that the restrictive covenant is unenforceable and that Defendant **[**2]** is in breach of its lease due to its abandonment of the leased premises. On May 23, 1988, the

Court granted a motion by the Attorney General of the State of Delaware to intervene on behalf of the citizens of Milford.

Briefing on Plaintiffs' motion for a preliminary injunction has been completed on an accelerated basis and oral argument **[*1569]** was heard on June 9, 1988. What follows is the Court's decision on Plaintiffs' motion.

II. BACKGROUND

The Milford Shopping Center was built in 1961. Safeway Stores, Inc. ("Safeway") was the first supermarket tenant in the shopping center. Approximately two months after Safeway entered into its lease, A&P entered into the lease at issue for other space in the shopping center. This lease contained, among other covenants, the following restrictive covenant:

> The lessor obligates himself not to lease, rent or permit to be occupied as a supermarket, grocery store, meat market, produce store or dairy store, except bakery and Safeway Food Market of 14,845 square feet, any property owned or to be owned by him within 2,000 feet of the demised premises herein described during the term of this lease or any extension thereof. This shall be taken as a covenant **[**3]** running with the land that is or may be owned by the lessor within 2,000 feet of the demised premises, not merely a personal obligation of the lessor.

(hereinafter the "Restrictive Covenant"). The A&P lease was amended several times over the life of its term. One of the amendments that impacts upon this litigation extended the term an additional fifteen years, granted A&P the right to renew for four additional five year periods and reflected the subsequent enlargement of the leased premises.

In 1977, Safeway chose not to continue its lease. It moved to a new location in the Milford Village Shopping Center ("Milford Village") approximately two miles from the Milford Shopping Center.

In October, 1979, the landlord notified A&P that it intended to lease the old Safeway premises to B. Green, Inc. ("B. Green") in order to place another supermarket in the shopping center. A&P, however, sought to enforce the Restrictive Covenant against B. Green. Although B. Green brought an action in state court seeking to have the Restrictive Covenant declared unenforceable, the suit was subsequently dismissed without prejudice.

The Milford Shopping Center was bought in 1986 by Front Street, a Plaintiff **[**4]** in this action. All of the leases in the shopping center were reviewed by Andrew Kaplan, a general partner of Front Street.

In April, 1987, A&P renewed its lease for five years but began looking for an alternate site for its supermarket. As a result, A&P opened discussions with Safeway for the purchase of three of its stores, including the one in Milford Village. In June of 1987, A&P transferred control of the property in the Milford Shopping Center to its wholly-owned division, Super Fresh. As a result, the store was converted to a Super Fresh store. In July, 1987, A&P completed its purchase of the Safeway property in Milford Village. On August 28, 1987, A&P closed down its Super Fresh operations in the Milford Shopping Center and moved the operations to the newly purchased property in the Milford Village. Since that time, A&P has paid its rent on the leased premises at the Milford Shopping Center but has kept it empty and has insisted on its continued right to enforce the Restrictive Covenant on the premises formerly occupied by the Safeway store.

In the interim, Plaintiff Front Street was able to let the old Safeway property in the Milford Shopping Center to an auto parts store. **[**5]** In February of this year, Front Street filed a complaint in the Justice of the Peace Court of the State of Delaware, in and for Kent County, against A&P for summary possession of the property. Plaintiff voluntarily dismissed the action. At the same time, Front Street has been searching for a new supermarket tenant for the old Safeway premises in the Milford Shopping Center and has successfully negotiated with its auto parts tenant to move the auto parts store to an alternate location in the shopping center at Plaintiff's option. On April 28, 1988, Plaintiffs filed this action seeking relief from A&P's actions based upon federal and state claims.

III. CONTENTIONS OF THE PARTIES

A. *State Law Claims*

Plaintiffs set forth a number of arguments in support of their claim that Defendant **[*1570]** A&P is unreasonably and illegally enforcing its Restrictive Covenant. Plaintiffs first argue that the Restrictive Covenant applies to any "property" within 2,000 square feet of the A&P premises *except* the 16,275 square feet formerly occupied by Safeway Food Market. Docket Item ("D.I.)" 21, at 50-51. Plaintiffs contend that the plain meaning of the words used in the covenant require such a reading **[**6]** and that it is illogical to argue, as does the Defendant, that the exemption from the use restriction would only apply to the Safeway business rather than the property itself. Moreover, even if the language could be construed as ambiguous, it is settled law in Delaware that any ambiguity in a restrictive covenant is to be resolved in favor of unrestricted land use.

Plaintiffs alternatively argue that the Restrictive Covenant as interpreted by Defendant is unenforceable as a matter of Delaware law. ***HN1***[] Covenants to restrict land use are enforced only if reasonable and equitable. No one disputes that under certain circumstances restrictive covenants which protect the grantee from competition from competitors will be upheld so long as they are reasonable in both scope and geography. However, the Restrictive Covenant in question, if it is interpreted to exempt only the now defunct Safeway store, would be unreasonable and inequitable. Plaintiffs contend that A&P can claim no legitimate purpose for continuing to enforce the Restrictive Covenant under the present circumstances. Because A&P has vacated the Milford Shopping Center without any intention of ever returning or subleasing its premises **[**7]** to another supermarket, Plaintiffs contend A&P cannot now be heard to enforce the Restrictive Covenant because the covenant cannot possibly compromise A&P's now defunct operation in the Milford Shopping Center. *Id*. In all other respects, Plaintiffs contend, the Restrictive Covenant is unreasonable.

Plaintiffs next contend that they are entitled to summary possession because A&P is in breach of its lease. D.I. 21 at 59. The lease which A&P signed with Front Street's predecessor in 1961 provided that A&P would operate as an "anchor tenant" in the Milford Shopping Center "for the purpose of a general merchandise business." D.I. 25A at 9. On November 12, 1971, the original lease was amended to read in pertinent part "lessee shall *continue to occupy* the premises under the terms of the extended lease . . . ." *Id*. (emphasis added). A&P, they allege, is in breach of its lease because it has, without warning, deliberately vacated its premises which, under the lease, it had a duty to continuously occupy and operate as an anchor tenant. They also allege that the economic viability of the satellite stores depends upon the continued operation of at least one supermarket.

Plaintiffs further **[**8]** argue that A&P has breached its duty of good faith and fair dealings. Plaintiffs contend that A&P has acted in bad faith both with respect to its obligations under the lease as well as with regard to its dealings with the other tenants and consumers at the Milford Shopping Center. In support of its argument, Plaintiffs contend that while A&P has been looking for an alternate site for its supermarket for over ten years, it never intimated that fact to the Plaintiffs or the consumers in Milford. D.I. 21 at 67. Moreover, once A&P vacated their premises in the Milford Shopping Center abruptly and without notice, A&P persisted in making no affirmative efforts to assign or sublet the premises until Plaintiffs initiated its summary possession action in February of 1988. *Id*. at 68. In conclusion, Plaintiffs argue that A&P's breach of an implied covenant of good faith and fair dealings alone warrants a cancellation of its lease and an immediate return of its premises to Front Street.

Defendant, on the other hand, argues that Plaintiffs have failed to demonstrate a probability of success on any of their state law claims. Defendant first argues that its lease with Front Street contains neither **[**9]** an express nor an implied covenant to continuously operate a supermarket on the premises. While Defendant concedes that its lease provides that it shall "continue to occupy the premises" in the Milford Shopping Center, that language does not impose **[*1571]** upon A&P the duty to continuously operate a supermarket on the premises. Rather, a temporary vacancy of the leased property is permissible while A&P seeks a subtenant. D.I. 25 at 22.

Defendant further contends that, in the absence of express language in the lease, the Court should not imply a covenant of continuous operation. Moreover, because A&P is free to assign or sublet the premises, it would be inconsistent to impose a duty upon A&P to continuously operate its business throughout the term of its lease. *Id*. at 32. Finally, the Defendant argues that Plaintiff Front Street's other leases with smaller tenants contain express covenants to continuously operate and, therefore, had Front Street intended to impose such an obligation upon A&P, it could have so provided by express language.

Defendant next argues that the Restrictive Covenant is both enforceable and reasonable. The language which exempts the Safeway Store from the Covenant's **[**10]** restrictions on the use of property surrounding A&P's premises is clear and unambiguous. The Restrictive Covenant clearly prohibits Front Street from leasing the former Safeway premises to a tenant for use as a grocery or food store during the term of A&P's lease. D.I. 25 at 34. The language of the Restrictive Covenant which excepts Safeway Food Market and Bakery from the use restrictions clearly refers only to those entities and not to the property itself.

Defendant next contends that the Restrictive Covenant is enforceable under Delaware law. Delaware courts consistently uphold restrictive covenants so long as they are reasonable under the circumstances. A&P contends that the Restrictive Covenant is limited in scope and geography and that it continues to serve a useful and valid purpose. Finally, Defendant argues that it has not breached any implied duty of good faith which Plaintiffs argue is engrafted upon every contract. D.I. 25 at 57-58. On the contrary, Plaintiffs are attempting to impose a new set of contractual obligations which are nowhere to be found in A&P's lease. In addition, Plaintiffs' repeated assertions that A&P agreed in its lease to operate as an "anchor tenant" **[**11]** are unsupported by the terms of the lease itself. Therefore, Plaintiffs' argument as to any alleged breach of an implied duty of good faith must necessarily fail.

B. *Federal Claims*

The Plaintiffs allege that the Defendant has violated *Sections 1* and *2* of the Sherman Act. *15 U.S.C. §§ 1*, *2*. [1] As to three common elements of their several theories to support their contention, the Plaintiffs argue that this Court has jurisdiction to hear their antitrust claims and that they have presented enough facts to establish the relevant geographic and product markets. First, the Plaintiffs contend that this Court has jurisdiction over their federal claims because the enforcement of the Restrictive Covenant both occurs in and substantially effects interstate commerce. D.I. 21 at 33. In support of their position, Plaintiffs point out, *inter alia*, that a national supermarket chain's anti-competitive conduct has a substantial effect on interstate commerce; that the food sold in Defendant's stores originates from all over the country and is distributed to its stores in the Philadelphia division from warehouses in New Jersey and Maryland. The Restrictive Covenant at issue, they contend, is **[**12]** a feature in many of the Defendant's supermarket leases and the Restrictive Covenant is directed at Defendant's competitors who ship goods in interstate commerce. *Id*. at 33-36.

The second and third common elements of the federal claims are their relevant markets. The Plaintiffs maintain that the relevant geographic market is the Milford Shopping Center. This proposition, they **[*1572]** allege, is supported by the fact that the Milford Shopping Center is a small town shopping center that serves many senior and young families; that the other two shopping centers in the town are "significantly inconvenient" because of the distance and transportation barriers; and that the Milford Shopping Center is intended to be a one-stop-shopping center. D.I. 21 at 37-38; D.I. 26 at 27. **[**13]** The Plaintiffs do suggest, alternatively, that if this Court should not agree with the Plaintiffs' position, then the Court should consider the town of Milford itself as the relevant geographic market. D.I. 21 at 38 n*. Third, the Plaintiffs assert that the relevant product market is the "sale at retail of goods typically sold in supermarkets and grocery stores, including meats, produce, diary, bakery and household items." *Id*. at 36. [2]

Having set forth the necessary jurisdictional predicate and the relevant markets for the antitrust analysis, Plaintiffs argue that the Defendant has violated *Section 1* of the Sherman Act. Plaintiffs attempt to satisfy the concerted action requirement for a *Section 1* claim by suggesting, alternatively, that A&P has conspired with its wholly-owned subsidiary, Super Fresh, or that A&P has conspired with Safeway. *Id*. at 32 n.*; D.I. 26 at 30. If this Court should find concerted action, it is argued that the Defendant's conduct fails the rule of reason test. The Plaintiffs ask the Court to consider, *inter alia*, the facts **[**14]** that (1) A&P exercised its option to renew the lease even though its move to another location was imminent; (2) that A&P suddenly vacated its Milford Shopping Center premises; (3)

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[1] Plaintiffs complaint also sets forth violation of the Delaware antitrust laws, 6 Del.C. §§ 2101-2114. ***HN2***[] The Delaware Antitrust Act requires that the state law be construed in harmony with the interpretation of the federal ***antitrust law***. *6 Del.C. § 2113*. Consequently, this Court's discussion and decision with regard to the Plaintiffs' Sherman Act claims shall dictate the ruling in the Plaintiffs' state antitrust claims.

[2] The parties agree that the relevant product market is the retail food store market. Compare D.I. 25 at 55 n* with D.I. 21 at 36.

that the Defendant's motive in maintaining its lease and enforcing the Restrictive Covenant is anti-competitive; (4) that the complained of conduct has a devastating effect on the consumers in the community because A&P effectively controls the alternate supermarket locations, thus depriving many families of a local supermarket and raising prices; and (5) that A&P's absence from the Milford Shopping Center makes the enforcement of the Restrictive Covenant unreasonable and obviates the possible original economic justification for its existence. D.I. 21 at 38-47.

The Plaintiffs also allege a violation of *Section 2* of the Sherman Act in that the Defendant has monopolized and attempted to monopolize the retail sale of food goods in the relevant geographic market. D.I. 21 at 48. Although the claims of monopoly and attempted monopoly are separate and distinct claims, the Plaintiffs' analysis seemingly combines the two. Plaintiffs argue that they can show intent to monopolize through testimony of A&P which reveals **[**15]** A&P's intent to capture 28% of the market share, as well as through Defendant's conduct. Furthermore, Plaintiffs contend that A&P's attempted enforcement of the Restrictive Covenant satisfies the requirement of showing an overt act aimed at achieving monopolization. *Id*. at 49. Finally, under this broad allegation of a *Section 2* violation, Plaintiffs maintain that they can establish a dangerous probability of A&P achieving monopolization since the Defendant admits it hoped to achieve a 28% market share in Milford since Defendant "no doubt intends to aggressively attempt to increase its share of the Milford market of food dollars" and since Acme, which presently possesses 36% of the market share "could also possibly leave Milford or suffer serious deterioration of market share, in which case A&P is positioned to fall into a monopoly position." D.I. 21 at 49; D.I. 26 at 33-34.

Needless to say, the Defendant raises several arguments in support of its denial that it has violated the Sherman Act. [3] A& **[*1573]** P contends that this Court must conclude that the relevant geographic market is the Milford area for two reasons: the Plaintiffs' own market share data is based upon this assumption and it **[**16]** is unreasonable to conclude that a consumer would only look to the Milford Shopping Center for the goods sought. D.I. 25 n*.

The Defendant argues, furthermore, that the Plaintiffs' *Section 1* claim must fail for two reasons. First, the Plaintiffs are unable to prove concerted action **[**17]** between A&P and either Super Fresh or Safeway. *Id*. at 50; D.I. 29 at 47-48. Second, the Restrictive Covenant satisfies the rule of reason test since it only applies to the Milford Shopping Center and alternative sites are available.

Similarly, the Defendant maintains that Plaintiffs' *Section 2* claims must also fail. The Defendant argues that, as a matter of law, Plaintiffs' *Section 2* monopolization claim must fail because Plaintiffs allege that A&P has captured only 28% of the market. D.I. 25 at 56. Furthermore, relief cannot be granted on the attempted monopolization claim because Plaintiffs have failed to establish the requisite intent and dangerous probability that A&P will be successful in achieving a monopoly. *Id*. at 57.

IV. DISCUSSION OF LAW

HN3[] The standards for granting or denying a motion for a preliminary injunction are well established. A preliminary injunction is not granted as a matter of right. *Norfolk Southern Corp. v. Oberly, 594 F. Supp. 514, 519 (D.Del. 1984)*, citing *Eli Lilly and Co. v. Premo Pharmaceutical Labs., 630 F.2d 120, 136* (3d Cir.), *cert. denied*, *449 U.S. 1014, 66 L. Ed. 2d 473, 101 S. Ct. 573, 208 U.S.P.Q. (BNA) 88 (1980)*. It is an extraordinary remedy and must be sparingly granted. *Norfolk Southern* ***[**18]*** *Corp., 594 F. Supp. at 514*, citing *Dorfmann v. Boozer, 134 U.S. App. D.C. 272, 414 F.2d 1168 (D.C.Cir. 1969)*; *Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc., 376 F.2d 543, 547 (3d Cir. 1967)*. In order to obtain a preliminary injunction, the moving party must show "(1) a reasonable

[3] Initially the Defendant raised the issue of whether the Plaintiffs Drabbant and Front Street had standing to raise the antitrust claims because the Plaintiffs were not injured by the alleged antitrust conduct and the damages allegedly suffered were speculative. D.I. 25 at 48. The Defendant's brief was docketed with the Court on May 24, 1988. On May 23, 1988, this Court granted the motion allowing the Attorney General of the State of Delaware to intervene as a party plaintiff on behalf of the Delaware citizens residing in and around the Milford area and the town of Milford. D.I. 24. At oral argument, counsel for the Defendant asked this Court not to rule on the standing issue since the Attorney General intervened. Transcript, D.I. 29 at 46. The Defendant did, however, seek to preserve this issue for briefing before trial, in particular as to the Plaintiffs Drabbant and Front Street. *Id*. at 46-47.

probability of eventual success in the litigation, and (2) that irreparable injury will ensue if relief is not granted. In addition, the court may consider (3) the possibility of harm to other interested persons from the grant or denial of relief, and (4) the public interest." *Kennecott Corp. v. Smith, 637 F.2d 181, 187 (3d Cir. 1980)*, citing *Constructors Ass'n of Western Pennsylvania v. Kreps, 573 F.2d 811, 815 (3d Cir. 1978)*; *Delaware River Port Auth. v. Transamerican Trail. Tr., Inc., 501 F.2d 917, 919-20 (3d Cir. 1974)*. Merely establishing a risk of irreparable harm is not enough. *ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987)*. Rather, the moving party has the burden of proving a "clear showing of immediate irreparable injury." *Id*., quoting *Continental Group, Inc. v. Amoco Chem. Corp., 614 F.2d 351, 359 (3d Cir. 1980)*.

Moreover, ***HN4***[] where the moving party is asserting what is essentially **[**19]** economic injury, he must meet a more stringent standard to show that the harm is peculiar or special. In *Coca-Cola Bottling of Elizabethtown v. Coca-Cola Co., 668 F. Supp. 906, 910 (D.Del. 1987)*, the court held that where the alleged harm is economic, "the threshold of 'peculiarity' that the proposed action threatens must be high, because purely economic injuries are generally compensable and do not require injunctive relief." The court went on to note that particularized proof of the direct harm caused by the defendant was necessary in order for the plaintiffs to demonstrate that the threatened injury was "sufficiently peculiar." *Id*.

In the instant case, the Court finds that the harm which the Plaintiffs allege they are suffering is primarily economic in nature. The loss of business and customers the tenants in the Milford Shopping Center are allegedly suffering and will continue to suffer is necessarily economic. **[*1574]** This Circuit has consistently held that "***HN5***[] purely economic injuries are generally compensable and do not require injunctive relief." *Coca-Cola Bottling, 668 F. Supp. at 910*. *See also* *ECRI, 809 F.2d at 226* ("We have never upheld any injunction where the claimed **[**20]** injury constituted a loss of money, a loss capable of recoupment in a proper action at law.") (citations omitted). Therefore, as discussed *infra*, the harm must be sufficiently peculiar and special to justify the extraordinary form of relief Plaintiffs are requesting.

In support of their assertion that A&P's actions will cause Plaintiffs irreparable harm, Plaintiffs rely upon three affidavits. The affiants attest to the fact that the Milford Shopping Center "from its inception in 1961 . . . was intended to operate with two supermarket anchor tenants." Affidavit of Orville W. Shockley, D.I. 17, para. 7; *see also* Affidavit of Clara Drabbant, D.I. 16, para. 5; Affidavit of Jack A. Nylund, D.I. 18, para. 7. In light of that fact, Plaintiffs contend that, with the departure of the first Safeway store in 1977 and now A&P's departure in August of 1987, the loss to the shopping center is "extremely adverse." D.I. 16, para. 9. The affiants also assert that A&P's departure "continues to have a serious negative effect on the Milford Shopping Center, its tenants . . . as well as the community area of Milford." *Id*., P 10. *See also* D.I. 18, para. 9.

Plaintiffs also contend that they **[**21]** are facing the possibility of bankruptcy if A&P is allowed to continue its anticompetitive policies. In support of their claim, Plaintiffs' affidavits attest to the fact that the future of the Milford Shopping Center is "very dark" and potentially "financially ruinous" because of A&P's actions. Unless an anchor supermarket tenant is allowed to operate in the shopping center, many of the tenants, including Plaintiff Drabbant, will face "possible insolvency." D.I. 16, paras. 7, 9, 11; D.I. 17, para. 10; D.I. 18, paras. 8, 10. Significantly, however, Plaintiffs have produced no facts to support such generalized assertions of potential bankruptcy. Also, Plaintiffs have produced no specific evidence to show how A&P's actions are directly causing them harm. For example, they have not produced any financial data or other facts to substantiate what must be characterized as hyperbole. The Court has no evidence of the extent or amount of harm Plaintiffs will suffer. Based upon the record before this Court, it is impossible to conclude that "damages when ascertained according to legal rules, would not be a just and reasonable substitute." *A.L.K. Corporation v. Columbia Pictures Industries,* ***[**22]*** *Inc., 440 F.2d 761, 763 (3d Cir. 1971)*. Therefore, in the absence of more specific proof of the peculiar nature of the harm Plaintiffs will suffer if a preliminary injunction is not granted, the Court finds that Plaintiffs have not sustained their burden. "Mere assertions of dire economic effects cannot, without some concrete proof, meet the irreparable harm standard." *Coca-Cola Bottling, 668 F. Supp. at 913*.

Furthermore, not only have Plaintiffs failed to show irreparable injury but the record is devoid of proof that the harm they will suffer is immediate or imminent. The affidavits submitted by Plaintiffs make reference to the "great potential" possibility of bankruptcy or the "possible insolvency" facing the satellite tenants. D.I. 16, paras. 9, 11; D.I.

18, paras. 10, 11. While Ms. Drabbant also avers that "the present tenants will be driven out of business, rendered insolvent and/or bankrupt", this statement, like others similar to it, is completely unsubstantiated. D.I. 16, para. 15. [4] The affidavits are facially inconsistent in that the alleged harm appears simultaneously to be both immediate and potential. Moreover, Mr. Kaplan, a partner of Front Street, testified that, **[**23]** if he continues to lose **[*1575]** money at the present rate, "Front Street will have to borrow money, without a doubt, if it doesn't want to go into foreclosure." Deposition of Andrew Scott Kaplan, D.I. 30 at 162-63. If Plaintiffs can borrow money, it is difficult to see how bankruptcy is imminent.

Furthermore, the affidavits themselves reveal the fact that any alleged harm Plaintiffs will suffer cannot be imminent and solely as a result of Defendant's actions. Mr. Shockley states that as early as 1977, when the Safeway Supermarket left the shopping center, "the effect of losing this tenant, and of the owner's inability to relet this space to another supermarket tenant was adverse to the economic well being and viability of the Milford **[**24]** Shopping Center." D.I. 17, para. 9. Thus, as far back as 1977, Plaintiffs were predicting the demise of the shopping center. If the Milford Shopping Center was facing adverse economic conditions as far back as 1977, the Court finds it difficult to understand how Plaintiffs are presently suffering a new and imminent harm. While the Court is not unaware that, with the passage of time and the departure of A&P as well as other tenants, those adverse economic conditions may have worsened, the Court is unpersuaded that the harm is imminent and solely a result of A&P's present actions.

In order for the Plaintiffs to demonstrate their need for a preliminary injunction because of the imminent harm they are facing, they must also show that it is A&P's actions which are harming them. If A&P is not the cause of their injury, then a preliminary injunction enjoining A&P's actions would be pointless. While the Plaintiffs' affidavits repeatedly state that A&P's departure is the cause of their harm, they offer no concrete evidence to support that allegation. Indeed, Plaintiffs' repeated assertions that the Milford Shopping Center "from its inception" was intended to operate with two anchor supermarket **[**25]** tenants are unsupported in the record. D.I. 17, para. 7. Neither A&P's lease nor any other source of evidence supports the proposition that A&P was to be an "anchor tenant." Specifically, Mr. Kaplan testified that during 1987, Front Street suffered a loss of $ 37,000. D.I. 30 at 89. A&P, however, was operating its supermarket during eight months of that year. Moreover, Mr. Kaplan could not recall whether or not Front Street had ever shown a profit during any of the quarters in 1987. *Id*. Therefore, the losses suffered by Front Street during 1987 are not clearly attributable to A&P's departure. Indeed, Mr. Kaplan stated that the only profits Front Street ever made since its purchase of the Milford Shopping Center was a total of $ 3,700 in 1986. *Id. at 90*. Mr. Kaplan also testified as further proof of the harm Plaintiffs are suffering that, in the first quarter of 1988, Front Street suffered a loss of *$ 20,000. Id. at 89*. The Court finds such evidence unpersuasive. Because of Front Street's record of losses prior to A&P's departure, the fact that in 1988 it suffered a $ 20,000 loss for the first quarter does not establish that A&P was the cause. In addition, because of Safeway's **[**26]** departure in 1977, it is unclear what adverse economic effect that supermarket's departure (as opposed to A&P's) had on the shopping center. Whether the presence of the Restrictive Covenant kept it vacant or whether other economic factors were at work is not revealed in the present record.

The evidence presented does not paint a picture of a thriving and profitable shopping center that has suddenly faced an economic decline due to the departure of one of its supermarket tenants. Rather, the evidence suggests that the Milford Shopping Center had been operating at a loss even when A&P was present in the shopping center. Based upon the foregoing facts, therefore, the Court finds that Plaintiffs have failed to carry their burden of showing that A&P's departure and enforcement of its Restrictive Covenant is threatening Plaintiffs with imminent bankruptcy.

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[4] Other similarly unsupported statements include the following:

> Prospective tenants will be irretrievably lost to vacant stores in the shopping center;
>
> Present tenants will likely refuse to renew leases as they expire;
>
> Revenues to tenants, including the Beauty Shop, and Front Street, will continue to be incalcuably depressed; and damages suffered by consumers caused by the lack of competition will be impossible to calculate.

D.I. 16, para. 15.

In addition to the Court's determination that Plaintiffs have failed to establish irreparable injury, the Court is also not persuaded that the balance of equities tips in favor of granting Plaintiffs' motion for a preliminary injunction. Absent a showing **[*1576]** that the injury of which Plaintiffs allege is both immediate and irreparable, the **[**27]** Court is unwilling to exercise its power of granting an extraordinary remedy at this preliminary stage in the litigation. The harm to the Defendant were a preliminary injunction granted at this stage outweighs any potential injury Plaintiffs may suffer as a result of A&P's actions. Moreover, as this Court has held, "if relief were to be granted, the status quo would not be maintained and the Plaintiffs would have gained everything they would have gained after a trial on the merits." *Norfolk Southern, 594 F. Supp. at 523*.

While the Court need not reach the issue of the probability of success on the merits as to Plaintiffs' state law claims, as indicated at oral argument, there are elements of Plaintiffs' position which require serious attention by the Defendant. The more noteworthy factual underpinings of Plaintiffs' argument include the plain meaning of the amended lease provision requiring that the Defendant "shall continue to occupy the leased premises", A&P's actions in attempting to find a new tenant and, finally, the limited scope of the Restrictive Covenant derived either from its plain meaning or from the ambiguity of the terms used.

V. PLAINTIFFS' ANTITRUST CLAIMS

While **[**28]** declining to reach the probability of success as to Plaintiffs' state law claims, the interests of judicial economy compel the Court to decide the probability of success of Plaintiffs' antitrust claims. Plaintiffs' failure to establish irreparable injury would be sufficient to deny the motion for a preliminary injunction.

A. *Jurisdiction Over Plaintiffs' Sherman Act Claims*

HN6[] In order for this Court to have jurisdiction over the Plaintiffs' federal antitrust claims, the allegedly illegal conduct must either be in the flow of interstate commerce or, though occurring on a local level, substantially affect interstate commerce. *Harold Friedman Inc. v. Thorofare Markets, 587 F.2d 127, 132 (3d Cir. 1978)*. The second test is considered from the perspective of "whether the local activity has a significant impact on competition in commerce and whether the commerce so affected is substantial in volume." *Id*. In *Harold Friedman*, the court considered the facts that the exclusivity clause at issue was used by Thorofare in other leases; that Thorofare enforced the covenant against a potential out-of-state tenant; and the fact that the value of the goods traveling through interstate **[**29]** commerce to Friedman's and Thorofare's stores was substantial. *Id. at 134-35*. The Third Circuit also went on to explain:

> As the corporate practices of such supermarket chains as Thorofare amply demonstrate, the retail sale of food and household commodities is no longer effectuated solely through neighborhood grocery stores that order their supplies independently from local wholesalers. Although the consumer outlets necessarily must serve discrete localities, the trend is toward increased concentration in the intrastructure that administers and supplies the local stores. Therefore, when a large interstate supermarket chain is in the picture, anticompetitive activities directed at an individual store will inevitably have a substantial effect upon the flow of goods across state lines to either the victimized establishment or the firm that is engaged in the anticompetitive practice, if not to both. Where, as here, such interstate supermarket industry is involved, it cannot be said that the "relationship to interstate commerce is too tenuous in a practical sense to warrant federal control."

Id. at 136 (footnotes omitted). Consequently, the court concluded that there was jurisdiction **[**30]** to hear the Sherman Act claims.

The Defendant is a large interstate supermarket chain. The Super Fresh division supermarkets are supplied by warehouses in New Jersey and Maryland and they supply the stores in Pennsylvania, New Jersey and Delaware by shipping the products in interstate commerce. Deposition of Julian J. DiFiore, D.I. 32 at 35. The products that are gathered in these warehouses come from locations across the country. *Id*. **[*1577]** The Restrictive Covenant at issue in this case, furthermore, is similar to ones used by A&P and its assignees in other states. *See* *Berkeley Dev. v. Great Atlantic & Pacific Tea, N.J.Super.L., 214 N.J. Super. 227, 518 A.2d 790 (1986)*; *Great Atlantic & Pacific Tea Company v. Bailey, Pa.Super., 421 Pa. 540, 220 A.2d 1 (1966)*. In light of the holding in *Harold Friedman* and the aforementioned factors, this Court concludes that Defendant's conduct substantially affects interstate commerce thus satisfying the jurisdictional predicate of the Sherman Act.

B. *Plaintiffs' Section 1 Claim*

HN7[] Section 1 of the Sherman Act provides that "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. [**31] § 1. Although the statute's language seems all encompassing, the case law developing Section 1 construes it as prohibiting only those contracts or combinations which unreasonably restrain competition. Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958); Malley-Duff & Associates v. Crown Life Ins. Co., 734 F.2d 133 (3d Cir. 1984). Furthermore, Section 1 does not preclude independent action. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984). Consequently, for A&P's enforcement of the Restrictive Covenant to constitute a violation of Section 1, the Plaintiffs must prove:

> (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant products and geographic markets; (3) that the objects of and the conduct pursuant to the contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of the conspiracy.

Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, *436 U.S. 913, 56 L. Ed. 2d 413, 98 S. Ct. 2253 (1978)*.

HN8[] In order for Plaintiffs to be granted relief based upon a Section 1 violation, the **[**32]** Plaintiffs must show a probability of success of establishing all of the requisite elements of such a claim. In particular, the Plaintiffs must establish that A&P was involved in concerted action in its attempt to restrain trade. Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105 (3d Cir. 1980); Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978). In order to do this, the Plaintiffs must present evidence from which the trier of fact could reasonably infer that A&P and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." Edward J. Sweeney & Sons, Inc., 637 F.2d at 111, citing Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3d Cir. 1963); United States v. Standard Oil Co., 316 F.2d 884, 890 (7th Cir. 1963); *see also* Monsanto Co., 465 U.S. at 768 (there must be direct or circumstantial evidence that reasonably tends to prove that the defendants and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective.").

The Plaintiffs attempt to establish concerted action by seeking to prove that A&P conspired with either Super Fresh, its wholly owned subsidiary, **[**33]** or Safeway. As a matter of law, a parent corporation is incapable of conspiring with its wholly owned subsidiary for purposes of a Section 1 violation. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984). Consequently, if Plaintiffs' Section 1 claim is to survive, they must show that there is a reasonable probability that they will be successful in establishing that A&P and Safeway had a "conscious commitment to a common scheme designed to achieve an unlawful objective."

The Plaintiffs argue that they have established concerted action because A&P made it a condition of its purchase of the Safeway store in the Milford Village that it be able to protect its lease in the Milford Shopping Center and Safeway aquiesced and consented thereto in its sale of the store. D.I. 26 at 30. The Plaintiffs base **[*1578]** their theory upon deposition testimony and a memorandum written by Mr. DiFiore. Unfortunately for the Plaintiffs, the evidence relied upon does not reveal Safeway's conscious commitment to the scheme of enforcing the lease and Restrictive Covenant for the unlawful objective of restraining trade. The memorandum written by Mr. DiFiore upon which Plaintiffs rely was written to **[**34]** F. X. Leonard, head of real estate for A&P and J. Y. Mariner, acting vice president of real estate for A&P at the time. D.I. 20A, Exhibit 1(4). [5] At his deposition, Mr. DiFiore explained that the memorandum was sent to these two men. D.I. 32 at 53. No mention is made in the deposition that Safeway was a recipient of this memorandum. Furthermore, Mr. DiFiore's deposition does not reveal that Safeway was aware of A&P's intent to restrain trade or committed to that end. The deposition testimony reveals only that the precondition of the validity of the Milford Shopping Center lease was agreed to by a director of real estate for A&P, not by Safeway. D.I. 32 at 54. Furthermore, DiFiore agreed with Plaintiffs' counsel's characterization of this memorandum

[5] The Plaintiffs latch upon the language "one of the conditions by which the Milford Safeway purchased by Super Fresh was agreed to was that the old Milford Super Fresh location would be totally protected." D.I. 20A, Exhibit 1.

as merely a reminder to the people in A&P's real estate division that they had agreed that the Milford Shopping Center lease would be enforceable. [6]

[35]** Thus, rather than this memorandum appearing as the "smoking gun" upon which Plaintiffs may build its *Section 1* claim, it actually begins to look like an intra-corporate memorandum memoralizing an intracorporate condition imposed upon the purchase of the Safeway property in the Milford Village. Rather than implicating Safeway and recharacterizing the innocent appearance of this memorandum, the deposition testimony only reinforces the intra-corporate nature of the memorandum and the "condition." Safeway is never mentioned as a participant to this agreement. The Plaintiffs, furthermore, have not presented any evidence, either in the form of testimony or documents, from Safeway to support the contention that Safeway made a "conscious commitment to a common scheme to achieve an unlawful objective."

Consequently, on the record before this Court on the Plaintiffs' motion for a preliminary injunction, this Court must conclude that the Plaintiffs have failed to carry their burden of showing a probability of success in establishing concerted action between A&P and Safeway to restrain trade. Plaintiffs' failure to carry their burden on probability of success on the merits obviates the need to **[**36]** discuss irreparable injury.

C. *Plaintiffs' Section 2 Claims*

Plaintiffs allege two claims under *Section 2*: monopolization and attempted monopolization. ***HN9***[] For purposes of evaluating both claims, the relevant geographic and product markets must be established. *Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250 (E.D.Pa. 1987)*, and cases cited therein. For the purposes of this motion, the parties seem to agree on the relevant product market. This Court, **[*1579]** therefore, must determine the relevant geographic market.

(1) The Geographic Market

The determination of the relevant geographic market results from analyzing competition. *Borough of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307, 311 (3d Cir. 1982)*. It is the area in which "a potential buyer may rationally look for the goods and services he or she seeks." *Pa. Dental Ass'n v. Medical Serv. Ass'n of Pa., 745 F.2d 248, 260 (3d Cir. 1984)*; *Borough of Lansdale, 692 F.2d at 311*. It is a question of fact concerning which the Court must

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[6] The pertinent part of the dialogue between Plaintiffs' counsel and Mr. DiFiore is set forth below:

> Q. But you are missing my question. It says here that Mr. DiFiore said, "One of the conditions by which the Milford Safeway," I guess you left out the word was purchased, was "purchased by Super Fresh was agreed to was that the Old Milford Super Fresh location would be totally protected."
>
> What I want to know is who agreed to the condition? Was it Farley? Was it Leonard?
>
> Was it A&P? Who had the responsibility for seeing that that condition was fulfilled?
>
> A. Real estate.
>
> Q. Okay. And that would be Farley on your level and Leonard on the next?
>
> A. Yes.
>
> Q. And by that you meant, look, we agreed to buy the Milford Safeway place provided you people would guarantee that the former location would be totally protected; is that right?
>
> A. Yes.
>
> Q. And you are just reminding them of that now; is that right?
>
> A. Yes.

D.I. 32 at 55.

recognize the commercial realities of the issue at question resolved on a case by case basis. Borough of Lansdale, 692 F.2d at 311. [7]

[37]** The parties dispute whether the geographic market should be the Milford Shopping Center or the town of Milford. This Court finds that the Plaintiffs have failed to carry their burden of showing a probability of success of establishing that the relevant geographic market is the Milford Shopping Center. The thrust of the Plaintiffs' argument is that the Milford Shopping Center should be considered the relevant geographic market since it serves the immediate community within walking distance of the stores. D.I. 21 at 37. More specifically, it serves those consumers who are senior citizens or less mobile. The other two supermarkets, A&P's Super fresh and its competitor, Acme, are two miles away from the Milford Shopping Center. [8] Hence, Plaintiffs argue, it is not within walking distance for those in the community around the Milford Shopping Center. Furthermore, Plaintiffs assert that there are traffic barriers around the Milford Village which cut down on its accessability. D.I. 21 at 37. To support their position, Plaintiffs cite to three affidavits they filed with the Court. Each of these remarkably similar affidavits make bald assertions. Two of the affidavits state:

> Many of the **[**38]** people in this area are young families as well as senior citizens and other than some local corner operations Mom and Pop stores and convenience markets, the only other places to shop for food and grocery items are Super Fresh and Acme stores in the shopping centers that border the west most sites of the corporate limits of the City of Milford.

Compare D.I. 18, para. 9 with D.I. 16, para. 10. The third affidavit merely states that because the Acme and Super Fresh are two miles from the Milford Shopping Center they present "a significant inconvenience for many consumers in Milford, many of whom are elderly and depend on the convenience of the Milford Shopping Center to satisfy their daily needs." D.I. 17, para. 11. Thus, the Court is presented with statements by these three affiants in addition to the statements made in the Plaintiffs' brief. The Plaintiffs do not suggest that their affiants are experts upon whose opinion this Court may rely. [9] **[**40]** Nor do the Plaintiffs **[*1580]** present the Court with any demographic data or statistics which would reveal the age of the community, those who own cars in the area, the distances traveled by those who use the Acme or Super Fresh, or other data **[**39]** that would assist the Court in making its determination. [10] In light of the evidence presented at this time on the Plaintiffs' motion for a preliminary

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[7] Two commentators set forth the following factors to consider:

> Definition of the relevant geographic market depends on the commercial realities of the community in which the shopping center is located. Factors to be considered include: the area which the center serves; the location and number of competing centers or "free standing" retail outlets within that area or in reasonably close proximity; and factors such as physical barriers, traffic flow patterns, zoning restrictions, locations of suppliers and shifts in the consumer population.

Reilly & Keys, *The Antitrust Aspects of Restrictive Covenants in Shopping Center Leases*, (ICSC 1986), 22.

[8] There seems to be some dispute over the distance of the Super Fresh from the Milford Shopping Center. The Defendant alleges, without citing affidavits or deposition testimony, that the Super Fresh is approximately one mile away. D.I. 25 at 5. The Plaintiffs, on the other hand, submit affidavits all stating, in the exact same wording, that the nearest supermarkets, presumably the Super Fresh and Acme, are two miles away. D.I. 16, para. 10; D.I. 18, para. 9. For purposes of this motion, the Court will assume, without deciding, that the Super Fresh in the Milford Shopping is two miles away from the Milford Shopping Center.

[9] In point of fact, the affiants are: (1) a president of his own insurance agency who leases space in the Milford Shopping Center; (2) the president and chief executive officer of the Southern Delaware Chamber of Commerce; and (3) the vice president of the corporation which operates a beauty shop in the Milford Shopping Center. The latter two are those that submit the remarkably similar testimony.

[10] The Plaintiffs do submit a petition attached to one affidavit. D.I. 17. While petitioners are effective in the political process, their impact is lessened in a court of law which adjudicates and preserves the rights of individuals, even if it is against the voice of the majority. In this instance, the people signed a petition stating: "We want and must have a food store in Milford Shopping Center. If you feel the same, please sign this petition below. Your help and support is greatly appreciated, by all of the tenant [sic] of the Shopping Center." *Id*. Thus, rather than providing the Court with the much needed demographic information, the Plaintiffs have supplied a list of those who feel that they want a food store in the Milford Center. The importance of the petition is undermined,

injunction, this Court must conclude that the Plaintiffs have failed to carry their burden of showing a probability of success in establishing the Milford Shopping Center as the relevant geographic market. [11]

[41]** For the purpose of this motion, however, this Court concludes that the Defendant will probably be successful in establishing the town of Milford as the relevant geographic market. It appears that the commercial realities of this situation support this conclusion. The Defendant's own business perspective on moving from the Milford Shopping Center to the Milford Village indicates that it considered the town of Milford as the market in which it must increase its market share. D.I. 20A, Exhibit 1. In point of fact, when the Plaintiffs discuss the Defendant's market share for purposes of its *Section 2* claim, they use the market share percentage based upon the town of Milford. *See* D.I. 21 at 40, 49. Furthermore, the Court recognizes that the distance of two miles between A&P and Acme's location and that of the empty property may not be great enough to establish the Milford Shopping Center as a distinct geographic market; rather, the distance of only two miles indicates that these locations should be considered as falling into one geographic market. The Plaintiffs unintentionally note two characteristics of this situation which supports this conclusion. The Plaintiffs characterize the **[**42]** two shopping centers which separately contain the Super Fresh and Acme as "regional" shopping centers. D.I. 21 at 37. The concept of these two shopping centers being regional ones creates the inference that those who shop there come from distances greater than two miles. The region which they serve implicitly encompasses the same population market as that which the Milford Shopping Center serves. Secondly, the Plaintiffs themselves recognize that those who signed the petitions submitted to the Court come from the town of Milford. D.I. 26 at 28. It has not been disputed that the A&P in the Milford Village serves the town of Milford. Furthermore, the petitions reveal that a supermarket in the Milford Shopping Center would serve the people in the town of Milford. Therefore, if both shopping centers serve the same group of consumers, it seems reasonable to **[*1581]** conclude that one geographic market encompasses these two shopping centers: the town of Milford. For these reasons, the Court concludes that the probability of success in establishing the town of Milford as the relevant geographic market weighs in favor of the Defendant.

(2) Plaintiffs' Monopoly Claim

HN10[] In order for Plaintiffs to establish **[**43]** that Defendant has violated *Section 2* by achieving a monopoly, Plaintiffs must show: "(1) the possession of monopoly power in the relevant geographic and product markets; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident." *Pa. Dental Ass'n, 745 F.2d at 260*, citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. The courts have recognized that market share is a primary indication of whether monopoly power exists. *Id*.

As a matter of law, the Plaintiffs have failed to show a reasonable possibility of success on the monopoly claim. The Plaintiffs, by relying upon the Defendant's own projections, recognize that the Defendant, at the most, has achieved a 28% market share. D.I. 21 at 48. In an attempt to build up this percentage, the Plaintiffs assert that A&P "no doubt intends to aggressively attempt to increase its share of the Milford market of food dollars, by capturing a significant portion of the 'leakage' estimated by it at 25%, as well as a part of Acme's 36% market share." D.I. 26 at 34. The market share data relied upon by Plaintiffs **[**44]** are projections of market share A&P wanted to achieve after

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moreover, after a quick perusal of the petition reveals that people outside of the Plaintiffs' asserted geographic area have signed them. If people outside of the Plaintiffs' geographic market are willing to travel to the Milford Shopping Center, why should the court assume that those in the community around the Milford Shopping Center are unable to travel two miles to the Milford Village?

[11] In their brief, Plaintiffs state that the "'one-stop-shopping' aspect of a functioning and viable Milford Shopping Center also reconfirms the almost obvious fact that the Milford Shopping Center itself represents the relevant geographic market in this case." D.I. 21 at 38. For support, Plaintiffs cite Reilly & Keys at 22 and *State of Maryland v. Lee's Sport, Inc*., 1981-2 Trade Cases, para. 64,365 (Md.Cir.Ct. 1981). The Court finds this unpersuasive. First, Reilly and Keys refer to the "one-stop shopping" asset in shopping centers as an aspect that defines a "unique *product* market." Reilly & Keys at 22. Secondly, *State of Maryland v. Lee's Sport, Inc*. is an Assurance of Discontinuance which does not constitute an admission by any of the parties with respect to any issue of fact or law except as provided in the *Maryland Commercial Law Code Annotated, section 11-206(c)*. *Lee's Sport, Inc*., 1981-2 Trade cases P 64,365 at 74,686.

opening the Super Fresh in the Milford Village. *See* D.I. 20A, Exhibit 1. Thus, at the most, these are statistics indicating what Defendant hoped to achieve as opposed to what it now possesses. In any event, for purposes of the monopoly claim, it can be assumed that the Defendant has captured 28% of the market share. This is not enough to indicate monopoly power. In *Pa. Dental Ass'n*, the Third Circuit affirmed the District Court's holding that, as a matter of law, a 32%-35% market share was insufficient to establish monopolization. *Pa. Dental Ass'n, 745 F.2d at 261*; *See also* *Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (D.Del. 1978)* (35% insufficient to establish monopolization). Consequently, this Court must conclude that Plaintiffs would probably fail to establish monopolization at a trial on the merits.

(3) Plaintiffs' Attempted Monopoly Claim

HN11[] In order for Plaintiffs to establish their *Section 2* claim of attempted monopolization, they must show: "(1) a specific intent to monopolize; and (2) the consequent dangerous probability of success within the relevant geographic and product markets." *Pa.* ***[**45]*** *Dental Ass'n, 745 F.2d at 261*; *Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 888 (D.Del. 1987)*; *Tasty Baking Co., 653 F. Supp. at 1267*. As to proving the requisite intent, the Third Circuit has explained that "a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not 'predominately motivated by legitimate business aims.'" *Pa. Dental Ass'n, 745 F.2d at 260-61*, quoting *Times- Picayune Publishing Co. v. United States, 345 U.S. 594, 627, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*.

The Court is not completely persuaded that the Plaintiffs will establish the requisite intent for their attempt to monopolize claim. The Plaintiffs rely on several passages from the deposition testimony to show that A&P is maintaining its lease and enforcing the Restrictive Covenant in order to prevent competition with its new Super Fresh store. *See, e.g.*, D.I. 33 at 29-30, 37-38, 48; D.I. 32 at 27-31, 56-59; D.I. 35 at 29. Plaintiffs' claim, however, is that Defendant is attempting to monopolize the retail sale of food goods **[**46]** in the town of Milford. The Defendant's major competition, with 36% of the market share if the Defendant achieved its goal of 28%, is **[*1582]** Acme. Thus, it seems that if Plaintiffs were to clearly establish the intent to monopolize, Plaintiffs should produce evidence of A&P's intent to drive Acme out of the market. Plaintiffs have not done so. Thus, while the evidence presented is compelling, it does not appear to address the entire picture of the Defendant's intent to monopolize the relevant product market in the town of Milford.

Nevertheless, if it is conceded that the Plaintiffs may have possibly established the requisite intent, they have failed to carry their burden of showing a probability of success in establishing a dangerous probability that A&P will succeed in achieving a monopoly position. ***HN12***[] While market share may be considered by a court in determining whether there is a dangerous probability of monopoly, it is not determinative. *Kellam Energy, Inc., 668 F. Supp. at 891*. The court may also consider other market characteristics such as "the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct **[**47]** and the elasticity of consumer demand." *International Distribution Centers, Inc. v. Walsh Trucking, 812 F.2d 786, 792 (2d Cir. 1987)*, cited with approval in *Kellam Energy, Inc., 668 F. Supp. at 891*; *see also* *Tasty Baking Co., 653 F. Supp. at 1270*.

The Plaintiffs rely upon the market share data to support this element of their claim. D.I. 21 at 49. The Plaintiffs point to the Defendant's possible 28% market share and ask the Court to speculate as to what would happen if A&P should capture some of the share from the "Mom and Pop" stores and if Acme possibly left Milford or suffered a deterioration in market share. These hypotheses, highly speculative as they are, do not appear to be a significant evidentiary basis for carrying the burden for the issuance of a preliminary injunction. On the other hand, it is true that this Court has held that a 35% market share supports a dangerous probability of success in achieving a monopoly. *Outboard Marine Corp., 461 F. Supp. at 404*. [12] Plaintiffs, however, have failed to explain to this Court

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[12] It is important to note, however, that in *Outboard Marine Corp*., the defendants conceded for the purpose of the motion to dismiss that 35% market share constituted a "reasonable probability of success." *Outboard Marine Corp., 461 F. Supp. at 404*.

how *Outboard Marine Corp*. may apply to these facts and the significance or insignificance of the disparity between a 35% market share and **[**48]** a 28% market share.

The make-up of the market at issue also suggests that the Plaintiffs have failed to carry their burden. According to Defendant's analysis of projected market share, Acme would possess 36% of the market, Meatland, 11%; Super Fresh, 28%; and the "Mom and Pop" stores ("leakage" according to the experts), 25%. Plaintiffs have failed to explain to this Court how there is a dangerous probability that A&P would become a monopoly when one of its competitors has a greater share of the market. The Plaintiffs themselves admit, furthermore, that part of the urgency for this preliminary injunction is that if the owner of the Milford Shopping Center cannot lease the old Safeway property to Meatland, someone will build them a store in Milford. D.I. 30 at 160, 164. It is difficult for this Court to conclude there is a dangerous probability of A&P gaining a monopoly when evidence presented by the Plaintiffs suggests that **[**49]** someone is willing to build a store for Meatland in the geographic market at issue. Considering the present state of the competition and the possibility of even more, cautions against concluding that A&P can gain a monopoly. If that were not enough, Plaintiffs additionally fail to provide the Court with information on the probable development of the industry, the elasticity of consumer demand or the strength of the present competition. [13] Consequently, for the reasons **[*1583]** stated above, this Court concludes that the Plaintiffs have failed to carry their burden of showing a probability of success in proving a dangerous probability of A&P successfully gaining a monopoly. As a result, Plaintiffs may not be granted relief on their *Section 2* claim of attempted monopoly.

For all these reasons, the motion for a preliminary injunction **[**50]** is denied.

End of Document

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[13] It seems that the barriers to entry in this product market would be great, although Plaintiffs did not present evidence on this factor. The evidence presented by Plaintiffs, however, indicates that in this particular case, someone is willing to attempt to surmount whatever entry barriers that do exist and provide Meatland a place from which to operate in Milford.

Lease Lights, Inc. v. Public Service Co.

United States Court of Appeals for the Tenth Circuit

June 27, 1988, Filed

No. 86-1797

Reporter
849 F.2d 1330 *; 1988 U.S. App. LEXIS 8669 **; 1988-1 Trade Cas. (CCH) P68,112

Lease Lights, Inc.; Jack R. Seay, d/b/a Seay Electric Company; Knight Lights Company, Inc.; and Protective Lighting, Inc., Plaintiffs-Appellees, v. Public Service Company of Oklahoma, a corporation, Defendant-Appellant. Oklahoma Corporation Commission, Amicus Curiae

Subsequent History: As amended July 27, 1988.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Oklahoma, D.C. No. 77-C-417-E.

Core Terms

lighting, immune, outdoor, rates, supervised, state action doctrine, regulation, state action, monopolization, electricity, motor carrier, antitrust, public utility, leased, plaintiffs', compulsion, regulatory agency, rate charged, state policy, ratemaking

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Scope, Exemptions**

The state action doctrine allows state legislatures to formally command that certain areas of commerce be exempt from the provisions of the Sherman Act, *15 U.S.C.S. § 1 et seq.* It includes the requirement that state legislatures compel the immune behavior. A state must compel, rather than merely prompt or allow, anticompetitive conduct for state action immunity to be conferred.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN2[] Exemptions & Immunities, Parker State Action Doctrine

While compulsion by the state is the best evidence of a state policy to displace competition, immunity is justified if a state merely permits the conduct to occur. This test is satisfied by showing (1) the challenged behavior is sanctioned by a clearly articulated and affirmatively expressed state policy, and (2) the state actively supervises the private anticompetitive conduct at issue. The first element of the test does not require legislation explicitly authorizing the challenged conduct, but only an indication by the state that it intends to displace competition with regulation in the particular area of commerce.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Business & Corporate Compliance > ... > Energy & Utilities Law > Federal Oil & Gas Leases > Local & State Regulation

Energy & Utilities Law > Leases & Licenses > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN3[] Exemptions & Immunities, Filed Rate Doctrine

The Oklahoma Constitution gives the Oklahoma Corporation Commission (Commission) the power to regulate public utilities, including all gas, electric, heat, light, and power companies. *Okla. Const. art. IX, § 34*. The legislature has given the Commission general supervision over all public utilities that supply the production, transmission, delivery, or furnishing of heat or light with gas and the electric current for light, heat or power. *Okla. Stat. tit. 17, § 151* (1981). Within this domain, the Commission has the power to prescribe rules, requirements and regulations affecting the utilities' services, operation, and the management and conduct of their business. *Okla. Stat. tit. 17, § 152*. The Commission also establishes and enforces rates "as may be reasonable and just." *Okla. Const. art. IX, § 18*. These constitutional and statutory provisions indicate a clear intent by the state to supplant the market for leased outdoor lighting with active regulation by the Commission.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN4[] Exemptions & Immunities, Parker State Action Doctrine

The constitutional invalidity of an attempted state regulation is not an appropriate basis for disregarding state action immunity. There should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN5[] Monopolies & Monopolization, Attempts to Monopolize

To prove attempted monopolization, plaintiffs must show: (1) a relevant market in which the alleged attempt occurred; (2) a dangerous probability of success in monopolizing the relevant market; (3) a specific intent to monopolize; and (4) conduct in furtherance of such an attempt.

Counsel: Jack I. Gaither (Bruce D. Gaither with him on the brief), Tulsa, Oklahoma, for Plaintiffs-Appellees.

Jeffrey H. Howard of Davis, Graham & Stubbs (Floyd L. Walker and James F. Bullock of Pray, Walker, Jackman, Williamson & Marlar, Tulsa, Oklahoma; and Robert H. Harry, Denver, Colorado, with him on the briefs), Washington, District of Columbia, for Defendant-Appellant.

Lindil Fowler, General Counsel, Oklahoma City, Oklahoma, on the brief, for Amicus Curiae.

Judges: Logan, Moore, and Baldock, Circuit Judges.

Opinion by: MOORE

Opinion

[*1331] MOORE, Circuit Judge.

The Public Service Company of Oklahoma (PSO) appeals from the jury verdict that it monopolized a sector of the leased outdoor lighting market in Tulsa, Oklahoma. PSO argues its conduct was controlled and supervised by the Oklahoma Corporation Commission (the Commission) until 1985 and may not be the subject of an antitrust action under the state action doctrine. PSO further urges that plaintiffs fail to prove sufficient non-immune conduct to support the claim of attempted monopolization. We hold that the state action doctrine protects those actions by PSO **[**2]** which were actively supervised by the Commission. In addition, we believe plaintiffs have failed to present adequate evidence of non-immune behavior by PSO to show an attempt to illegally monopolize the market for leased outdoor lighting in Tulsa. We therefore reverse the judgment of the district court.

I.

PSO is a public utility engaged in the generation, transmission, and delivery of **[*1332]** electricity in parts of eastern and southwestern Oklahoma. [1] PSO also sells and leases 175 and 400 watt outdoor lights in Tulsa, Oklahoma. The Commission, a state agency, supervises the rates charged by PSO for leasing outdoor lights to the public and for providing electricity to competing light services. In 1975, the Commission ordered PSO both to reduce the rates charged to the public for its outdoor lighting service and to restructure its rate system for providing electricity by replacing the flat annual fee with an outdoor metered rate. As a result, PSO reduced its leasing rates in Tulsa by about four percent (from $ 4.00 to $ 3.85 for 175 watt lights), while substantially increasing the rates charged to contractors for electricity used in their competing light services.

[3]** Four electrical contractors brought this action in 1977, alleging that this order was the economic equivalent of an "atomic bomb." They claimed PSO sought to drive them out of business in order to monopolize the outdoor lighting market in the Tulsa area. PSO unsuccessfully moved for summary judgment, asserting its challenged conduct was immune from antitrust attack under the state action doctrine. The district court held that the state action immunity doctrine was still developing and no consistent test had emerged. In 1981, the action proceeded to

[1] Electric power is also provided in Oklahoma by three other investor-owned utilities and by 31 rural electrical cooperatives.

a two-week jury trial during which the court directed a verdict against the plaintiffs for failing to satisfy the jurisdictional requirement of a Sherman Act violation by showing PSO's activities had a substantial impact on interstate commerce. This court reversed, holding that plaintiffs had made a prima facie showing of a sufficient nexus between PSO's actions and interstate commerce. *See* *Lease Lights v. Public Serv. Co. of Okla., 701 F.2d 794 (10th Cir. 1983)*. In a second trial in 1984, the jury awarded plaintiffs trebled damages exceeding $ 2 million. The court added over $ 500,000 in attorney fees and costs. PSO appeals from this **[**4]** judgment.

II.

A.

PSO's main argument is that its rate changes should be immune from antitrust attack. As first conceived by the Supreme Court in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, ***HN1***[] the state action doctrine allowed state legislatures to formally command that certain areas of commerce be exempt from the provisions of the Sherman Act. The Court subsequently developed the requirement that state legislatures compel the immune behavior. In *Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)*, for example, the Court struck down a minimum fee schedule enforced by the state bar, holding that there existed neither a state law nor a state supreme court decision requiring the establishment of a rigid price floor in the fees attorneys could charge their clients. Similarly, in *Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*, the Court decided that state regulation of Detroit Edison's distribution of electricity did not confer state action immunity on its anticompetitive actions in the market for the sale of light bulbs. State regulation alone, according to the Court, was insufficient to show that a party's anticompetitive conduct is being commanded by the state government. **[**5]** As in *Goldfarb*, the Court in *Cantor* required a state to compel, rather than merely prompt or allow, anticompetitive conduct for state action immunity to be conferred.

Plaintiffs now urge us to adhere to the compulsion requirement set forth in these decisions. They ignore, however, that the Supreme Court has explicitly softened the previously stringent requirements for state action immunity. In *Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*, the United States challenged a joint ratemaking procedure used by three motor carrier rate bureaus, arguing **[*1333]** that the procedure could not be immune under the state action doctrine because it was not compelled by the four states in which the bureaus operated. The Court refused to adhere to the compulsion requirement. ***HN2***[] While compulsion by the state is the best evidence of a state policy to displace competition, according to the Court, immunity is justified if a state merely *permits* the conduct to occur. This test is satisfied by showing 1) the challenged behavior is sanctioned by a clearly articulated and affirmatively expressed state policy, and 2) the state actively supervises the private anticompetitive **[**6]** conduct at issue. *471 U.S. at 57* (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980))*. The first element of the test does not require legislation explicitly authorizing the challenged conduct, but only an indication by the state that it intends to displace competition with regulation in the particular area of commerce. *Id. at 64*.

The Court held the rate bureaus met these requirements. Both parties agreed that the regulatory agencies in the four states actively supervised the collective ratemaking activities. Furthermore, three of the four states had statutes permitting collective ratemaking by common carriers. The fourth state, Mississippi, gave the regulatory agency authority to regulate common carriers by granting it the power to prescribe "just and reasonable rates" for the intrastate transportation of general commodities. This language, the Court stated, expressed the legislature's intent that intrastate trucking rates be determined by a regulatory agency, rather than by the market. Therefore, plaintiffs' collective ratemaking in each of the four states was protected by state action immunity.

The test employed in *Southern Motor* ***[**7]*** *Carriers* to replace the compulsion requirement has received consistent recognition by the Court as the proper standard to determine the applicability of state action immunity. [2] Indeed, on

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[2] While the Court first articulated the test in the *Midcal Aluminum* decision, it also approved the compulsion requirement in that case. Needless to say, after *Midcal Aluminum* the federal courts were in complete confusion regarding which test to adopt. In *Southern Motor Carriers*, the Court for the first time clearly rejected the compulsion requirement. *See* Comment, *Private Parties*

every occasion that the Court has considered state action immunity during the past three years, it has invoked the *Southern Motor Carriers* test rather than the compulsion test. *See, e.g., 324* *Liquor Corp. v. Duffy, 479 U.S. 335, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987)* (New York's liquor pricing system does not fall within state action exemption to antitrust laws because the statute, even though "clearly articulated and affirmatively expressed as state policy," does not provide for active supervision by the state). Recently, for example, the Court held that the state action doctrine did not protect Oregon physicians from antitrust liability for their activities on hospital peer-review committees because state officials did not have the power to review the findings of these committees, and therefore the "active supervision" prong of the *Southern Motor Carriers* test was not satisfied. *See* *Patrick v. Burget, 486 U.S. 94, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)*.

[8]** We have dwelled on *Southern Motor Carriers* and its progeny because these decisions are dispositive of the instant case. First, we believe there exists a clearly articulated state policy to regulate the market for leased outdoor lights. ***HN3***[] The Oklahoma Constitution gives the Commission the power to regulate public utilities, which it defines as "all gas, electric, heat, *light*, and power companies. . . ." *Okla. Const. art. IX, § 34* (emphasis added). Pursuant to this authority, the legislature has given the Commission general supervision over all public utilities that supply "the production, transmission, delivery, or furnishing of heat *or light* with gas [and the] . . . electric current for *light*, heat or power." *See* *Okla. Stat. tit. 17, § 151* (1981) (emphasis added).

[*1334] Within this domain, the Commission has the power to prescribe "rules, requirements and regulations, affecting [the utilities'] services, operation, and the management and conduct of their business." *Okla. Stat. tit. 17, § 152*. The Commission also establishes and enforces rates "as may be reasonable and just." *Okla. Const. art. IX, § 18*. The constitution states that the authority of the Commission to prescribe **[**9]** these rates is paramount; rates which are inconsistent with the Commission's rates "shall be unlawful and void." *Id.* To carry out this mandate, the Commission may exercise "full visitorial and inquisitorial power to examine . . . public utilities . . . ." *Okla. Stat. tit. 17, § 152*. Furthermore, the Commission must periodically conduct detailed rate investigations and continually oversee public utilities' compliance with rate schedules which include fuel adjustment clauses. *Okla. Stat. tit. 17, §§ 252*, *263*. We hold that these constitutional and statutory provisions indicate a clear intent by the state to supplant the market for leased outdoor lighting with active regulation by the Commission.

We also believe the Commission has used this grant of authority to closely supervise the outdoor lighting services provided by public utilities, including PSO. The Commission has regulated the outdoor lighting market in Oklahoma for twenty years. It currently imposes a thorough set of guidelines upon the lighting services of thirty-three public utilities operating within Oklahoma. Moreover, the Commission until 1985 closely regulated the rates charged by PSO for its outdoor lighting services. **[**10]** From 1977 to 1985, PSO submitted monthly reports to the Commission of its compliance with the fuel adjustment clause in its outdoor lighting rates. When PSO applied to reduce its Tulsa lighting charge from $ 4.00 to $ 3.95 a month for a 175 watt light (while raising the cost of its service in rural areas), the Commission conducted three days of public hearings involving extensive testimony and over 100 exhibits. After considering the evidence, the Commission rejected PSO's request and chose instead to reduce PSO's rate to $ 3.85. Thus, the lower rate charged by PSO for its outdoor lighting service in Tulsa, which plaintiffs claim destroyed their business, was compelled by an independent decision of the Commission that PSO could not disobey.

B.

Plaintiffs emphasize that the Oklahoma Supreme Court overturned the Commission's outdoor lighting rates in December 1983, finding that PSO's lighting business "is not used or useful to the ratepayers as a whole, and thus its investment may not be included in its general rate base." *Public Serv. Co. of Okla. v. Oklahoma Corp. Comm'n, 688 P.2d 1274, 1281 (Okla. 1983)* (*PSO*). [3] We hold that this decision did not alter PSO's responsibility **[**11]** to comply with rates mandated by the Commission before 1984. ***HN4***[] The constitutional invalidity of the attempted

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and State Action Immunity to the Sherman Anti-Trust Act After Southern Motor Carriers Rate Conference, 24 Houston L. Rev. 311, 333 (1987).

[3] As a result of this decision, the Commission decontrolled the rates for PSO's outdoor lighting service in April 1985.

state regulation is not an appropriate basis for disregarding state action immunity. *E.g., Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985)*. Rather, there should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized. *See* P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 212.4b, at 132 (Supp. 1987). To rule otherwise would require regulated industries to seek judicial review of every order of a regulatory agency to ensure that compliance does not later subject them to antitrust liability.

In this case, neither the Commission nor PSO had any reason to anticipate that outdoor lighting rates could not be included in PSO's rate base. Until the 1984 decision, the Oklahoma Supreme Court had never overturned a decision by the Commission involving the outdoor lighting of a regulated utility. Indeed, the court affirmed the 1975 "atomic bomb" order challenged in the instant **[**12]** case in *Chickasha Cotton Oil Co. v. Oklahoma Corp. Comm'n, 562 P.2d 507* (Okla.), *cert. denied*, *434 U.S. 829, 54 L. Ed. 2d 88, 98 S. Ct. 110 (1977)*. The court **[*1335]** also stated one year before *PSO*, "the duty of the Commission to supervise, regulate and control the charges and rates of public utilities is constitutionally mandated." *Cartwright v. Southwestern Bell Tel. Co., 662 P.2d 675, 679 (Okla. 1983)*. [4]

[13]** For these reasons, we conclude that PSO's rate changes meet the test for state action immunity set forth in *Southern Motor Carriers*. Indeed, PSO's case for immunity is even stronger than the arguments successfully espoused in *Southern Motor Carriers*, since in that case, regulatory agencies merely allowed the challenged collective ratemaking by trucking companies. Individual common carriers remained free to submit individual rate proposals to the Public Service Commissions. 471 U.S. at 52. In the instant case, however, the Commission compelled the challenged conduct by rejecting PSO's requested rates and establishing its own price after extensive, formal hearings were held. As mentioned, the Court held in *Southern Motor Carriers* that compulsion is the best evidence of a state policy to displace competition. *471 U.S. at 62*. Therefore, we hold that PSO's actions pursuant to the Commission's rate orders are immune from antitrust attack under the state action doctrine. [5]

[14]** III.

The remaining issue is whether plaintiffs proved sufficient non-immune conduct to support the verdict. ***HN5***[] To prove attempted monopolization, plaintiffs must show: 1) a relevant market in which the alleged attempt occurred; 2) a dangerous probability of success in monopolizing the relevant market; 3) a specific intent to monopolize; and 4) conduct in furtherance of such an attempt. *Shoppin' Bag of Pueblo v. Dillon Cos., 783 F.2d 159, 161 (10th Cir. 1986)*. Once immunity is recognized, PSO argues, it should be shielded from all complaints regarding the rate changes resulting from the 1975 order and from any other conduct which was mandated by the Commission. PSO believes that once the immune conduct is extirpated from plaintiffs' prima facie case, nothing remains of plaintiffs' contentions from which a reasonable jury could find predatory conduct satisfying the latter three elements of attempted monopolization.

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[4] Furthermore, the 1984 decision may reasonably be interpreted as only requiring evidence that outdoor lighting is useful to the ratepayers, rather than as a limit on the Commission's jurisdiction to regulate the outdoor lighting market. Based on this interpretation, the Commission reconfirmed in December 1985 that the outdoor lighting provided by PSO's neighboring utility, Oklahoma Gas and Electric Company, should continue to be regulated. The Commission distinguished the *PSO* case on the ground that Oklahoma Gas and Electric's outdoor security lighting earned a "higher than system average rate of return" and was not subsidized by the other service classes. *See In the Matter of the Application of Oklahoma Gas and Electric Company*, OCC Cause No. 29450, Order No. 290658, p.10 (Dec. 20, 1985). We note that the interpretation of the public utility laws by the expert agency charged with enforcement of these laws should be given persuasive weight. *E.g., Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612 (6th Cir. 1982)*, *cert. denied*, ***459 U.S. 1208, 75 L. Ed. 2d 441, 103 S. Ct. 1198 (1983)***.

[5] PSO also believes it is insulated from liability by the *Noerr-Pennington* doctrine, which precludes application of the Sherman Act to an entity's efforts to obtain favorable treatment from the government, even if its goals are anticompetitive. Given our holding on PSO's state action immunity claim, we need not address this issue.

We agree. Plaintiffs complain of a series of rate changes by PSO for its outdoor lighting service from 1973 to 1983, including the 1975 "atomic bomb" rate order. Yet each of these rate orders are immune under the state action doctrine because the Commission consistently **[**15]** established and supervised the rates charged by PSO during this period.

Several of plaintiffs' remaining allegations also concern conduct that is immune under the state action doctrine. For example, plaintiffs argue that PSO has an unfair advantage because, unlike private contractors, it is authorized by state and local authorities to install lighting without a state or municipal license. However, PSO did not cause these regulations to be adopted and is immune from attack based **[*1336]** on the licensing requirements of state and local law, since these regulations are clearly articulated and actively supervised by the government.

For the same reason, plaintiffs' complaint that PSO refused to allow them to attach their lights to PSO's poles without a permit is untenable. Franchise agreements require plaintiffs to have a municipal permit before using PSO's poles; they expressly declare that PSO is "authorized to allow others *having a permitted right* granted by the City of Tulsa to attach facilities to its poles and structures." (Emphasis added.) Again, there is no evidence that these regulations are a sham or that city franchise agreements should not be immune from attack under the antitrust **[**16]** laws. *See* *Rural Elec. Co. v. Cheyenne Light, Fuel & Power Co., 762 F.2d 847 (10th Cir. 1985)* (requirements in city franchise agreement are immune from challenge under the state action doctrine).

Plaintiffs' final claim is that PSO unreasonably delayed hooking up their lights. While this alleged behavior is not immune under the state action doctrine, we believe plaintiffs have failed to show the delay resulted from a policy of discrimination. The only testimony on this issue was from a customer of plaintiffs who attributed the delay in the hookup of his light to the need to install an intermediate pole to bridge the distance between the existing electrical service and his light. Furthermore, PSO only had three work crews to serve 71,000 customers, and hooking up new commercial installations was a lower priority than restoring interrupted service or servicing new residential customers. We believe, therefore, there is no evidence that hookups for PSO's outdoor lighting customers received priority over hookups for other outdoor lighting installations. We hold that plaintiffs have failed to show either a specific intent to monopolize or nonimmune conduct in furtherance of the attempted **[**17]** monopolization. [6] Accordingly, the district court's judgment is REVERSED.

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[6] Because of our holding, we need not address whether plaintiffs satisfied the first two elements of attempted monopolization. We note, though, that to satisfy the second element, plaintiffs must show there existed a dangerous probability of PSO succeeding in monopolizing the relevant market by proving it had the ability to control prices and exclude competition. *E.g.,* *Shoppin' Bag of Pueblo, 783 F.2d at 164*. This would have been a very difficult task, given the fact that the Commission dictated to PSO both the price it could charge for leasing outdoor lights and the electricity rates it could levy on competing contractors. *Cf.* *Bright v. Moss Ambulance Serv., 824 F.2d 819, 824 (10th Cir. 1987)* (activity which is protected by state action immunity may not be the basis for allegations of improper market power).

Dreiling v. Peugeot Motors of America, Inc.

United States Court of Appeals for the Tenth Circuit

June 28, 1988, Filed

Nos. 85-1823, 85-1880, 85-2628, 85-2735

Reporter
850 F.2d 1373 *; 1988 U.S. App. LEXIS 8913 **; 1988-2 Trade Cas. (CCH) P68,125

Lloyd J. Dreiling and Steven J. Dreiling, Plaintiffs, L. J. Dreiling Motor Company, Inc., a Colorado corporation, Plaintiff-Appellant/Cross-Appellee, Podoll & Podoll; Richard B. Podoll; Burns & Figa; Hugh A. Burns and Phillip S. Figa, Appellants/Cross-Appellees, v. Peugeot Motors of America, Inc., a Delaware corporation, Defendant-Appellee/Cross-Appellant, Automobile Peugeot, a French corporation; Peugeot, S.A., a French corporation and Chrysler Corporation, a Delaware corporation, Defendants-Appellees

Prior History: **[**1]** Appeal from the United States District Court for the District of Colorado, (D.C. No. 81-C-911), JIM R. CARRIGAN, D.C. Judge.

Core Terms

dealers, summary judgment, termination, district court, discovery, attorney's fees, fraudulent, genuine issue, conspiracy, dealership, antitrust, warranty claim, good faith, Sherman Act, anticompetitive, manufacturer, replace, intimidation, franchise, amended complaint, antitrust claim, coercion, restrain, alleges, argues, contract claim, ambiguous, promise

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > Pretrial Matters > Continuances

HN1[] **Entitlement as Matter of Law, Appropriateness**

Although under *Fed. R. Civ. P. 56(f)* summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition, this protection arises only if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion. Where a party opposing summary judgment and seeking a continuance pending completion of discovery fails to take advantage of the shelter provided by *Fed. R. Civ. P. 56(f)* by filing an affidavit, there is no abuse of discretion in granting summary judgment if it is otherwise appropriate.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Summary Judgment, Supporting Materials**

The party filing the affidavit opposing summary judgment must show how additional time will enable him to rebut movant's allegations of no genuine issue of fact. If the party fails to make this showing, he cannot claim the protection of *Fed. R. Civ. P. 56(f)*, and the court will accordingly assume that both parties have had ample opportunity for discovery.

Civil Procedure > Judicial Officers > Judges > General Overview

Governments > Courts > Judges

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Trials > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] **Judicial Officers, Judges**

A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The trial judge is not to weigh the evidence to determine the truth of the matter, but instead must ask whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. In making the decision, the trial judge must consider all the evidence in the light most favorable to the nonmoving party. Thus, the trial judge must deny motions for summary judgment when reasonable jurors might disagree, even though the judge as trier of fact would find for the moving party. The appellate court apply this same standard as it reviews de novo whether genuine issues exist.

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

HN4[] **Causes of Action & Remedies, Breach of Contract**

In a breach of contract action, where a plaintiff produces no evidence demonstrating that a defendant had knowledge of admitted fraudulent warranties claims that resulted in its termination of the contract, the actions of the plaintiff's agent in making the fraudulent claims were imputed to the plaintiff, and the defendant thus could terminate the contract without breaching it. Therefore, with respect to the breach of contract claim, no genuine factual issue remains.

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Contracts Law > Breach > General Overview

Business & Corporate Law > Distributorships & Franchises > General Overview

Business & Corporate Law > ... > Causes of Action > Fiduciary Duties > Good Faith & Fair Dealing

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

HN5[] **Distributorships & Franchises, Termination**

The Dealers Day in Court Act, *15 U.S.C.S. §§ 1221-1225*, creates a new cause of action, other than for breach of contract, which did not theretofore exist, in cases where a manufacturer is guilty of coercion and intimidation in its dealings with its franchise holders, regardless of whether the franchise is terminated. The act requires automobile manufacturers to act in good faith in terminating, cancelling, or not renewing the franchise. *15 U.S.C.S. § 1222*. The term "good faith" is defined narrowly in *15 U.S.C.S. § 1221(e)* so that actionable conduct must clearly involve coercion or intimidation or threats of coercion or intimidation.

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Business & Corporate Law > ... > Causes of Action > Fiduciary Duties > Good Faith & Fair Dealing

HN6[] **Distributorships & Franchises, Termination**

Coercion or intimidation must include a wrongful demand that will result in sanctions if not complied with.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

To survive a motion for summary judgment in an antitrust action, the plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN9[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Under a two-part evidentiary test for summary judgment in antitrust conspiracy cases, the court must answer the following questions: (1) is the plaintiff's evidence of conspiracy ambiguous, i.e., is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests?

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive. The substitution of one distributor for another is not manifestly anticompetitive. If a manufacturer decides on his own to substitute one dealer for another his decision to sell exclusively to a new dealer does not amount to an antitrust "conspiracy" with the latter.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, codified at *15 U.S.C.S. § 1*, prohibits agreements with either the purpose or effect of restraining competition unreasonably.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Sherman Act, Claims**

The four elements of a claim under § 2 of the Sherman Act, codified at 15 U.S.C.S. § 2, include: (1) The plaintiff must demonstrate a combination or conspiracy to monopolize; (2) there must be overt acts done in furtherance of the combination or conspiracy; (3) the defendants must have a specific intent to monopolize; and (4) the combination or conspiracy must have an appreciable effect upon commerce.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN13[] **Remedies, Costs & Attorney Fees**

Federal courts possess the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. This sanction may attach in any bad-faith lawsuit, whether unreasonably filed or improperly continued. The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. "'Bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN14[] **Remedies, Costs & Attorney Fees**

The bad-faith exception to the general rule that attorney's fees may not be recovered requires more than a showing of a weak or legally inadequate case, and more than a finding of negligence, frivolity, or improvidence.

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Judges: Logan, Barrett, and Timbers, * Circuit Judges.

Opinion by: LOGAN

Opinion

[*1375] LOGAN, Circuit Judge.

* Honorable William H. Timbers, Senior United States Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

In 1981, Peugeot Motors of America, Inc. terminated the franchise of L. J. Dreiling Motor Co., Inc. (Dreiling) on the asserted ground that Dreiling had submitted approximately $ 32,000 worth of fraudulent warranty claims. Shortly thereafter Dreiling sued, seeking damages for this termination on antitrust and **[**2]** other grounds. On November 1, 1982, the district court dismissed Dreiling's claim under the Automobile Dealers Day in Court Act (the Dealers Act), *15 U.S.C. §§ 1221-1225*, that Peugeot [1] failed to act in good faith in terminating Dreiling's dealership. Dreiling later **[*1376]** amended its complaint to add Chrysler as a defendant; and soon thereafter it filed a fourth and final amended complaint asserting that the fraudulent warranty submissions were "merely a pretext, and in fact [Peugeot] engineered or participated in the creation of their ground for termination," and that the termination actually was part of a nationwide conspiracy between Peugeot and Chrysler Corporation (Chrysler) to replace existing Peugeot dealers with Chrysler dealers. Plaintiff's Fourth Verified Amended Complaint, II Supp. R. Tab 21, at 12. The complaint alleged that (1) Peugeot breached its contract with Dreiling; (2) Chrysler tortiously interfered with Dreiling's and Peugeot's contractual relations; (3) Peugeot and Chrysler violated *§ 1* of the Sherman Act, *15 U.S.C. § 1*, by agreeing to restrain trade; and (4) Peugeot and Chrysler violated *§ 2* of the Sherman Act, *15 U.S.C. § 2*, and *§ 7* of the Clayton Act, *15 U.S.C.* ***[**3]*** *§ 18*, by merging unlawfully.

In 1985 the district court granted defendants' motion for summary judgment on all claims, *L. J. Dreiling Motor Co. v. Peugeot Motors of America, Inc., 605 F. Supp. 597 (D. Colo. 1985)*, and subsequently ordered Dreiling and its attorneys to pay Chrysler's attorney fees. Dreiling has appealed the summary judgment, arguing that the trial court denied sufficient opportunity for discovery, and that genuine issues of fact remained with respect to the Dealers Act claim and the claims contained in the fourth verified complaint. Dreiling and its attorneys also assert that the trial court abused its discretion in granting Chrysler attorney's fees against Dreiling **[**4]** and the attorneys personally. Peugeot on cross-appeal claims that the court erred in denying its motion for attorney's fees.

I

Adequacy of Discovery

Dreiling first argues that the "Opinion of the District Court unfairly granted summary judgment after extremely limited discovery." Dreiling's Opening Brief at 15. Defendants vigorously contest Dreiling's characterization of the extent of discovery; this characterization also is at odds with the district court's finding:

> "Discovery has been extensive. Plaintiffs served hundreds of written interrogatories and requests for production of documents on Peugeot. Seventeen depositions have been taken, ten by Dreiling and seven by Peugeot. At the preliminary injunction hearing on June 26, 1981, ten witnesses testified for about six hours. Numerous affidavits and exhibits have been submitted by both sides in support of various motions. While one would not measure the worth of the Mona Lisa by the weight of the paint, it merits notice that the court file in this case is approximately fifteen inches thick, and this does not include most of the documents produced by discovery."

605 F. Supp. at 600.

We need not decide whether discovery was sufficient, **[**5]** as Dreiling failed to alert the district court to this issue in a proper manner. ***HN1***[] Although the Supreme Court has held that, under *Fed. R. Civ. P. 56(f)*, "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition," *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n. 5, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*, this protection arises only if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion. *Weir v. Anaconda Co., 773 F.2d 1073, 1082 (10th Cir. 1985)*. "Where a party

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[1] The complaint named three members of the Peugeot corporate family: Peugeot Motors of America, Inc. ("PMA"), a Delaware corporation; Peugeot, S.A. ("PSA"), a French corporation; and Automobiles Peugeot ("AP"), a French corporation. PSA owns one hundred percent of AP. PSA owns ten percent of PMA and AP owns the remaining ninety percent. Chrysler owns approximately fifteen percent of PSA. Except when differentiation is relevant, the Peugeot corporate family will be denominated simply as "Peugeot."

opposing summary judgment and seeking a continuance pending completion of discovery fails to take advantage of the shelter provided by *Rule 56(f)* by filing an affidavit, there is no **[*1377]** abuse of discretion in granting summary judgment if it is otherwise appropriate." *Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 832-33 (10th Cir. 1986)*.

Even if we considered Dreiling's Memorandum Brief in Opposition and Dreiling's general statements at hearings about its inability to take depositions of the highest officers of Chrysler and Peugeot as affidavits, [2] *see* *Weir, 773 F.2d at 1083*; *Pasternak,* ***[**6]*** *790 F.2d at 833*, they would be insufficient to satisfy the requirements of *Rule 56(f)* for a continuance to permit additional discovery. The Memorandum Brief argues only that summary judgment is not appropriate because genuine issues of fact remain. Instead of contending that additional discovery is necessary to raise a genuine issue, the brief concludes: "Plaintiff desires to get this case to trial at the earliest possible date and would request that this court immediately set a trial date . . . ." II Supp. R. Tab 27, at 19. The other statements simply express the hope that depositions of the high officers will turn up something useful to Dreiling's case. We have held that ***HN2***[] "the party filing the affidavit must show how additional time will enable him to rebut movant's allegations of no genuine issue of fact." *Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984)*. Having failed to make this showing Dreiling cannot claim the protection of *Rule 56(f)*, and we will accordingly "assume that both parties have had ample opportunity for discovery." *Liberty Lobby, 477 U.S. at 250 n. 5*.

[7] II**

Genuine Issues of Fact

We must now address whether "genuine issues" remain with respect to Dreiling's claims. The Supreme Court, in *Liberty Lobby*, held that ***HN3***[] a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *477 U.S. at 248*. The trial judge is not to weigh the evidence to determine the truth of the matter, but instead must ask "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id. at 252*. In making the decision, the trial judge must consider all the evidence in the light most favorable to the nonmoving party. *Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230, 234 (10th Cir. 1975)*. Thus, the trial judge must deny motions for summary judgment when reasonable jurors might disagree, even though the judge as trier of fact would find for the moving party. On appeal, we apply this same standard, *Weir, 773 F.2d at 1079*, as we review de novo whether genuine issues exist.

A. Breach of Contract

Although Dreiling argues on appeal that it "never admitted the existence of fraudulent warranty claims," Dreiling's Opening Brief at 16, the record **[**8]** is to the contrary. Paragraph 22 of its original Verified Complaint, I Supp. R. Tab 1, at 4, concedes that

> "between the dates of March, 1980, and December, 1980, Defendant Lou Bartlett submitted fraudulent warranty claims to Defendant Peugeot Motors of America, Inc., using the forms of Plaintiff, the L. J. Dreiling Motor Company, Inc., and purportedly submitting said fraudulent warranty claims as an authorized representative of Plaintiff the L. J. Dreiling Motor Company, acting within the scope of his employ."

Although subsequent amended complaints excluded this admission, Dreiling's counsel confessed the fraud at an April 17, 1984, hearing. Moreover, counsel admitted that Dreiling "got the money for those fraudulent claims." IV Supp. R. 22.

Section 25 C.1.f. of the Dealer Agreement states that Peugeot may terminate the dealership in the event of "*any* materially false or fraudulent claim or statement relating to . . . warranty repairs. . . ." I Supp. R. Tab 1, Exh. A (emphasis added). **[*1378]** In the face of the admitted fraudulent warranty claims, Peugeot's termination of the dealership does not breach the dealer agreement.

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[2] Dreiling's familiarity with *Rule 56(f)* is evidenced by the filing of a *Rule 56(f)* motion and affidavit in response to an earlier motion for summary judgment.

Dreiling nevertheless contends that a genuine issue of fact **[**9]** still remains as to whether the wrongdoing of its agent would be imputed to Dreiling. As the district court characterized Dreiling's argument,

> "Dreiling argues correctly that [Restatement (Second) of Agency] section 261 presumes an innocent third party and is inapplicable where a third party had actual notice and knowledge of an agent's wrongful conduct. There is a factual dispute as to when Peugeot gained knowledge of Bartlett's fraudulent submissions. Plaintiff alleges that in September 1980 Joseph DiStefano, a Dreiling employee, told William McMullin, the Peugeot central zone service representative, that some 'funny business' was going on in Bartlett's submission of Peugeot warranty claims. Dreiling argues that Peugeot had actual knowledge of Bartlett's fraud as of September 1980 and that his conduct after that time cannot be imputed to the dealership."

605 F. Supp. at 611. ***HN4***[] Dreiling, however, has produced no evidence demonstrating that Peugeot had knowledge of the admitted fraudulent warranties claims made before September 1980. Bartlett's actions, as an agent, in making the fraudulent claims from March to September 1980 are imputed to Dreiling, and Peugeot thus could terminate **[**10]** the dealership without breaching the contract. With respect to the breach of contract claim, no genuine factual issue remains.

B. Tortious Interference with Contract Relations

The Colorado Court of Appeals in *Carman v. Heber, 43 Colo. App. 5, 601 P.2d 646 (1979)*, set forth the five elements for a tortious interference of contract claim under Colorado law, including the requirement that "action by the defendant [induced] a breach of the contract." *Id., 601 P.2d at 647*. Because we have concluded that summary judgment for the breach of contract claim was appropriate, we must find a *fortiori* that there is no genuine issue that Chrysler's action induced a breach. We affirm summary judgment on this claim.

C. Dealers Day in Court Act

Our affirmance of summary judgment on the breach of contract claim does not, by itself, resolve whether genuine issues of fact remain for Dreiling's Dealers Act claim. ***HN5***[] The Dealers Act "creates a new cause of action, other than for breach of contract, which did not theretofore exist, in cases where a manufacturer is guilty of coercion and intimidation in its dealings with its franchise holders, regardless of whether the franchise is terminated." *Hanley* ***[**11]*** *v. Chrysler Motors Corp., 433 F.2d 708, 710-11 (10th Cir. 1970)*. The act requires automobile manufacturers "to act in good faith . . . in terminating, cancelling, or not renewing the franchise," *15 U.S.C. § 1222*. The term "good faith" is defined narrowly in *§ 1221(e)*, *Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901* (9th Cir.), *cert. denied*, *436 U.S. 946, 56 L. Ed. 2d 787, 98 S. Ct. 2848 (1978)*, so that "actionable conduct must clearly involve 'coercion or intimidation or threats of coercion or intimidation . . . .'" *Gage v. General Motors Corp., 796 F.2d 345, 351 (10th Cir. 1986)* (quoting *15 U.S.C. § 1221(e)*).

Dreiling contends that Peugeot used the fraudulent warranty claims as a pretext for terminating the dealership and that "a genuine issue of material fact exists concerning whether the franchise . . . was terminated as a result of the Chrysler-Peugeot agreements." Dreiling's Reply Brief at 10. To support this argument Dreiling points to evidence that Peugeot may have known about the fraudulent warranty claims as early as September 1980 but waited until May 1981 before terminating the dealership.

Dreiling may have had a Dealers Act claim had it shown that Peugeot used its knowledge of fraudulent **[**12]** warranty claims and the threat of termination to coerce Dreiling into accepting higher sales objectives. *See* I Supp. R. Tab 1, Exh. G, H **[*1379]** (evidence of coercion). It is arguable that under *§ 1222* manufacturers cannot use even material breaches as pretexts for coercing or intimidating dealers. *See* *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., 447 F.2d 786, 791 (5th Cir. 1971)* ("The Dealers Day in Court Act contemplates a cause of action even upon the assertion of legal rights if there is a failure of good faith in the exercise thereof."). *But see* *Gage, 796 F.2d at 351* ("The exercise of these legal rights cannot amount to coercion, intimidation or threats as a matter of law."). Dreiling, however, was terminated even after it had accepted the higher sales objectives, thus undercutting any argument that the threat of termination was used to coerce this acceptance.

Further, Dreiling argues only that Peugeot terminated its dealership so that it could be replaced by a Chrysler dealership. Under this theory, the termination was an end in itself. ***HN6***[] "Coercion or intimidation must include 'a wrongful demand which will result in sanctions if not complied with.'" *Fray Chevrolet* ***[**13]*** *Sales, Inc. v. General Motors Corp., 536 F.2d 683, 685 (6th Cir. 1976)* (quoting *Ship & Shore Motors, Inc. v. British Leyland Motors, Inc., 1974-1 Trade Cas. (CCH) P75,102 (D.N.J. 1974)*. As alleged, Peugeot's termination was not used to coerce or intimidate Dreiling. The allegations thus do not state a claim for relief under the Dealers Act.

D. Antitrust Allegations

Historically, summary judgment has been disfavored in antitrust litigation. In *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, the Supreme Court concluded that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Id. at 473*; *see also* *Umdenstock v. American Mortgage & Investment Co. of Oklahoma City, 495 F.2d 589, 592 (10th Cir. 1974)*. [3]

[14]** In 1986, however, the Supreme Court reversed the denial of summary judgment in a major predatory pricing decision, *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. "The Supreme Court's reversal was based on its conclusions: 1) that the predatory pricing conspiracy was so economically implausible that the defendants had no motive to engage in it; and 2) that the evidence of an agreement to enter into this conspiracy was indirect and ambiguous." *Instructional Systems Development Corp. v. Aetna Casualty & Surety Co., 817 F.2d 639, 646 (10th Cir. 1987)*. Although *Matsushita* upheld the traditional view that on summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, the opinion is important because it held that ***HN7***[] "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita, 475 U.S. at 588*. Also it held that ***HN8***[] to survive a motion for summary judgment the plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting *Monsanto Co. v. Spray-Rite* ***[**15]*** *Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984))*.

[*1380] 1. Sherman Act *§ 1*

Dreiling alleges that Chrysler and Peugeot violated Sherman Act *§ 1* by entering into a multifaceted agreement in which, *inter alia*, Chrysler agreed not to compete with Peugeot if Peugeot would terminate some of its dealers and replace them with Chrysler dealers. [4] The alleged agreement thus consisted of a horizontal component -- the promise by Chrysler not to produce competing cars; and a vertical component -- Peugeot's promise to hand over the dealerships to Chrysler. The district court analyzed each part separately.

As to the horizontal component, the district court **[**16]** found that Dreiling had failed to produce sufficient evidence of Chrysler's promise not to produce competing cars:

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[3] In *Umdenstock*, we reversed summary judgment on an antitrust claim because there was inadequate opportunity for discovery. That decision went on to state, "On the record presented we cannot say with certainty that plaintiffs can prove no facts which would entitle them to the requested relief." *Id. at 592*. Dreiling has interpreted this statement to require the district courts in deciding motions for summary judgment "to determine whether other facts *could* exist," Dreiling's Opening Brief at 28 (emphasis in original), that would create a genuine issue. Even if this were the holding of *Umdenstock*, it has been overruled by *Liberty Lobby*. The questions of sufficiency of discovery and existence of genuine issues are distinct. If the sufficiency of discovery is not at issue, the trial judge should not speculate whether additional evidence could justify a trial but instead should determine whether the present record "is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby, 477 U.S. at 248*.

[4] The Burns and Figa law firm argues that the district court erred in granting Chrysler summary judgment because "Chrysler produced no evidence or affidavits that it played no role in Dreiling's termination." Burns & Figa Opening Brief at 14. The Supreme Court has recently rejected this argument in *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*, finding "no express or implied requirement in *Rule 56* that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id. at 323* (emphasis in original).

"Dreiling's allegation of Chrysler's agreement not to manufacture competing automobiles is similarly unfathomable. Dreiling's only support for this latter allegation is the following language from the preamble to the May 30, 1980 Agreement:

'Whereas CC [Chrysler Corporation] has determined that, in the light of the distinct character of the EIR [expensive import registration automobile] market, the distribution of Peugeot Vehicles via a selected number of CC dealers as herein contemplated will not be competitive with the distribution via these same dealers of the vehicles which CC currently distributed or plans to distribute during the term of this Agreement but will, in fact, strengthen these dealers to the benefit of CC and said dealers; . . . .'

But this is no *agreement* not to compete; rather, it is a statement of the *fact* that Chrysler and Peugeot did not then compete."

605 F. Supp. at 602 (emphasis in original). [5]

[17]** In *Gibson v. Greater Park City Co., 818 F.2d 722 (10th Cir. 1987)*, this circuit distilled from *Matsushita* ***HN9***[] a two-part evidentiary test for summary judgment in antitrust conspiracy cases:

"(1) is the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests."

Gibson, 818 F.2d at 724. As to the first part, Dreiling's evidence of a horizontal conspiracy not to compete is, at best, ambiguous. As the district court correctly observed, the preamble to the May 30 agreement reflected the absence of contemporaneous competition between Peugeot and Chrysler, not an intent to suppress competition in the future. As to the second part of the test, the preamble is perfectly consistent with the defendants' permissible interests in a joint venture, and Dreiling adduces no additional evidence that "tends to exclude the possibility that the defendants were pursuing these independent interests." *Id.*

Dreiling's appeal of the *§ 1* summary judgment **[**18]** then must rise or fall on whether genuine issues remain as to the second part of the Chrysler-Peugeot agreement, regarding Peugeot's alleged promise to "terminate existing Peugeot dealerships to protect Chrysler dealerships who were **[*1381]** to acquire the Peugeot franchise . . . ." Fourth Verified Amended Complaint, II Supp. R. Tab 21, at para. 7-8. In analyzing whether the evidence of this theory supports a triable claim, we agree with the district court that the rule of reason governs this part of the agreement. *See 605 F. Supp. at 604*. ***HN10***[] "*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. The substitution of one distributor for another is not manifestly anticompetitive. *See Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283, 287* (6th Cir.), *cert. denied*, *375 U.S. 922, 11 L. Ed. 2d 166, 84 S. Ct. 267 (1963)*; ABA ***Antitrust Law*** Section Monograph No. 9, 26-27; *see generally*, Posner, *The Next Step in Antitrust Treatment of Restricted Distribution Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981). If a manufacturer "'decides on his own to substitute one dealer for another . . . **[**19]** his decision to sell exclusively to a new dealer does not amount to an antitrust "conspiracy" with the latter . . . .'" *Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1030* (2d Cir.) (quoting *Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975)*, *cert.*

[5] The district court also concluded that Dreiling lacked standing to object to the alleged Chrysler-Peugeot agreement. It stated:

"Furthermore, Dreiling's alleged injury, its termination as a Peugeot franchisee, could not have been caused by these alleged horizontal market division aspects of the agreement between Chrysler and Peugeot." *605 F. Supp. at 602*. We do not reach the standing issue, because we agree that Dreiling has not established a genuine issue of horizontal conspiracy.

denied, *425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1667 (1976))*, *cert. denied*, *444 U.S. 917, 100 S. Ct. 232, 62 L. Ed. 2d 172 (1979)*.

The district court found that Peugeot had not promised to replace existing Peugeot dealers with Chrysler dealers, *605 F. Supp. at 605-07*, and regarding the agreements that Chrysler and Peugeot did make, the court found "neither an anticompetitive intent nor an anticompetitive purpose." *Id. at 605*. The district court correctly noted that ***HN11***[] *§ 1* of the Sherman Act prohibits agreements with either the purpose or effect of restraining competition unreasonably. *605 F. Supp. at 608*; *see* *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*; L. Sullivan, *Antitrust* at 194 ("If either the purpose or effect of a practice evaluated under the rule of reason is sufficiently adverse to competition to outweigh any benefits, the conduct is deemed unreasonable."). In reviewing the issue de novo, we conclude that summary **[**20]** judgment is appropriate.

In its complaint, Dreiling alleges that defendants restrained the sale and purchase of expensive import registration automobiles (EIRs) within Colorado and throughout the United States. But Dreiling has not demonstrated how replacing Peugeot with Chrysler dealers would restrain trade in the EIR market. As to effect, Dreiling presented no plausible theory of how the dealer replacement would restrain either the manufacture or distribution of automobiles. "Dealings between a manufacturer and its agents may be arbitrary, unfair, or lacking in good business judgment, but, without more, they will not violate the Act." *Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 571 (5th Cir. 1978)*, *cert. denied*, *440 U.S. 909, 59 L. Ed. 2d 457, 99 S. Ct. 1218 (1979)*. The record contains no evidence that the dealer replacement would reduce competition in either manufacturing or sales. *Cf.* *Bowen, 522 F.2d at 1254-56* (newspaper illegally agreed with exclusive franchise dealers to eliminate competition from nonexclusive dealers).

Just as Dreiling's counsel has failed *ex post* to enunciate a plausible theory of anticompetitive effect, the record does not show that the agreement was motivated by **[**21]** any anticompetitive purpose. Dreiling complains that its inability to show purpose is due to the district court stay of discovery, which "allowed *absolutely no discovery* against Chrysler . . . ." Dreiling's Opening Brief at 4 (emphasis in original). While summary judgment should rarely be granted prior to discovery against one defendant, we again feel bound to consider the record as it stands absent a *Rule 56(f)* affidavit. Moreover, Dreiling's failure even to assert a plausible anticompetitive effect leads us to agree with the district court that the possibility that proposed discovery of high-ranking Peugeot and Chrysler representatives would reveal an anticompetitive purpose "is so remote that it cannot defeat this grant of summary judgment . . . ." *605 F. Supp. at 609*.

[*1382] In sum, we discern no genuine issues of fact regarding either horizontal or vertical restraints in violation of Sherman Act *§ 1*.

2. Sherman Act *§ 2* and Clayton Act *§ 7*

Dreiling contends that Chrysler's acquisition, in 1978, of approximately fifteen percent of PSA's stock constitutes a combination by Chrysler and Peugeot to monopolize the EIR market in Colorado and the United States, in violation of Sherman Act **[**22]** *§ 2* and Clayton Act *§ 7*. This court set forth ***HN12***[] the four elements of a *§ 2* claim in *Olsen v. Progressive Music Supply, Inc., 703 F.2d 432* (10th Cir.), *cert. denied*, *464 U.S. 866, 78 L. Ed. 2d 172, 104 S. Ct. 197 (1983)*: (1) The plaintiff must demonstrate a combination or conspiracy to monopolize; (2) there must be overt acts done in furtherance of the combination or conspiracy; (3) the defendants must have a specific intent to monopolize; and (4) the combination or conspiracy must have an appreciable effect upon commerce. *Id. at 436-38*.

We agree with the district court that Dreiling has not shown an appreciable effect upon commerce. Although it has adduced evidence of its own termination, Dreiling has not produced any evidence of a wide-scale substitution of Chrysler-Peugeot dealers for other existing Peugeot dealers. Dreiling similarly lacks even a scintilla of evidence to support its assertion that this lawsuit dissuaded Chrysler and Peugeot from pursuing the alleged plot to terminate the existing Peugeot dealers. The case reduces to the termination of Dreiling, and only Dreiling. We do not believe, under the relevant Supreme Court standards, that the replacement of one dealer constitutes a sufficient impact **[**23]** upon commerce to state a *§ 2* claim. *See* *United States v. Yellow Cab Co., 332 U.S. 218, 225, 91 L.*

Ed. 2010, 67 S. Ct. 1560 (1947); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953).

We also affirm the district court's summary disposition of the Clayton Act count. Having chosen the sale of EIRs as the line of commerce, Dreiling must come forth with evidence both of Chrysler's presence as a competitor in the EIR market and of market power by Peugeot and/or Chrysler. Dreiling failed not only to discharge this burden but also to suggest how additional discovery and a full trial would develop these critical elements.

III

Attorney's Fees

Despite the American rule that each party shall bear its own litigation expenses, ***HN13***[] federal courts possess the inherent authority to "assess attorneys' fees . . . when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .'" *Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975)* (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129, 40 L. Ed. 2d 703, 94 S. Ct. 2157 (1974))*. This sanction may attach in any bad-faith lawsuit, whether unreasonably filed or improperly continued:

> "The **[**24]** bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. '"Bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.' *Hall v. Cole, 412 U.S. 1, 15, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973)*."

Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980). Both client and counsel may be held liable for attorney's fees. *Id.* Recognizing that illiberal use of the sanction might discourage the zealous advocacy of difficult cases, we trust the imposition of attorney's fees to the cautious discretion of the district court, *Mertsching v. United States, 704 F.2d 505, 506* (10th Cir.) (per curiam), *cert. denied*, *464 U.S. 829, 78 L. Ed. 2d 108, 104 S. Ct. 105 (1983)*, after fair notice to the parties and a hearing on the record. *Roadway Express, 447 U.S. at 767*; *Rosewitz v. Latting, 689 F.2d 175, 178 (10th Cir. 1982)*. We note, however, that ***HN14***[] the bad-faith exception to the **[*1383]** general rule that attorney's fees may not be recovered requires more than a showing of a weak or legally inadequate case, and more than a finding of negligence, frivolity, or improvidence. *Cornwall v. Robinson, 654 F.2d 685, 687 (10th Cir. 1981)*. It is **[**25]** a narrow exception indeed. With this in mind we review the district court's assessment of fees against Dreiling and its counsel, Burns & Figa and Podoll & Podoll, in favor of Chrysler and its refusal to assess such fees in favor of Peugeot.

Peugeot made its claim for attorney's fees after the district court had decided all claims in its favor on summary judgment. The district court carefully weighed its interests in being free of frivolous claims and in being open and amenable to consider creative claims put forth in good faith. Noting that the court itself had recommended Dreiling retain counsel experienced in ***antitrust law***, and complimenting the reputation and experience of Burns & Figa, who were retained before preparing the third and fourth amended complaints, the court ruled, "I can't say that an attorney in good faith reviewing this matter would not have proceeded." V. Supp. R. 40. It therefore denied Peugeot's motion.

But at the same time the court granted Chrysler's motion for attorney's fees, finding that adding Chrysler as a defendant was "not well-grounded in fact, the case [was] not warranted by existing law, or any good faith argument for the extension, modification or **[**26]** reversal of existing law and rather it was interposed for improper purposes." V. Supp. R. at 36-37. It declared that Chrysler's joinder "was a last-minute desperate attempt to bring in somebody to try to keep the ship afloat and get some walking money into the case. . . ." *Id. at 36*.

We hold the district court correctly denied fees to Peugeot but wrongfully granted them to Chrysler. We believe, as the court stated with respect to Peugeot's request, that a reasonable attorney who faced these facts might well have filed the suit. The reassertion of the Dealers Act and interference-with-contract claims in connection with an alleged conspiracy was questionable in light of the court's having already dismissed, in a different context, the Dealers Act and contract claims against Peugeot; they were not, however, precluded by the earlier dismissal.

Further, we agree with the district court that Dreiling's antitrust claims against Peugeot were not so frivolous as to justify attorney's fees as a sanction. But we cannot agree with the district court that the antitrust claims against Chrysler were inherently less meritorious than the antitrust claims against Peugeot. The court itself approved **[**27]** the addition of Chrysler as a party defendant, after Chrysler's agreements with Peugeot had been mentioned from the outset, and the court suggested obtaining experienced antitrust counsel like Burns & Figa. In fact, Dreiling's third and fourth amended complaints, asserting antitrust claims against Chrysler and Peugeot based upon the several agreements between those defendants, seem to us considerably more meritorious on their face than what had been earlier alleged against Peugeot alone. Because the legal essence of the antitrust claims was that Peugeot and Chrysler combined or conspired to restrain trade, we believe that the attorney's fee award either should have been granted in favor of both defendants or in favor of neither.

The principal infirmity of the antitrust claims came about not at the time of pleading but later, when Dreiling by its counsel failed to support its request for additional discovery with *Fed. R. Civ. P. 56(f)* affidavits, and when counsel misconceived the burden of production of evidence to avoid summary judgment. These defalcations, however, became clear only after *Matsushita, Celotex* and *Liberty Lobby*, each of which were decided after the court's **[**28]** grant of summary judgment. As noted, *Matsushita* heightened the antitrust plaintiff's burden with its holding that summary judgment is proper for a defendant when the evidence is indirect, ambiguous and consistent with defendant's permissible interest. *Liberty Lobby* clarified that the mere existence of some factual dispute will not defeat a motion for summary judgment; the court must ask itself whether a fair-minded jury **[*1384]** could return a verdict on the evidence presented. Finally, *Celotex* held that a party defendant moving for summary judgment need not support its motions by affidavits or other evidence negating the plaintiff's claim. These principles, freshly enunciated by the Supreme Court, have played an important part in our upholding the summary judgments by the district court. Although we do not wish to imply that these claims necessarily should have survived summary judgment under the state of the law at that time, it is only through the benefit of hindsight that the claims, and counsel's actions, could appear to be so unreasonable as to justify sanctions.

Considering the narrowness of the exception to the American rule against attorney's fee awards, that not even **[**29]** objectively frivolous claims advanced in subjective good faith justify fee awards, we must reverse the district court's award of Chrysler's fees while affirming its denial of fees to Peugeot.

The judgment is AFFIRMED in all respects except the award of attorney's fees to Chrysler. As to that aspect it is REVERSED.

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Gould v. Sacred Heart Hosp.

United States District Court for the Northern District of Florida, Pensacola Division

June 29, 1988, Decided ; June 29, 1988, Filed

PCA No. 86-4392-RV

Reporter

1988 U.S. Dist. LEXIS 17434 *; 1988 WL 1017208

JEFFREY L. GOULD, M.D., and LOIS VIRGINIA GOULD, Plaintiffs, v. SACRED HEART HOSPITAL OF PENSACOLA; HOBGOOD, POST and BALCHUNAS, M.D., P.A.; ALBERT A. POST, M.D.; S. RANDALL HOBGOOD, M.D.; NORMAN W. HAINES, JR., M.D.; JAMES R. HARDMAN; and RICHARD ZEILER, Defendants

Core Terms

radiology, termination, conspiracy, alleges, by-laws, privileges, staff privileges, medical staff, monopolize, revoke, tying arrangement, regulations, antitrust, business relationship, conspired, patients, employment contract, licensed, tortious interference, public policy, concerted, reasons, recommendation, contracts, employees, annual, staff, defamatory statement, defendants', commerce

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss, the district court must accept the facts alleged in the complaint as true and interpret them in the light most favorable to the plaintiff.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Complaints, Requirements for Complaint**

To state a claim in federal court, the pleader need only provide a short and plain statement of the claim showing that the pleader is entitled to relief *Fed. R. Civ. P. 8(a)(2)*.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] **Pleadings, Rule Application & Interpretation**

To give fair notice, the complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.

Governments > State & Territorial Governments > Licenses

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Revocation & Suspension

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

HN4[] **State & Territorial Governments, Licenses**

See Fla. Stat. ch. 395.0115(1).

Business & Corporate Compliance > ... > Healthcare Law > Business Administration & Organization > Accreditation

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

Public Health & Welfare Law > ... > Providers > Types of Providers > Hospitals

HN5[] **Business Administration & Organization, Accreditation**

See Fla. Stat. ch. 395.0115(1).

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

HN6[] **Business Administration & Organization, Facility & Personnel Licensing**

The procedures proscribed in Fla. Stat. ch. 395.0115 do not apply where a hospital is not acting under the good cause rationale within the meaning of the statute.

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

HN7[] **Business Administration & Organization, Facility & Personnel Licensing**

See *Fla. Stat. ch. 395.002(9)*.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN8[] **Business Administration & Organization, Hospital Privileges**

See Fla. Stat. ch. 395.0115.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN9[] **Business Administration & Organization, Hospital Privileges**

Fla. Admin. Code Ann. r. 10D-28.56(1)(f) prohibits a hospital from acting on a request for appointment or reappointment to its medical staff or from dismissing a staff member without prior referral to the medical staff for their recommendation.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN10[] **Business Administration & Organization, Hospital Privileges**

Fla. Admin. Code Ann. r. 10D-28.58(2)(d) provides in pertinent part that a medical staff recommendation for the withdrawal of a staff member's privileges must be preceded by a thorough investigation by the medical staff or a committee thereof, with the subject member being given the right of hearing before the medical staff or a committee thereof.

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

HN11[] **Business Administration & Organization, Facility & Personnel Licensing**

When a statute establishes a licensing system, the terms of the statutory license are necessarily defined by the statute. Thus, the authority to revoke the license exists only to the extent conferred by the statute. If the statute sets out the grounds for revocation, there is no authority to revoke except for those grounds.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN12[] **Business Administration & Organization, Hospital Privileges**

Fla. Stat. ch. 395.0115 was designed simply to define the types of disciplinary actions to which the protections set out in other parts of ch.395.0115 apply.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN13[] **Business Administration & Organization, Hospital Privileges**

Fla. Stat. ch. 395.0115 provides for two forms of protection: (1) it affords medical staff members certain procedural guarantees, ch. 395.0115(1); and (2) it provides licensed facilities, their medical staffs, and others limited immunity from liability. Fla. Stat. ch. 395.0115(2).

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN14[] **Business Administration & Organization, Hospital Privileges**

The protections of Fla. Stat. ch. 395.0115 do not apply to all actions by a hospital against its medical staff members. They apply, instead, only to the suspension, denial, revocation, or curtailment of staff privileges for good cause, such as incompetence, negligence, or significant mental or physical impairment.

Contracts Law > Defenses > Public Policy Violations

HN15[] **Defenses, Public Policy Violations**

When a particular contract, transaction, or course of dealing is not prohibited under constitutional or statutory provision, or prior judicial decision, it should not be struck down on the ground that it is contrary to public policy, except it be clearly injurious to the public good or contravene some established interest of society.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Labor & Employment Law > Employment Relationships > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN16[] **Contract Interpretation, Ambiguities & Contra Proferentem**

An unambiguous contract provision can be interpreted as a matter of law, while an ambiguous provision raises a question of fact as to the parties' intent. The preliminary question of whether an ambiguity exists is a question of law. A contract is not rendered ambiguous merely because the parties disagree as to its paper construction.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Labor & Employment Law > Employment Relationships > Employment Contracts > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN17[] **Motions to Dismiss, Failure to State Claim**

Mere expectations are insufficient to create a binding term of employment.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

HN18[] **Conspiracy, Elements**

Not all conspiracies are independently actionable in tort. The distinguishing features of an independently actionable conspiracy are: (1) some peculiar power of coercion possessed by the conspirators by virtue of their combination, which power an individual would not possess; and (2) a malicious purpose to harm the plaintiff.

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN19[] Commercial Interference, Business Relationships

A contract is sufficient, but not necessary, evidence of a business relationship. A tortious interference claim is designed to redress the loss of the advantage of a business relationship. The causation question, therefore, is not necessarily whether the interference induced a breach of contract, but more generally, whether it caused a loss of the gain the plaintiff would have received absent the interference. The plaintiff must establish that if the defendant had not meddled in his business relationship he would have profited from that relationship.

Torts > ... > Commercial Interference > Contracts > General Overview

HN20[] Commercial Interference, Contracts

Parties to an employment relationship cannot be liable for interference with the relationship.

Labor & Employment Law > Employment Relationships > Employment Contracts > Breaches

Torts > ... > Commercial Interference > Contracts > General Overview

HN21[] Employment Contracts, Breaches

An employee is properly treated as a third-party to the employer's business relationship with the plaintiff if he was not acting on his employer's behalf; i.e., in the interest of the employer, when he interfered with the relationship, even though the interference was pursuant to his authority as an employee.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN22[] Inchoate Crimes, Conspiracy

Tortious interference pursuant to a conspiracy, unlike the independent tort of conspiracy, requires proof of an independent wrong or tort.

Torts > Intentional Torts > Defamation > Procedural Matters

Torts > Intentional Torts > Defamation > General Overview

HN23[] Defamation, Procedural Matters

Federal law determines the specificity with which a plaintiff must plead a defamation claim.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Torts > Intentional Torts > Defamation > Procedural Matters

Torts > Intentional Torts > Defamation > General Overview

HN24[] Pleadings, Rule Application & Interpretation

The operative test for determining the requisite degree of specificity for pleading a defamation claim remains whether the allegation gives the defendant fair notice of the plaintiff's claim and the ground upon which it rests.

Torts > Intentional Torts > Defamation > General Overview

HN25[] Intentional Torts, Defamation

A private individual cannot recover for defamation without proof that the defamatory statement was published with some culpable disregard for its truth.

Family Law > Marital Duties & Rights > Causes of Action > Loss of Consortium

Torts > ... > Malicious Prosecution > Elements > Malice

Torts > ... > Types of Losses > Loss of Consortium > General Overview

Torts > ... > Types of Losses > Loss of Consortium > Spouses

HN26[] Causes of Action, Loss of Consortium

The right to recover for loss of consortium also exists wherever such loss is caused by another's wrongful act intentionally inflicted, as for example, a malicious prosecution of the wife, or a defamation of her character.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN27[] Pleadings, Rule Application & Interpretation

The plaintiff must plead enough data so that each claim of the alleged antitrust violation can be properly identified, although the alleged facts need not be spelled out with exactitude.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN28[] Price Fixing & Restraints of Trade, Tying Arrangements

Certain tying arrangements are per se violations of the antitrust laws. The essential character of a per se violation lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer did not want at all, or might have preferred to purchase elsewhere on different terms. The existence of forcing, i.e., the seller's use of its market power in one market to impair competition in another, must be probable or likely.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN29[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The tying arrangement must foreclose a substantial volume of commerce from competitors in the market for the tied product. When the seller lacks the degree of market power needed to force customers to purchase an unwanted tied product, an antitrust violation cannot be established per se, but only by proof of an unreasonable restraint on competition in the relevant market. An unreasonable restraint on competition may be shown through direct evidence of diminished competition in the relevant market, or through indirect evidence of anti-competitive effect, such as an adverse impact on the price, quantity, or quality of the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN30[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Under the rule of reason, an unlawful tying arrangement may be established by proof that the tying arrangement unreasonably restrained competition. Such proof is inherently dependent on often complex economic analysis. A plaintiff cannot be expected to set out in his complaint the economic underpinnings of a rule of reason claim.

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 > ... > US Department of Justice Actions > Civil Actions > General Overview

HN31[] **Remedies, Damages**

Only members of a conspiracy in restraint of interstate commerce can be liable under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, for treble damages.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

HN32[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

An exclusive dealing contract is not unlawful unless performance of the contract will probably foreclose competition in a substantial share of the line of commerce affected. In other words, the opportunities for other traders to enter into or remain in that market must be significantly limited by the contract. The amount of commerce affected cannot be determined in the abstract, such as by calculating its dollar amount, but only by reference to the total amount of commerce in the relevant product/geographic market. Thus, the substantiality test requires a determination of the line of commerce and the geographic area of effective competition.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN33[] **Regulated Practices, Trade Practices & Unfair Competition**

The antitrust laws were enacted for the protection of competition, not competitors. An antitrust cause of action does not exist merely for restraint of an individual's trade, but only where a restraint of trade in a relevant market occurs.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN34[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Group boycotts are among those restraints which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal per se.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN35[] **Practices Governed by Per Se Rule, Boycotts**

Not all concerted refusals to deal are group boycotts subject to per se condemnation. The per se approach generally has been limited to situations involving concerted efforts to deny competitors relationships; e.g., supplies or customers, they need to effectively compete. Therefore, unless access to the withheld relationships is needed for the plaintiff to effectively compete, a refusal to deal should be scrutinized under the rule of reason.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN36[] **Motions to Dismiss, Failure to State Claim**

A complaint that does not set out the facts which warrant the conclusion that an antitrust conspiracy existed will not survive a motion to dismiss.

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 > Elements

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

HN37[] Scope, Monopolization Offenses

Section 2 of the Sherman Act, 15 U.S.C.S. § 2, prohibits monopolization, attempted monopolization, and conspiracy to monopolize. The elements of monopolization are: (1) The possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN38[] Monopolies & Monopolization, Actual Monopolization

Monopoly power acquired through skill or luck, not exclusionary or anti-competitive practices, is not unlawful. Exclusionary behavior includes practices which tend to impair the opportunities of rivals and which either do not advance competition or unnecessarily restrict it.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN39[] Monopolies & Monopolization, Actual Monopolization

A monopolization claim does not require proof of a specific intent to monopolize. However, evidence of intent to monopolize is relevant to the question of whether the defendant's conduct was exclusionary or anti-competitive.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN40[] Monopolies & Monopolization, Actual Monopolization

The existence of monopoly power can only be evaluated in the context of the relevant product and geographic market. Determining the relevant market is a question of fact.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN41[] Monopolies & Monopolization, Conspiracy to Monopolize

Unlike a monopolization claim, conspiracy and attempt to monopolize require evidence of a specific intent to monopolize. Specifically, to establish an attempt to monopolize, the plaintiff must prove that the defendant: (1) had the specific intent to monopolize, (2) took overt acts in furtherance of a scheme to monopolize, and (3) had a dangerous probability of success.

Judges: [*1] Roger Vinson, United States District Judge.

Opinion by: VINSON

Opinion

ORDER

This case arises out of the decision of defendant Hobgood, Post and Balchunas, M.D., P.A. ("P.A."), a professional corporation of physicians exclusively designated to provide radiology services at defendant Sacred Heart Hospital of Pensacola ("Sacred Heart" or "hospital"), to terminate the employment of plaintiff Jeffrey L. Gould, M.D. ("the plaintiff"). The plaintiffs' 45-page, 15-count complaint names Sacred Heart, the P.A., three physicians, and two hospital administrators as defendants. The complaint contains counts alleging termination of radiology staff privileges and termination of employment without the process due under state law, various regulations, and hospital by-laws. It also contains counts alleging breach of contract, conspiracy to deprive the plaintiff of his right to practice medicine, conspiracy to tortiously interfere with the plaintiff's contracts and business relationships, defamation, loss of consortium, violations of *Section 1* and *2* of the Sherman Antitrust Act, and violations of the Florida Antitrust Act of 1980.

The defendants have all moved to dismiss (docs. 11,14 18). Additionally, defendants **[*2]** P.A., Albert A. Post, M.D., S. Randall Hobgood, M.D., Sacred Heart, James R. Hardman, and Richard zeiler have filed motions to strike the plaintiff's affidavit and portions of the plaintiff's memorandum (docs. 34,37).

I. *The Alleged Facts*

HN1[] On a motion to dismiss, I must accept the facts alleged in the complaint as true and interpret them in the light most favorable to the plaintiff. *Ancata v. Prison Health Services, Inc., 769 F.2d 700, 703 (11th Cir. 1985)*. Accordingly, the facts relevant to the instant motions are those set out in the complaint and its attachments, *see Rule 10(c), Federal Rules of Civil Procedure*, which are as follows.

At all times material to this suit, the plaintiff was a physician licensed to practice medicine in Florida, and was board certified in diagnostic radiology. On January 1, 1973, he was appointed to the medical staff of Sacred Heart. In September of 1974, Sacred Heart asked Gould to form a new radiology department at the hospital. Gould, Hobgood, Post, and a Dr. Brown formed a professional corporation of physicians, now known as Hobgood, Post & Balchunas, M.D., P.A., to operate the radiology department.

In 1974, the P.A. and Sacred Heart executed **[*3]** a contract (complaint, attachment A) which made the P.A. the exclusive provider of radiology services at the hospital. Under the contract, the hospital agreed to appoint to its medical staff all physician employees of the P.A. who received the affirmative recommendation of the credentials and executive committees of the medical staff, but *only* physician employees of the P.A. The contract authorized Sacred Heart to appoint a physician member of the P.A. to serve as chairman of the radiology department with responsibility to the hospital and its medical staff for professional and administrative supervision of the radiology department's operations. In addition, the contract required the P.A. to directly bill its patients, and specifically precluded the P.A. from incurring any liability on behalf of the hospital. Finally, the contract stated that the physician members of the P.A. were not employees of the hospital.

The P.A. elected Gould as its first president, and, on July 1, 1975, the hospital appointed him chairman of the radiology department. However, Gould did not enter into an employment contract with the P.A. until August 19, 1977 (complaint, attachment B), although the term **[*4]** of his contract was from January 1, 1976 to January 1, 1977, "and from year-to-year thereafter . . . unless either party gives the other written notice at least thirty (30) days prior to the end of the annual term . . . ." (para. 2) The P.A. could terminate the plaintiff's employment contract only upon the occurrence of one or more enumerated events constituting "cause" (para. 9).

On November 10, 1981, Gould was elected president of Sacred Heart's medical staff. Pursuant to the hospital's by-laws, Gould, as president of the medical staff, became an ex officio member of the hospital's executive committee and chairman of the medical staff's quality assurance committee.

The complaint alleges that, in personal conversations during the latter half of 1981, Gould recommended certain oil field exploration investments to defendants Hobgood, Post and Norman W. Haines, Jr., M.D. These defendants acted on the recommendation, but, early in 1982, their investments became "a financial burden" and they became "very dissatisfied" with them (para. 18c). On November 30, 1982, the P.A.'s board of directors voted to terminate Gould's employment, effective January 1, 1983. The P.A. notified the plaintiff **[*5]** of its decision in compliance with the notice requirement in the plaintiff's employment contract, "written notice at least thirty (30) days prior to the end of the annual term." (Complaint, attachment D). On December 21, 1982, after learning of his dismissal from the P.A., Gould approached the hospital's head administrator and requested permission to continue his radiology practice at the hospital. Two days later, the administrator denied his request.

Therefore, these operative facts seem to be clear: the hospital was contractually bound to utilize only radiologists employed by the P.A.; plaintiff Gould's employment contract with the P.A. could be terminated without cause by the P.A. upon written notice at least 30 days prior to the end of the annual employment term; and the P.A. complied with this provision in terminating the plaintiff.

II. *The Law and Discussion*.

A. *Count I*

The initial difficulty presented by Count I is in determining what claim it purports to assert. [1] The count is located in the complaint under the heading "Failure To Provide Due Process." The terminology of this heading suggests that the plaintiff in Count I is purporting to state a claim under the *due **[*6]** process clause of the Fourteenth Amendment to the Constitution of the United States* or under the corresponding clause of the Constitution of the State of Florida (Article I, Section 9). Consistent with this interpretation, Count I contains language associated with a substantive or a procedural due process claim. (paras. 24,29) Nevertheless, I can fairly conclude that the claim the plaintiff is attempting to state in Count I is that Sacred Heart, through Hardman, Zeiller, and others, and pursuant to a conspiracy among all defendants, terminated the plaintiff's radiology privileges without following the procedures required by Chapter 395, *Florida Statutes,* the by-laws of Sacred Heart, the Regulations of the Joint Commission on Accreditation of Hospitals in Florida, and the Regulations of the Department of Health and Rehabilitative Services ("HRS"). [2]

[*7] ***HN2***[]

To state a claim in federal court, the pleader need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." *Rule 8(a)(2), Federal Rules of Civil Procedure*. The purpose of this requirement is to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957)*. ***HN3***[] To give fair notice, the complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *In re Plywood Antitrust Litigation, 655 F.2d 627, 641 (5th Cir. Unit A 1981)* (emphasis in original).

[1] The difficulty is not occasioned because the claim is too tersely stated. The 45-page complaint in general cannot be characterized as a "short and plain statement" of the plaintiff's claims. *Rule 8(a)(2), F.R.Civ.P.*

[2] The plaintiff clearly has not stated a constitutional due process claim as there is no allegation in the complaint indicating that any defendant was acting under color of state law or was involved in state action. *See* *42 U.S.C. § 1983*; *Lugar v. Edmondson, 457 U.S. 922, 929, 101 S.Ct. 2744, 73 L.Ed.2d 482 (1982)*; ***Florida Canners Association v. State, 371 So.2d 503 (Fla. 2d DCA 1979)***, *aff'd sub nom,* *Coca-Cola Co., Food Division, Polk County v. State, 406 So.2d 1079 (Fla. 1981)*. The defendants' argument that Count I should be dismissed because Gould assertedly has no property interest in continued radiology privileges at Sacred Heart, thus, is misdirected to the extent that it assumes there has been a constitutional due process claim asserted.

These principles of pleading indicate that Count I does not state a claim. Obviously, a material element of the asserted claim in Count I is a violation of the enumerated laws and rules. The facts alleged in the complaint, however, do not indicate that the termination of the plaintiff's radiology privileges was in violation of these laws and rules.

(1) *The alleged basis of the termination* **[*8]** . Conspicuously absent from Count I is an allegation of the reason Sacred Heart terminated or purported to terminate the plaintiff's radiology privileges. None of the complaint's allegations suggests that the hospital ostensibly or in fact acted for reasons covered within Chapter 395, *Florida Statutes* (1981), or the regulations promulgated thereunder. To the contrary, the plaintiff alleges in Count VI that the termination of his privileges was not for cause. Specifically, the plaintiff alleges there that, in furtherance of a conspiracy among the defendants and others, the P.A. dismissed him, and Sacred Heart terminated his radiology privileges, "without justification or cause, but for reasons other than his inability to provide competent, high quality, medical attention and as a consequence of their dissatisfaction with an investment in which Dr. Gould recommended they become involved." (para. 55) [3]

[*9] (2) *The scope of the subject laws and rules*. Chapter 395, *Florida Statutes* (1981), provides for the licensing and regulation of hospitals in Florida. The only part of the Chapter that applies to revocations of staff privileges is ***HN4***[] Section 395.0115, which governs actions by a "licensed facility [4] . . . to suspend, deny, revoke, or curtail the privileges of any staff member for good cause . . . ." § 395.0115(1) (emphasis added). [5] ***HN5***[] Under the statute, "the procedures for such actions shall comply with the standards outlined by the Joint Committee on Accreditation of Hospitals, the Accreditation Association for Ambulatory Health Care, and the Medicare/Medicaid conditions of participation." § 395.0115(1) (emphasis added). This language unambiguously demonstrates that ***HN6***[] the procedures proscribed in Section 395.0115 do not apply where a hospital is not acting under the "good cause" rationale within the meaning of the statute.

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[3] Although in this allegation the plaintiff attributes the dissatisfaction with his investment advice to all the defendants, in paragraph (18) he identifies only Hobgood, Post, and Haynes as the defendants who received and acted on this advice.

[4] ***HN7***[] A "licensed facility" is "a hospital or ambulatory surgical center licensed in accordance with [Chapter 395]." *§ 395.002(9)*.

[5] ***HN8***[] Section 395.0115 reads:

(1) The governing board of any licensed facility, after considering the recommendations of its medical staff, is authorized to suspend, deny, revoke, or curtail the staff privileges of any staff member for good cause, including, but not limited to:

(a) Incompetence.

(b) Negligence.

(c) Being found to be a habitual user of intoxicants or drugs to the extent that he is deemed dangerous to himself or others.

(d) Being found liable for medical malpractice by a court of competent jurisdiction.

(e) Mental or physical impairment which may adversely affect patient care.

However, the procedures for such actions shall comply with the standards outlined by the Joint Commission on Accreditation of Hospitals, the American Osteopathic Association, the Accreditation Association for Ambulatory Health Care, and the 'Medicare/Medicaid Conditions of Participation.'

(2) There shall be no liability on the part of, and no cause of action of any nature shall arise against, any licensed facility, its governing body and governing body members, medical staff, or disciplinary body, or its agents or employees for any action taken in good faith and without malice in carry out the provisions of this section.

Section 395.0115 was amended in 1985 by Chapter 85-175, Section 3, after the incidents occurred which gave rise to this suit. The parties do not contend that the amendment applies retroactively, and, thus, I apply Section 395.0115 as it existed when it was allegedly violated.

[*10] Similarly, the facts alleged in the complaint do not show that the regulations of HRS pertaining to terminations of staff privileges [i.e., Sections 10D-28.56(1)(f) and 10D-28.58(2)(d), Florida Administrative Code (984)] apply here. In relevant part, ***HN9***[] Section 10D-28.56(1)(f) prohibits a hospital from acting on a request for appointment or reappointment to its medical staff or from dismissing a staff member "without prior referral to the medical staff for their recommendation . . . ." [6] At first reading, it may appear that this regulation applies to any dismissal of a staff member, and, therefore, would apply to the plaintiff's loss of radiology privileges, regardless of the basis of Sacred Heart's action. However, the regulation's requirement of medical staff consultation logically indicates that the regulation is applicable only to dismissals for reasons relating to the subject physician's ability to competently practice medicine. The benefit of such consultation regarding matters unrelated to professional competence (e.g., where, as is alleged here, the hospital intends to terminate staff privileges **[*11]** for contractual reasons) would be minimal or non-existent. The only reasonable construction, therefore, is that HRS intended Section 10D-28.56(1)(f) to apply only to dismissals relating to a physician's ability to practice medicine, where consultation with the medical staff would assist the hospital's decision-making.

This interpretation is consistent with a HRS' authority under Chapter 120, and Section 395.005, **[*12]** *Florida Statutes* (1985). The latter statutory section authorizes HRS to promulgate and enforce rules "to implement the provisions of this part [part 1 of Chapter 395, Sections 395.001-395.25]." HRS' regulations pertaining to reductions in staff privileges should be read in light of the agency's limited statutory mandate. It must be assumed that HRS promulgated the regulations mindful that its authority was solely to implement the provisions of part 1 of Chapter 395.

As noted above, the sole provision in Chapter 395 relating to reductions in staff privileges is section 395.0115, which provides only for "good cause" reductions. In accordance with its limited mandate, HAS presumably has promulgated regulations which do no more than implement Section 395.0115. Thus, the agency's regulations governing reductions in staff privileges are properly interpreted to regulate only reductions for "good cause."

The only other HRS regulation governing reductions in staff privileges is ***HN10***[] Section 10D-28.58(2)(d), which provides in pertinent part that a medical staff recommendation for the withdrawal of a staff member's privileges must be preceded by "a thorough investigation by the medical staff **[*13]** or a committee thereof, with the subject member being given the right of hearing before the medical staff or a committee thereof." The procedures required by Section 10D-28.58(2)(d) expressly apply to a recommendation of the medical staff or a committee thereof. The complaint does not indicate that such a recommendation was made. Therefore, the complaint also fails to allege that the termination of the plaintiff's radiology privileges violated Section 10D-28.58(2)(d).

The complaint also fails to allege facts which demonstrate that any of the procedures prescribed in Sacred Heart's by-laws applied to the termination of the plaintiff's radiology privileges. Article III, Section 3(a) of those by-laws permits Sacred Heart to reduce a doctor's clinical privileges "only after there has been a recommendation from the Medical and Dental Staff as provided in these by-laws." Under Article VI, *Section 1(c)*, the curtailment of clinical privileges must be based upon "the direct observation of care provided, review of the records of patients treated in this or other hospitals, review of the records of the medical and dental staff which document the evaluation of the member's participation in the **[*14]** delivery of medical care, and the results of a health status examination in accordance with Article V, Section (b)." Article VII governs only "corrective action" where a physician's conduct is "considered to be lower than the standards of the Medical or Dental Staff or to be disruptive to the operation of the hospital . . . ." Finally, the appellate procedures set out in Article VIII apply only when a physician receives notice of a recommendation of the executive committee or, in some instances, of a decision of the hospital, that adversely affects his status as a member of (or applicant for) the medical staff.

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[6] While it is not entirely clear, it appears that the plaintiff does not allege that he was dismissed from Sacred Heart's medical staff; rather, he alleges only that his radiology privileges at the hospital were revoked. while revocations of staff privileges are not covered by the literal language of Section 10D-28.56(1)(f), it is unlikely that HRS intended the regulation to reach dismissals but not curtailments of staff privileges. This interpretation is fortified by the reference in Section 10D-28.58(2)(d), a coordinate regulation, to "withdrawal of any privileges of a member of the medical staff . . . ."

Each of these by-law provisions concerns adjustments to clinical privileges based on the subject physician's professional performance and abilities. Moreover, Article VIII applies only when a physician has received the specified notice. The complaint's allegations, thus, do not show that these provisions governed the termination of his radiology privileges.

The claim in Count I for a violation of Sacred Heart's by-laws is also deficient because of an absence of authority which permits a plaintiff to sue directly under a hospital's by-laws. To be sure, a doctor may bring a breach **[*15]** of contract claim to enforce those by-laws on the theory that the by-laws constitute a contract between the hospital and its medical staff. *See Lawler v. Eugene Wuesthoff Memorial Hospital, 497 So.2d 1261, 1264 (Fla. 5th DCA 1986)*. But this does not support a claim that the by-laws themselves are actionable (on a non-contract theory of recovery).

The availability of a contract claim also obviates the need to bring a separate claim directly under the by-laws. The plaintiff can, and has, sued Sacred Heart in contract to enforce Sacred Heart's by-laws. (*See* Count V) Thus, even if Count I presented a legally cognizable claim against Sacred Heart for a violation of its by-laws, that claim would merely duplicate a clearly recognized claim, asserted in Count V, for breach of contract. *See* *Rule 12(f), Federal Rules of Civil Procedure*. [7]

[*16] In sum, the above discussion of Chapter 395, the HRS regulations, and Sacred Heart's by-laws shows that the complaint is devoid of any allegation that affirmatively indicates the applicability of that statute and the related rules. On the other hand, however, its allegations do not preclude the possibility that the laws and rules applied to the termination of the plaintiff's radiology privileges. The plaintiff has alleged merely that Sacred Heart terminated those privileges in fact without cause. He has not alleged, however, that the hospital did not purport to terminate the plaintiff for cause. Under the allegations of the complaint, it is possible, for example, that the hospital told the plaintiff that his radiology privileges were being revoked because of his asserted incompetence in order to mask an actual, but improper, motive. In such a situation, where the hospital is ostensibly revoking a staff member's privileges for his alleged incompetence, or other "cause," the physician is entitled to the procedural protections of Section 395.0115.

I have found no reported decision addressing the question of whether Section 395.0115 encompasses this situation. However, I believe my construction **[*17]** of that statutory section is consistent with its purpose. Logic suggests that one of its purposes in providing procedural protection was to prevent sham "for cause" revocations of staff privileges. Because the procedures insure that the hospital has a solid evidentiary basis for its decision, it prevents a hospital from acting ostensibly for cause, but actually for improper motivations, where a finding of cause is unsupportable.

(3) *The Weathers principle*. The plaintiff argues that he has stated a claim in Count I for a violation of Section 395.0115 on the ground that the statute prohibits revocations of staff privileges for any reasons other than those set out in the statute. His contention is based on the principle, articulated in *In re Weathers, 31 So.2d 543 (Fla. 1947)*, that "[w]here a board or officer is granted the right and power to revoke a license for certain named reasons, causes, or crimes, set out in the statutes, a license may not be revoked for any other or different cause or causes not clearly within the provisions of the statutes . . . ." *31 So.2d at 544* (quoting *Kentucky State Board of Dental Examiners v. Crowell, 294 SW 818, 819)*. I am not persuaded, **[*18]** however, that this principle should govern the interpretation of Section 395.0115, or that it has any application under the facts of this case.

HN11[] when a statute establishes a licensing system, the terms of the statutory license are necessarily defined by the statute. Thus, the authority to revoke the license exists only to the extent conferred by the statute. If the statute sets out the grounds for revocation, there is no authority to revoke except for those grounds. It follows that

[7] The plaintiff makes no mention in his memorandum in opposition to the instant motions of the regulations of the Joint Commission on Accreditation of Hospitals. Nor has he furnished this Court with a copy of the portions on which he relies. Thus, I must assume that he no longer intends to rely upon them. Moreover, there is some question whether a private cause of action exists for a violation of those regulations.

the principle enunciated in *In re Weathers, supra*, properly applies to the revocation of a statutory license. *See In re Weathers, supra*; *Federgo Discount Center v. Department of Professional Regulation, 452 So.2d 1063, 1066 (Fla. 3rd DCA 1984)*; *Bach v. Florida State Department of Dentistry, 378 So.2d 34, 36 (Fla. 1st DCA 1980)*; *State v. Board of Business Regulation, 304 So.2d 473, 476-77 (Fla. 1st DCA 1974)*. However, I conclude that it should not, and does not, apply here.

The authority to revoke hospital staff privileges predates the enactment of Section 395.0115. Subject to the terms of its contract with a physician, a hospital has always possessed the authority to revoke that doctor's **[*19]** staff privileges. *See Smith v. Piezo Technology and Professional Administrators, 427 So.2d 182, 184 (Fla. 1983)*. Therefore, although Section 395.0115(1) states that a licensed facility "is authorized" to suspend, deny, revoke, or curtail staff privileges, that statutory provision did not confer on hospitals in Florida any authority that they did not already possess. It follows that the purpose of this language could not have been to grant hospitals the authority to revoke or curtail staff privileges. Rather, as demonstrated by the structure of ***HN12***[] Section 395.0115, it was designed simply to define the types of disciplinary actions to which the protections set out in other parts of Section 395.0115 apply.

HN13[] Section 395.0115 provides for two forms of protection: (1) it affords medical staff members certain procedural guarantees [§ 395.0115(1)]; and (2) it provides licensed facilities, their medical staffs, and others limited immunity from liability [§ 395.0115(2)].

HN14[] Under Section 395.0115, these protections do not apply to all actions by a hospital against its medical staff members. They apply, instead, only to the suspension, denial, revocation, or curtailment of staff privileges for **[*20]** good cause, such as incompetence, negligence, or significant mental or physical impairment. Section 395.0115 limits the scope of its protections by setting out in subsection (1) the actions which are subject to those protections. These actions are then simply referenced in the parts setting out the protection. For example, Section 395.0115(1) provides that "the procedures for *such actions* shall comply with [certain enumerated] standards . . . ." (emphasis added) Similarly, subsection (2) immunizes a licensed facility, its medical staff members, and others from damages "for any action taken without intentional fraud in *carrying out the provisions of this section*." (emphasis added) In short, Section 395.0115, read as a whole, indicates that the language in subsection (1) "authorizing" licensed facilities to suspend, deny, revoke, or curtail staff privileges was not intended to confer authority, but merely to define the scope of the protections afforded in other parts of Section 395.0115.

This statutory construction compels the conclusion that the legislature did not intend for Section 395.0115 to set out the exclusive grounds for suspending, denying, revoking or curtailing staff **[*21]** privileges. [8]

This reasoning applies with equal force to the HRS regulations and Sacred Heart's by-laws. Accordingly, Count I is DISMISSED for failure to state a claim.

B. *Count II*

In Count II of the complaint, the plaintiff challenges the P.A.'s termination of his employment contract. He alleges that the P.A. violated the same laws and rules enumerated in Count I by terminating the plaintiff's contract without following the procedures prescribed in those laws and rules. He appears to argue that the public policy of the state of Florida obligated **[*22]** the P.A. to comply with those procedural requirements. His argument is grounded on the following reasoning:

The Florida Legislature (apparently through enactment of Chapter 395) has indicated that it is the public policy of the state to provide members of hospital medical staffs in Florida with due process before restrictions on their staff privileges may be imposed. Exclusive contracts between a hospital and a professional association allow this public

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[8] Under the plaintiff's interpretation, Section 395.0115 would effectively bar a hospital from entering into an exclusive contract with a professional association. Given the recognized benefits to the public of such arrangements *[see, e.g., Jefferson v. Parish Hospital District No. 2, 466 U.S. 2, 43-44, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984)* (O'Connor, J., concurring)], I find nothing to indicate that the legislature intended Section 395.0115 to prohibit such contracts.

policy to be circumvented in the situation where the P.A. dismisses a physician employee pursuant to contract. The plaintiff apparently concludes that, because the hospital is contractually bound to withdraw the physician's privileges, it is encumbent upon the P.A. to provide the physician process in accordance with Florida's public policy.

I am not persuaded by this novel argument. Preliminarily, I point out that, by its terms, neither Chapter 395 nor the rules thereunder applies to the P.A. Section 395.0115 expressly applies to a "licensed facility," which is defined in the statute as "a hospital or ambulatory surgical center licensed in accordance with [Chapter 395]," *Section 395.002*. Likewise, the relevant provisions of HRS' regulations **[*23]** apply specifically to a hospital "governing authority," *Section 10(d)-28.56*, and a hospital "medical staff," *Section 10(d)-28.58*. Finally, the sections of Sacred Heart's by-laws pertaining to adjustments in clinical privileges expressly apply only to certain named physicians, departments, and committees in the hospital's administrative heirarchy, such as the governing board and the Executive Committee. *See* Article III(3)(a), Article VI(1)(c), Article VII, Article VIII.

The concept of public policy is sometimes utilized as the basis to declare a contract or one of its provisions void. *See, e.g., John's Pass Seafood Co. v. Weber, 369 So.2d 616 (Fla. 2d DCA 1979)*. The legal justification for invalidating a contract on public policy grounds was clearly articulated by the Supreme Court of Florida in *Bituminous Casualty Corp. v. Williams, 17 So.2d 98 (Fla. 1944)*:

It is only in clear cases that contracts will be held void as contrary to public policy as it is a matter of great public concern that freedom of contract be not lightly interfered with. ***HN15***[] When a particular contract, transaction, or course of dealing is not prohibited under constitutional or statutory provision, or prior **[*24]** judicial decision, it should not be struck down on the ground that it is contrary to public policy, except it be clearly injurious to the public good or contravene some established interest of society. Courts, therefore, should be guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clearly to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties sui juris.

17 So.2d at 101-02 (citations omitted).

The plaintiff has not identified the contract which he is challenging on public policy grounds. Presumably, it is the combined effect of the two contracts involved in this case: the exclusive contract between the P.A. and Sacred Heart and plaintiff's employment contract with the P.A. The former contract permitted the hospital to revoke his staff privileges without following the procedures proscribed in Section 395.0115, and the latter contract allowed the P.A. to dismiss him at the end of his **[*25]** annual term of employment.

Neither contract facially violates Section 395.0115 or its implementing regulations. *Cf. Burroughs Corp. v. Sun Togs of Miami, Inc., 472 So.2d 1166 (Fla. 1985)*. Thus, either contract can be invalidated on public policy ground only if "it be clearly injurious to the public good or contravene some established interest of society." *Bituminous Casualty Corp. v. Williams, supra, 17 So.2d at 101*.

Section 395.0115's requirement that actions to revoke or modify staff privileges comply with certain procedural standards can hardly be characterized as being bound up with the "public good" or an "established interest of society." *Id. at 101*. The procedural requirement obviously is designed, not to protect the welfare of the general public, but to protect the much more limited professional and financial interests of physicians who enjoy or seek to obtain hospital staff privileges. A contract that permits the circumvention of this requirement, thus, is not clearly injurious to the public good or some established societal interest. [9]

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[9] I note that while the P.A.'s contract with Sacred Heart, which was signed by the plaintiff on behalf of the P.A., enables the hospital to summarily revoke staff privileges under certain circumstances, that is not its only effect. The contract also provides advantages to the hospital, patients, and members of the P.A. *See Jefferson Parish Hospital District No. 2 v. Hyde, supra, 466 U.S. at 43* (O'Connor, J., concurring).

[*26] I conclude, therefore, that neither contract at issue here is void as against public policy. I further conclude that the P.A. was not obligated by contract, statute, or public policy to afford the plaintiff any "due process," other than 30 days' written notice specified in the contract, before allowing his annual employment contract to expire. The notice was given as required. Accordingly, Count II is DISMISSED, for failure to state claim.

C. *Count III*

In Count III, the plaintiff alleges that the P.A. breached his employment contract when it terminated the contract without cause as defined in paragraph (9) of the contract. A review of the contract and the allegations of the complaint, however, unambiguously demonstrates that no breach occurred.

In paragraph (2), the contract defines its term:

The term of this employment contract shall be from January 1, 1976, to January 1, 1977, and from year-to-year thereafter, under the same terms and conditions hereof (except for salary and expense reimbursement which may be changed upon oral agreement of the parties) unless either party gives the other written notice at least thirty (30) days prior to the end of the annual term, that the **[*27]** employment is to terminate.

Paragraph (9) of the contract specifies the grounds upon which the P.A. may terminate the contract:

The occurrence of any one or more of the events listed below shall constitute cause for the Board of Directors to terminate this contract with the employee and upon affirmative vote of a majority of the Board of Directors, this contract shall be terminated by the corporation and the employee shall cease to be employed: [9 events are listed].

Attached to the complaint as Exhibit D is a copy of a letter from Post to the plaintiff dated November 30, 1982. The expressed purpose of the letter was to give the plaintiff "written notice that [his] employment with the corporation [would] terminate effective January 1, 1983." In the letter, Post certified that he personally delivered the letter to Gould on November 30, 1982.

Significantly, the letter does not indicate that the plaintiff's employment contract was terminated pursuant to paragraph (9); rather, it states that the plaintiff's employment with the corporation was terminated, in the manner specified in paragraph (2).

This conclusion is consistent with the P.A.'s decision to make the effective date of the **[*28]** plaintiff's dismissal January 1, 1983, and to certify that the notice of dismissal was delivered to the plaintiff on November 30, 1982. These dates were undoubtedly chosen in order to comply with the notice provision of paragraph (2). Specifically, the P.A. selected January 1, 1983, as the effective date of the plaintiff's termination because that was the terminal day of his annual employment term as specified in the contract. I recognize that the term "from January 1 . . . to January 1" may present an issue of whether it encompasses more than one year. The use of "to" instead of "through" makes it clear to me that the contract was for a calendar year term. Since the plaintiff was notified of his dismissal on November 30, 1982, he was given the requisite 30 days' notice. In short, the letter of November 30, 1982, indicates that the P.A. dismissed the Plaintiff by not renewing his annual contract in accordance with paragraph (2) of the complaint, not by terminating the contract pursuant to paragraph (9).

This conclusion conflicts with the plaintiff's allegation in Count III that the P.A. terminated his contract. In this situation, where there is a disparity between an allegation in **[*29]** the complaint and an attached document, the document controls. *Dyal v. Union Bag - Camp Paper Corp., 263 F.2d 387, 393 (5th Cir. 1959)*; 5 C. Wright & A. Miller, *Federal Practice and Procedure,* § 327 at 492-93 (1969).

Under the express and unambiguous terms of the contract, the plaintiff's employment could be terminated at the end of an annual term merely upon 30 days' written notice. [10] The letter of November 30, 1982, constitutes such

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[10] ***HN16***[] An unambiguous contract provision can be interpreted as a matter of law, while an ambiguous provision raises a question of fact as to the parties' intent. *Scott Paper Co. v. Taslog, Inc., 638 F.2d 790, 796 (5th Cir. 1981)*. The preliminary question of whether an ambiguity exists is a question of law. *Freeman v. Continental Gin Co., 381 F.2d 459, 465 (5th Cir. 1967)*.

notice. Thus, the contract and the attached exhibits affirmatively demonstrate that the plaintiff's termination did not breach the contract.

[*30] However, the plaintiff by affidavit states that he signed the contract with the understanding and intention that under the contract he could be terminated only for the causes listed in paragraph (9). (Doc. 30) In motions to strike the affidavit, the defendants argue that the affidavit should not be considered by this Court because, among other things, it contravenes the parol evidence rule. I agree.

As I discussed in note (10) *supra*, paragraph (2) of the complaint is clear and unambiguous. The plaintiff cannot now attempt to change its meaning through his affidavit. *See, e.g., Jaffee v. Jaffee, 394 So.2d 443, 446 (Fla. 3d DCA 1981)*; *Pearson v. Pearson, 342 So.2d 1018, 1019 (Fla. 4th DCA 1977)*; *Smith Engineering and Construction Co. v. United States Fidelity and Guarantee Co., 199 So.2d 302, 304 (Fla. 1st DCA 1967)*.

The affidavit thus presents facts which would be inadmissible under the parol evidence rule. Accordingly, it may not be considered on this motion. *See Rule 12(b), F.R.Civ.P.*; Rule 56(e) ("affidavits . . . shall set forth such facts as would be admissible in evidence . . . .").

The plaintiff also urges by allegation and argument that he "had an expectancy **[*31]** that his contract would continue for so long as he provided competent medical service to the P.A. . . . ." (Complaint, para. 42) According to the plaintiff, this expectancy is enforceable in contract. However, the plaintiff's position is not supported by the law in Florida. The Second District Court of Appeal in *Muller v. Stromberg Carlson Corp., 427 So.2d 261 (Fla. 2d DCA 1983)*, considered and rejected a similar argument on the ground that ***HN17***[] "[m]ere expectations are insufficient to create a binding term of employment." *427 So.2d at 268*; *see Maguire v. American Family Life Assurance Co., 442 So.2d 321, 323 (Fla. 3rd DCA 1983)*. Count III is also DISMISSED, for failure to state a claim.

D. *Count IV*

In Count IV, the plaintiff alleges that "[a]s a consequence of the requirements of the Agreement between Sacred Heart and the P.A., the requirements of Chapter 395 of the *Florida Statutes* and the By-Laws of the hospital for which the P.A. was the exclusive contracting agent to provide radiology services, the employment contract between the P.A. and Dr. Gould required, expressly or implied in law, P.A. to comply with the By-Laws of Sacred Heart prior to terminating that employment." **[*32]** (para. 46) The plaintiff sues the P.A. in this Count for breach of contract on the ground that it allegedly dismissed the plaintiff without complying with Sacred Heart's by-laws.

A careful review of the plaintiff's contract with the P.A. reveals no contract language that even arguably incorporates or obligates the P.A. to adhere to Sacred Heart's by-laws. I must conclude, therefore, that the plaintiff's allegation in the alternative that his employment contract expressly required the P.A. to comply with those by-laws is frivolous. *See Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974)*.

Nor do I find any legal basis for the plaintiff's allegation that the P.A. had an implied in law contractual obligation to comply with the by-laws. The plaintiff makes no attempt in his memorandum in opposition to the subject motions to explain the legal foundation for this allegation. He simply points out that he has made the allegation. Apparently, he believes that the allegation must be accepted as true for purposes of this motion. However, on a motion to dismiss, unsupported conclusions of law are not admitted. *E.g.*, *Stanton v. United States, 434 F.2d 1273,* ***[*33]*** *1276 (5th Cir. 1970)*.

I can conceive of no legal principle under which Sacred Heart's by-laws would be incorporated into the plaintiff's employment contract with the P.A. If the plaintiff is asserting that the P.A.'s contractual obligation to follow the by-laws arose because of public policy, that assertion is rejected for the reasons discussed earlier in this order. Accordingly, Count IV is DISMISSED, for failure to state a claim.

A contract is not rendered ambiguous merely because the parties disagree as to its paper construction. *Id.* I find that paragraph (2) of the plaintiff's employment contract unambiguously establishes that with proper notice the employment relationship was terminable at will at the end of the annual contract term.

E. *Count V*

The plaintiff alleges in Count V that he had a contract with Sacred Heart which required the hospital to adhere to its by-laws. On the reasoning set out in the earlier discussion of Count I, Count V is also DISMISSED, for failure to state a claim.

F. *Count VI*

Neither in Count VI nor in his memorandum in opposition to the instant motions does the plaintiff plainly articulate the legal theory on which Count VI is premised. Apparently, because Count VI is located under the heading "Tortious Interference," some of the defendants have interpreted the Count to attempt to state a claim for tortious interference with a contractual or business relationship. However, read in light of Counts VII-IX, which clearly purport to set forth claims for **[*34]** tortious interference with contractual and business relationships, Count VI seems to me to assert a claim for the independent tort of conspiracy. Moreover, under the facts alleged in the complaint a claim for conspiracy exists, the plaintiff is entitled to proceed on that claim, regardless of whether he has explicitly pled that theory of recovery. *See* *Thompson v. Allstate Insurance Co., 476 F.2d 746, 749 (5th Cir. 1973)*; 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1219 (1969). The pertinent inquiry then is whether the complaint alleges facts which are actionable as a civil conspiracy.

According to the allegations in Count VI, the defendants and others conspired ultimately to destroy the plaintiff's ability to practice medicine in Pensacola. In furtherance of this conspiracy, the plaintiff alleges, the P.A. terminated his employment and Sacred Heart revoked his staff privileges. In paragraph (56), the plaintiff alleges:

The Defendants knowingly conspired together and with other unnamed persons for the purpose of destroying Dr. Gould's ability to practice medicine in Pensacola, Florida. In as much as, on information and belief, the other hospitals in the Pensacola, **[*35]** Florida, area also had exclusive arrangements with contracting physicians to provide radiology services, when the Defendants conspired to terminate his contract with the P.A., which had the exclusive contract at Sacred Heart to provide radiology service, and to terminate his medical staff privileges to provide radiology services at Sacred Heart there was no other hospital facility in Pensacola at which Dr. Gould could practice his specialty.

HN18[] Not all conspiracies are independently actionable in tort. *See* *Snipes v. West Flagler Kennel Club, Inc., 105 So.2d 164, 165-66 (Fla. 1958)*. The distinguishing features of an independently actionable conspiracy are: (1) "some peculiar power of coercion possessed by the conspirators by virtue of their combination, which power an individual would not possess;" and (2) a malicious purpose to harm the plaintiff. *Churruca v. Miami Jai-Alai, Inc., 353 So.2d 547, 549-50 (Fla. 1977)*. I find that the plaintiff has not stated a claim for civil conspiracy because the allegations of the complaint indicate that the power to coerce or injure the plaintiff as alleged did not arise by virtue of the defendants' alleged combination. Instead, that power resided **[*36]** in the P.A. alone on the basis of its "at-will" contract with the plaintiff.

Under the facts as alleged in the complaint, the P.A. had power, absent any type of conspiracy, to "destroy" the plaintiff's ability to practice medicine at Sacred Heart. Alone, it could have terminated the plaintiff's employment, and this would have necessitated Sacred Heart, under its contract with the P.A., to revoke the plaintiff's radiology privileges.

Thus, the plaintiff has not alleged any facts which show that the alleged coercion against the plaintiff wad possible only through concerted action by the defendants. To the contrary, the facts alleged in the complaint affirmatively demonstrate that the power to "destroy" the plaintiff's radiology practice at Sacred Heart did not depend on concerted action by the defendants. *See* *Margolin v. Morton F. Plant Hospital Association, Inc., 342 So.2d 1090 (Fla. 2d DCA 1977)*.

It could be argued that because only the P.A. could unilaterally wrought the destruction of the plaintiff's radiology practice at Sacred Heart, Count VI should not be dismissed as to the other defendants, who could achieve that outcome only by conspiring with the P.A. However, my research **[*37]** has uncovered no reported decision of a Florida court which has extended the independent tort of conspiracy to such a situation. In each case, the power to coerce or injure the plaintiff was not possessed by any of the defendants alone, and did not arise until the defendants acted in concert. *See* *Churruca v. Miami Jai-Alai, Inc., supra*; *Margolin v. Morton F. Plant Hospital Association, Inc., supra*; *Snipes v. West Flagler Kennel Club, Inc., supra.* In fact, the Supreme Court of Florida in *Churruca, supra*, expressly held that a conspiracy is actionable in tort only "if the plaintiff can show some peculiar power of coercion possessed by the conspirators by virtue of their combination, *which power an individual would not possess* . . . ." *353 So.2d at 550* (emphasis added).

Accordingly, Count VI is DISMISSED, for failure to state a claim.

G. *Count VII*

Count VII asserts claims against each defendant except the P.A. for conspiracy to tortiously interfere and actual interference with the plaintiff's employment contract with the P.A. The defendants argue, inter alia, that a breach of that contract is an essential element of the plaintiff's claim, and that the complaint **[*38]** indicates that the P.A. did not breach the contract.

(1) *Tortious interference*. while interference with a contractual relationship and interference with a business relationship are treated as distinct torts in Florida, it is apparent that the former is subsumed in the latter. Florida courts have held that ***HN19***[] a contract is sufficient, but not necessary, evidence of a business relationship. *See, e.g., Tamiami Trail Tours, Inc. v. Cotton, 463 So.2d 1126, 1127 (Fla. 1985)*. A tortious interference claim is designed to redress the loss of the advantage of a business relationship. *See* *R. C. Hilton Associates, Inc. v. Stan Musial and Biggie's, Inc., 702 F.2d 907, 909 (11th Cir. 1983)* (applying Florida law). The causation question, therefore, is not necessarily whether the interference induced a breach of contract, but more generally, whether it caused a loss of the gain the plaintiff would have received absent the interference. *See* *United Yacht Brokers, Inc. v. Gillespie, 377 So.2d 668, 672 (Fla. 1979)*. The plaintiff, of course, must establish that if the defendant had not meddled in his business relationship he would have profited from that relationship. *See, id. at 672*; **[*39]** *Landry v. Hornstein, 462 So.2d 844, 846-47 (Fla. 3d DCA 1985)*.

Therefore, the issue here is whether the plaintiff has adequately alleged that the defendants interfered with an advantageous business relationship between him and the P.A. [11] The plaintiff alleges that he had an employment relationship with the P.A. He also alleges that the defendants conspired to and did induce the P.A. to terminate that relationship. His allegations that he had provided high quality radiology services to the satisfaction of the P.A. reasonably infer that his annual employment contract would have been renewed but for the defendants' conspiracy. Accordingly, I find that Count VII states a claim for tortious interference with a business relationship.

[*40] (2) *Third-party to the contract*. This conclusion, however, does not end my inquiry. I must also determine which defendants may be sued on this theory. Under established law in Florida, ***HN20***[] parties to an employment relationship cannot be liable for interference with the relationship. *Muller v. Stromberg Carlton Corp., 427 So.2d 266, 271 (Fla. 2d DCA 1983)*; *Buckner v. Lower Florida Keys Hospital District, 403 So.2d 1025, 1028 (Fla. 3rd DCA 1981)*. Under this principle, the P.A. obviously cannot be (and has not been) sued in Count VII. However, whether Hobgood and Post, as employees and shareholders of the P.A., also fall within the scope of this principle is a more difficult question.

The dispositive rule in Florida has been that if an employee (or other agent) of the entity which has the business relationship with the plaintiff is exercising his authority as an employee when he interferes with the relationship, he is considered a party to the relationship. *See, e.g.,* *Rabren v. Gulf Towing Co., 434 So.2d 340, 341 (Fla. 2d DCA 1983)*; *Buckner v. Lower Florida Keys Hospital District, supra, 403 So.2d at 1028*; *West v. Troelstrup, 367 So.2d 253, 255 (Fla. 1st DCA 1979)*; **[*41]** *Covert v. Terri Aviation, Inc., 197 So.2d 12, 13 (Fla. 3rd DCA 1967)*. However, in *Sloan v. Sax, 505 So.2d 526 (Fla. 3rd DCA 1987)*, the Third District Court of Appeal recognized an exception to

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[11] I note that Count VII alleges that the defendants conspired to interfere with the plaintiff's "contract *and employment relation*." (para. 66) (emphasis added). This language reveals the plaintiff's intention to sue for interference with his relationship with the P.A. generally, and not merely as defined by his employment contract. Cf. *Thompson v. Allstate, supra, 476 F.2d at 749*.

this rule. The court held that ***HN21***[] the employee is properly treated as a third-party to the employer's business relationship with the plaintiff if he was not acting on his employer's behalf. (*i.e.*, in the interest of the employer) when he interfered with the relationship, even though the interference was pursuant to his authority as an employee. *505 So.2d at 528*. Thus, on the basis of an allegation that the breach of the plaintiff's contract was harmful to the defendant's employer, the court determined that the "third-party" requirement was satisfied. *Id.* Because I can discern no "persuasive indication" that the Supreme Court of Florida would reject the exception set out in *Sloan v. Sax, supra*, I must apply that exception in this case. *See* *Studstill v. Borg Warner Leasing, 806 F.2d 1005, 1007 (11th Cir. 1986)*.

The complaint alleges facts which demonstrate that the plaintiff's termination was detrimental to the P.A. The plaintiff alleges that his termination financially benefited **[*42]** Hobgood and Post because they then shared the P.A.'s revenues that previously had been allocated to the plaintiff. (para. 63) This allegation suggests that the two defendants had their own interests, not the P.A.'s, in mind when they decided to terminate the plaintiff's employment. More importantly, the complaint alleges that the plaintiff had provided high quality radiology services to the P.A.'s patients (para. 62), that the plaintiff was the only employee of the P.A. who could provide certain special radiology services required by some of the P.A.'s patients (para. 73), and that the quality of the P.A.'s services substantially declined after the plaintiff's dismissal (para. 93(g)). I conclude, therefore, that under the factual allegations of the complaint, Hobgood and Post should not be treated as parties to the plaintiff's employment relationship with the P.A., and that Count VII states a claim against them for tortious interference with the relationship.

(3) *Conspiracy.* The plaintiff alleges in Count VII that the tortious interference was pursuant to a conspiracy among the defendants and others. ***HN22***[] This type of conspiracy, unlike the independent tort of conspiracy discussed **[*43]** in part II(E), *supra*, requires proof of an independent wrong or tort. *See* *American Diversified Insurance Services, Inc. v. Union Fidelity Life Insurance Co., 439 So.2d 904, 906 (Fla. 2d DCA 1983)*. The conspiracy is simply a means of spreading liability among all co-conspirators for a wrong done by only some conspirators in furtherance of the conspiracy. *See* *Donofrio v. Matassini, 503 So.2d 1278, 1281 (Fla. 2d DCA 1987)*; *Nicholson v. Kellin, 482 So.2d 931, 939 (Fla. 5th DCA 1985)*. Since I have concluded that Count VII states a claim for tortious interference, I further conclude that it also states a claim for conspiracy to so interfere. Therefore, the defendants' motions to dismiss are DENIED as to Count VII.

H. *Count VIII*

In Count VIII, the plaintiff alleges that Haines, Hobgood, Post, the P.A. and other unnamed persons conspired to and did intentionally and unjustifiably interfere with the plaintiff's relationship with Sacred Heart. According to the allegations in Count VII, that relationship was an employment relationship evidenced by an express or implied contract under which the hospital extended radiology privileges to the plaintiff.

I find that the facts alleged **[*44]** in the complaint are sufficient to state a claim that the plaintiff had an advantageous business relationship with Sacred Heart in the form of radiology privileges and that the defendants tortiously interfered with that relationship. Accordingly, for the reasons outlined in the discussion of Count VII, I conclude that Count VIII presents a legally sufficient claim for tortious interference with a business relationship. [12]

[*45] I. *Count IX*

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[12] Since the conspiracy is alleged to include others besides the P.A., Hobgood, and Post, the conspiracy does not run afoul of the principle that a corporation cannot conspire with its employees. *See* *Buckner v. Lower Florida Keys Hospital District, supra, 403 So.2d at 1029*. I also note that the defendants named in Count VIII may be able to show that their interference was justified. "Justification," however, is a defense to liability for tortious interference. *See, e.g.,* *Wackenhut Corp. v. Maimone, 389 So.2d 656, 657-58 (Fla. 4th DCA 1980)*. Because the factual basis for that defense does not appear on the face of the complaint and its attachments, I cannot rule on that defense on a motion to dismiss. *See* *Oaxaca v. Roscoe, 641 F.2d 386, 391-92 (5th Cir. Unit A 1981)*; 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1277 (1969).

Count IX asserts another tortious interference claim. It alleges that the plaintiff had continuing business relationships with his patients and physicians in the Pensacola community, and that, pursuant to these relationships, the plaintiff received referrals and repeat business. The plaintiff also alleges in Count IX that the defendants conspired to and did interfere with these relationships in two ways: (a) they prevented the plaintiff from practicing radiology at Sacred Heart; and (b) one or more of the defendants made derogatory and untrue statements about the plaintiff's honesty and professional abilities.

On facts similar to the ones alleged here, the Fifth District Court of Appeals in *Lawler v. Eugene Wuesthoff Memorial Hospital Association, supra*, upheld the trial court's dismissal of a claim for interference with a business relationship. In that case, the defendant hospital allegedly had maliciously terminated the plaintiff physician's staff privileges. This action, the plaintiff alleged, had damaged his relationships with his patients and doctors in the community. The district court rejected the plaintiff's claim because "the alleged interference with **[*46]** these relationships was only an indirect consequence of the termination of [the plaintiff's] staff privileges." *497 So.2d at 1263*.

This reasoning is fully applicable here. The P.A.'s termination of the plaintiff's employment and the hospital's termination of his radiology privileges, while directly affecting the plaintiff's relationships with the P.A. and the hospital, only indirectly interfered with his relationships with his patients and other doctors in the Pensacola community. Only direct interference with a business relationship is actionable. *See McCurdy v. Collis, supra*, 508 So.2d at 383.

However, the plaintiff argues that his alleged relationships with patients and physicians were directly affected by the defendants' alleged derogatory statements. Nevertheless, this general allegation of interference is defective because it fails to allege which of the defendants made the alleged derogatory statements. *See* *Conley v. Gibson, supra, 355 U.S. at 47*. Accordingly, Count IX is DISMISSED, for failure to state a claim.

J. *Count X*

In Count X, the plaintiff alleges that from October 1982 through January 1983 Hobgood, Post, and Haines told "doctors and others" that the plaintiff **[*47]** had "wrongfully appropriated P.A. funds to his own use," that he was "not providing competent radiology services to patients or physicians," and that he was "not carrying on his share of the responsibilities of the radiology practice of the P.A." (para. 88(a)). The plaintiff further alleges that those statements were made maliciously and without legal justification, and were false when made. In addition, he alleges that the statements caused him to suffer pecuniary loss, mental anguish, and injury to his professional and personal reputation.

The defendants press for dismissal of this count on the ground that it does not allege the elements of defamation with sufficient factual specificity. In the defendants argue that the complaint fails to allege: (1) the specific defamatory statements, (2) that the defendants made the statements without reasonable care as to their truth or falsity, and (3) the identity of those to whom the statements were published.

Preliminarily, I point out that while Florida law determines the elements of a defamation claim, federal law [specifically, *Rule 8(a)(2), Federal Rules of Civil Procedure*] supplies the standard for pleading that claim. *See* *Caster v.* ***[*48]*** *Hennessey, 781 F.2d 1569, 1570 (11th Cir. 1986)*; 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1204 (1969).

Hence, ***HN23***[] federal law determines the specificity with which the plaintiff must plead the alleged defamatory statements. On this issue, there is scant guidance available in the decisions of this Circuit. *See* *Olan Mills v. Enterprise Publishing Co., 210 F.2d 895, 897 (5th Cir. 1954)*. Federal courts generally are divided over the requisite degree of specificity. *See* 5 C. Wright & A. Miller, *Federal Practice & Procedure,* § 1245 (1969). However, courts have tended to adopt a stringent approach, *see* *id. at 217*, with some requiring that the defamatory statement be alleged in haec verba, *Asay v. Hallmark Cards, Inc., 594 F.2d 692, 699 (8th Cir. 1979)*. ***HN24***[] The operative test, however, remains whether the allegation gives the defendant "fair notice of the plaintiff's claim and the ground upon which it rests." *Conley v. Gibson, supra, 355 U.S. at 47*; *see* *Caster v. Hennessey, supra, 781 F.2d at 1570*. Applying this standard, I conclude that Count X adequately sets out the alleged defamatory statements. while the plaintiff does not reproduce these statements **[*49]** verbatim, he does allege their substance with reasonable specificity.

I reach a different conclusion, however, with regard to whether the complaint properly alleges the defendants' negligence. In *Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974)*, the Supreme Court of the United States held that the states cannot allow ***HN25***[] a private individual to recover for defamation without proof that the defamatory statement was published with some culpable disregard for its truth. *418 U.S. at 347*. In response to *Gertz,* Florida has changed from a strict to a negligence standard of liability; a plaintiff must prove that the defendant published the statement with negligent disregard for its truth or falsity. *See Boyles v. Mid-Florida Television Corp., 431 So.2d 627, 634 (Fla. 5th DCA 1983)*; *Miami Herald Publishing Co. v. Ane, 423 So.2d 376, 383 (Fla. 3d DCA 1982)*. The complaint in this case does not allege directly or by inference that the defendants knew or should have known of the falsity of their defamatory statements.

Finally, I find that the plaintiff's allegations regarding publication of the statements lack sufficient specificity. In *Caster v. Hennessey, **[*50]** supra*, the Eleventh Circuit found that the plaintiff's defamation claim was supported by adequate allegations of publication. The complaint in that case alleged in relevant part that the defamatory statement "was communicated to personnel within the defendant hospital and prospective employers." *781 F.2d at 1570*. In this case, however, the plaintiff has alleged only that the defamatory statements were told to "doctors and others." (para. 88(a)) This allegation provides little notice to the defendants as to whom the alleged defamatory statements were made. In particular, the word "others" does not eliminate anyone from being a possible recipient.

For the above reasons, Count X is DISMISSED, for failure to state a claim.

K. *Count XI*

In this Count, plaintiff Lois Virginia Gould seeks to recover for loss of her husband's consortium. She alleges that the defendants' tortious interference with her husband's business relationships, their defamation of his reputation, and their failure to afford her husband due process when he was dismissed caused her to lose her husband's consortium. The defendants urge dismissal of this Count on the ground that loss of consortium is actionable only **[*51]** when the claimant's spouse either suffers physical injury or, as a result of intentional infliction of emotional distress, suffers mental anguish.

The Supreme Court of Florida has not directly confronted the issue raised here. However, in *Food Fair, Inc. v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980)*, a Florida appellate court approved a claim by the plaintiff husband for loss of his wife's consortium, where the wife was suing the defendants for fraud and deceit. After acknowledging that in most cases the husband's claim for loss of consortium is based on the wife's physical injuries, the court held that "***HN26***[] 'the right to recover [for loss of consortium] also exists wherever such loss is caused by another's wrongful act intentionally inflicted, as for example, a malicious prosecution of the wife, or a defamation of her character.'" *382 So.2d at 155* (quoting 41 Am. Jur. 2d *Husband and Wife* § 451 at 379 (1968)).

Assuming that *Food Fair, Inc. v. Anderson* is an accurate statement of the law of Florida, I find that Count XI states a claim thereunder. The motions to dismiss are DENIED.

L. *Count XII*

The plaintiff argues that Count XII states claims under *Section 1* of the Sherman **[*52]** Act, Title *15, United States Code, Section 1*, for an unlawful tying arrangement and an unlawful exclusive dealing arrangement. The defendants assert that Count XII should be dismissed on several grounds.

It is now well established that the liberal pleading philosophy embodied in the Federal Rules of Civil Procedure applies equally to pleading an antitrust claim. *Quality Foods de Centro America, S.A. v. Latin America Agribusiness Development Corp., 711 F.2d 989, 995 (11th Cir. 1983)*. In fact, because of the factual nature of most antitrust cases, "summary procedures should be used sparingly . . . ." *Poller v. CBS, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962)*. Nevertheless, ***HN27***[] the plaintiff must plead "enough data . . . so that each claim of the alleged antitrust violation can be properly identified," *Quality Foods, supra, 711 F.2d at 995*, although the alleged facts "need not be spelled out with exactitude . . . ." *Id. See* Lombard's, Inc. v. Prince Manufacturing, Inc., 753 F.2d 974, 975 (11th Cir. 1985).

(1) *Tying arrangement*. In Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d (1084), the Supreme Court of the **[*53]** United States considered a challenge under Section 1 of the Sherman Act to an exclusive contract between a hospital and a firm of anesthesiologists. As the defendants have recognized, *Hyde* provides the analytical framework for determining whether the plaintiff has stated a claim for an unlawful tying arrangement. I begin my discussion, therefore, with a review of that case.

The plaintiff in *Hyde* was a board-certified anesthesiologist. His application for admission to the medical staff of the defendant hospital was denied because of the hospital's contract with a professional medical corporation providing that all anesthesiological services required by the hospital's patients would be performed by the corporation's physician employees. The plaintiff sued for declaratory and injunctive relief on the ground that the exclusive contract violated Section 1 of the Sherman Act. On appeal, the Fifth Circuit Court of Appeals found that the contract gave rise to an unlawful tying arrangement, but the Supreme Court reversed. In reversing, the Supreme Court set out the following method of analysis.

HN28[] Certain tying arrangements are per se violations of the antitrust laws. 466 U.S. at 10. **[*54]** The "essential character" of a per se violation "lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer did not want at all, or might have preferred to purchase elsewhere on different terms." 466 U.S. at 12. The existence of "forcing," (i.e., the seller's use of its "market power" in one market to impair competition in another) must be "probable" or "likely." [13] *Id. at 15, 16*. In addition, ***HN29***[] the tying arrangement must foreclose "a substantial volume of commerce" from competitors in the market for the tied product. *Id. at 16*. when the seller lacks the degree of market power needed to force customers to purchase an unwanted tied product, an antitrust violation cannot be established per se, but only by proof of an unreasonable restraint on competition in the relevant market. *Id. at 17-18*. An unreasonable restraint on competition may be shown through direct evidence of diminished competition in the relevant market, *id. at 29*, or through indirect evidence of anti-competitive effect, such as an adverse impact on the price, quantity, or quality of the tied product, *id. at 30-31*.

[*55] It is evident from the above discussion of *Hyde* that the two methods of establishing an unlawful tying arrangement involve different elements of proof. The essence of a per se violation is the existence of "forcing," while the rule of reason approach focuses on the anti-competitive impact of the tying arrangement. Because of these differences, the two methods of proof should be treated as separate claims for purposes of the instant motions. In that way, the defendants will have fair notice of the nature of the defense they will be called upon to prepare. *See* Conley v. Gibson, supra, 355 U.S. at 47. I must separately determine, therefore, whether the plaintiff has properly alleged either method of recovery.

(a) *Per se violation*. The facts alleged in Count XII fall short of establishing the elements of a per se violation. Specifically, the complaint fails to allege that Sacred Heart "possesses sufficient economic power in the tying [service] market to coerce buyer acceptance of the tied [service]." Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1414 (11th Cir. 1987). To be sure, the plaintiff alleges that "Sacred Heart possesses the market power necessary to **[*56]** require *its patients* to use the radiology services of P.A. and its employee physicians." (para. 93(c)) (emphasis added). But, this is nothing more than an allegation that the hospital's medical services and the P.A.'s radiological services are tied together; i.e., that those medical services can only be purchased together with radiological services. [14]

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[13] The market power needed for forcing can exist, for example, when the seller's share of a market is high or when it offers a unique product that competitors are unable to provide. ***Id. at 17***.

[14] This allegation would be sufficient if Sacred Heart was the sole provider of the tying services in the relevant market. The plaintiff, however, has not made such a claim. *See* Seidenstein v. National Medical Enterprises, 769 F.2d 1100, 1106 (5th Cir.

Not every refusal to sell two products separately can be said to restrain competition." *Jefferson Parish Hospital District No. 2 v. Hyde, supra, 466 U.S. at 11*. As the Supreme Court observed in *Hyde*:

Only if patients are forced to **[*57]** purchase [the professional association's anesthesiological] services as a result of the hospital's market power would the arrangement have anti-competitive consequences. If no forcing is present, patients are free to enter a competing hospital and use another anesthesiologist . . . .

Id. at 25.

The plaintiff must plead and prove, therefore, that, because of some advantage Sacred Heart has in the market for the tying services, patients in the relevant geographic market are forced to purchase the P.A.'s radiological services on terms that could not be exacted in a completely competitive market. *See United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977)*.

I realize that the plaintiff has alleged that "Sacred Heart provides *certain* medical services not *generally* available at other hospitals in the Pensacola, Florida, area on a basis *generally* affordable to the general public such as pediatric services." (para. 93(c)) (emphasis added). This allegation could be interpreted as alleging that Sacred Heart has market power over the sale of "certain medical services." But the use of the word "certain" deprives the defendants **[*58]** of fair notice of what the tying services are. This defect is not cured by saying that those services include pediatric services. Moreover, there is no indication that some or all pediatric services are only sold together with radiological services. In addition, the allegation in paragraph 93(c) is made more vague and ambiguous by the use of the word "generally." Finally, the plaintiff inconsistently alleges in paragraph 93(j) that the tying services are "Sacred Heart's medical services." *Cf. Lombard's, Inc., supra, 753 F.2d at 975*.

For the above reasons, the claim in Count XII for a per se unlawful tying arrangement is DISMISSED.

(b) *Rule of reason.* ***HN30***[] Under the rule of reason, an unlawful tying arrangement may be established by proof that the tying arrangement unreasonably restrained competition. *Hyde, supra, 466 U.S. at 29*. Such proof is inherently dependent on often complex economic analysis. *See, id. at 34* (O'Connor, J., concurring). A plaintiff cannot be expected to set out in his complaint the economic underpinnings of a rule of reason claim. In this case, the plaintiff has alleged the existence of a tying arrangement and anti-competitive effect (para. 37). **[*59]** Thus, I conclude that Count XII states a claim for an unlawful tying arrangement under the rule of reason. [15]

[*60] (c) *Defendants*. As the plain language of *Section 1* of the Sherman Act indicates, ***HN31***[] only members of a conspiracy in restraint of interstate commerce can be liable under Section 4 of the Clayton Act, Title *15, United*

1985). I also point out the implausibility of the plaintiff's allegation that *all* of Sacred Heart's other medical services are tied to the P.A.'s radiological services.

[15] The defendants argue that the only alleged restraint on competition engendered by the tying arrangement is the plaintiff's exclusion from the radiological services market in Pensacola, and that under *Hyde*, this effect does not, as a matter of law, constitute an unreasonable restraint on competition.

It may be that the plaintiff is basing his allegation that the tying arrangement adversely affected the price, quality, and quantity of radiological services in Pensacola solely on the fact that the arrangement allegedly prevented him from practicing radiology in Pensacola. However, that is not a necessary construction of the complaint, and, on a motion to dismiss, I must interpret the complaint in the light most favorable to the plaintiff. *Ancata v. Prison Health Services, Inc., 769 F.2d 700, 703 (11th Cir. 1985)*.

It is true that the Supreme Court in *Hyde* observed that the exclusive contract in that case merely reduced a patient's choice of anesthesiologists at the defendant hospital from five to four doctors, and concluded, apparently, that that was not a legally significant anti-competitive effect. *466 U.S. at 30-31*. But the *Hyde* Court certainly did not hold that a limitation on choice was the only relevant anti-competitive impact. The Court also (unsuccessfully) looked in the record for evidence of an adverse effect on the price or quality of anesthesiological services. *Id. at 31 n.52*.

States Code, Section 15, for teble damages. *See* Virtue v. Creamery Package Co., 227 U.S. 4, 32, 33 S.Ct. 214, 57 L.Ed. 391 (1913). The only allegation of a conspiracy in Count XII is the conclusory statement that defendants and others conspired to restrain interstate trade. (para. 93) The Count is devoid of an allegation indicating how any of the individual defendants participated in this conspiracy.

The agreement that creates the unlawful tying arrangement is not the contract between the P.A. and Sacred Heart. Hyde, supra, 466 U.S. at 18 n.28. That contract is nothing more than an arrangement whereby the P.A. supplies all the hospital's needs for radiological services. *See, id*. The contract raises only an exclusive dealing question. It is the hospital's agreements with its patients, which require them to use the P.A. for their radiological needs, that constitute the unlawful tying arrangement. *Id.*; Imperial Point Colonnades Condominium v. Manguarian, **[*61]** 549 F.2d 1029, 1042-43 (5th Cir. 1977).

This case differs from the typical tying arrangement where one defendant sells both the tying and the tied product. Here, as in *Manguarian,* one defendant provides the tying product or service and another the tied product or service. In that situation, although only one defendant is a party to the tying agreement (in this case, Sacred Heart), both defendants may be held liable "as *members of a conspiracy to restrain trade by means of a tying arrangement*." Manguarian, supra, 549 F.2d at 1043 (emphasis in original). Given the relationship of the P.A. to the tying arrangements in this case, it is reasonable to infer for purposes of the instant motions that the P.A. is a member of such a conspiracy. I am also willing to give plaintiff the benefit of the inference, in light of the fact that the P.A. is a closely held corporation, that Hobgood and Post "shape[d] corporate intentions" with respect to the P.A.'s participation in the alleged conspiracy, and that Count XII, therefore, also states a claim against those defendants. *See* Brown v. Donco Enterprises, Inc., 783 F.2d 644, 646 (6th Cir. 1986).

I reach the same conclusion with respect **[*62]** to defendants Haines, Hardman and Zeiler. In Count XIII, the plaintiff alleges that Haines, Hobgood, and Post met with Hardman, Zeiler and other Sacred Heart employees in an effort to persuade them not to permit the plaintiff to continue practicing radiology at the hospital after his dismissal from the P.A. Interpreted in the light most favorable to the plaintiff, these meetings could be viewed as actions in furtherance of the alleged tying arrangement conspiracy.

(2) *Exclusive dealing arrangement.* The plaintiff's claim against the defendants for an unlawful exclusive dealing arrangement is grounded on an allegation that the Sacred Heart/P.A. contract and similar contracts at other hospitals in Pensacola "erected barriers to entry into the market for the provision of radiological services in Pensacola, Florida." (para. 93(k)).

HN32[] An exclusive dealing contract is not unlawful unless performance of the contract will "probab[ly] . . . foreclose competition in a substantial share of the line of commerce affected." Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961). In other words, "the opportunities for other traders to enter into or remain **[*63]** in that market must be significantly limited" by the contract. Id. at 328. The amount of commerce affected cannot be determined in the abstract (such as by calculating its dollar amount), but only by reference to the total amount of commerce in the relevant product/geographic market. Id. at 329. Thus, the substantiality test requires a determination of "the line of commerce" and the geographic "area of effective competition." *Id.*

In this case, the complaint does define a line of commerce and a geographic area in which the Sacred Heart/P.A. contract and the other contracts in question operated. The plaintiff also alleges that the contracts raised significant barriers to entry into that market. This allegation could be read to infer that the contracts established barriers to entry because they foreclose competition in a substantial portion of the relevant market. But even construing the allegation this way, Count XII does not state an exclusive dealing claim. Count XII lacks an allegation that the *P.A./Sacred Heart contract alone* had the forbidden anti-competitive effect. while the structure of the entire market in which the contract operates is relevant in determining **[*64]** the exclusive dealing arrangement's impact on competition, *see* id. at 329, 334, the defendants' liability cannot arise from exclusive contracts at other hospitals, *see* Hyde, supra, 466 U.S. at 30 n.51.

Accordingly, the claim in Count XII that the defendants entered into an unlawful exclusive dealing arrangement is DISMISSED, for failure to state a claim.

M. *Count XIII*

The operative allegations in Count XIII appear to be as follows. The defendants conspired to restrain the radiological trade of the plaintiff and other non-P.A. radiologists by selecting the P.A. as the exclusive provider of radiological services at Sacred Heart and by refusing to permit non-members of the P.A. to practice radiology at the hospital. Acts taken in furtherance of this conspiracy caused several anti-competitive effects, including a decrease in the availability and selection of competent and complete radiological services at Sacred Heart, and an adverse impact on the quality and price of such services. The conspirators also impaired the ability of the plaintiff and others similarly situated to practice their profession in Pensacola. In addition, the defendants conspired to boycott the plaintiff's **[*65]** radiological services and intended to prevent the plaintiff from practicing radiology in Pensacola. They met with various Sacred Heart employees as well as physicians in the community who referred patients to radiologists, in an attempt to persuade these employees and physicians to boycott the plaintiff's services. Haines, Hobgood, and Post met with Hardman, Zeiler, and other Sacred Heart employees to convince them not to allow the plaintiff to practice radiology at the hospital after his dismissal from the P.A.

The plaintiff contends that these allegations state claims under *Section 1* of the Sherman Act for conspiracy to unreasonably restrain his trade and conspiracy to boycott his radiological services. It is not clear whether the plaintiff purports to state a separate claim for "conspiracy to unreasonably restrain his trade." The cases on which he relies suggests that the only claim asserted in Count XIII is conspiracy to boycott his professional services. In either event, I conclude that he has not stated a claim for a conspiracy to restrain his own trade.

The Supreme Court of the United States recently reaffirmed the well established principle that "***HN33***[] the antitrust laws . . . were **[*66]** enacted for 'the protection of *competition,* not *competitors*.'" *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. , 107 S.Ct. 484, 93 L.Ed.2d 427, 435 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S.Ct. 690, 50 L.Ed.2 701 (1977))* (emphasis in original). It follows that an antitrust cause of action does not exist merely for restraint of an individual's trade, but only where a restraint of trade in a relevant market occurs. That is not to say that an antitrust plaintiff need not show an injury to his "business or property," *15 U.S.C. § 15*, or that under certain circumstances injury to competition generally is sufficiently certain to follow an injury to the plaintiff's business that only the latter injury must be proven, *see, e.g., Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959)* (per curiam). Nevertheless, "the sole aim of antitrust legislation is to protect competition . . . ." *Gordon v. New York Stock Exchange, 422 U.S. 659, 689, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975)*. **[*67]** [16]

(1) *Group boycott*. ***HN34***[] Group boycotts are among those restraints "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal [per se]," *Northern Pacific Railroad Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)*. *See FTC v. Indiana Federation of Dentists, 476 U.S. , 106 S.Ct. 2009, 90 L.Ed.2d 445, 456 (1986)*; *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985)*. ***HN35***[] However, not all concerted refusals to deal are group boycotts subject to per se condemnation. The Supreme Court has recently cautioned that "the category of restraints classed as group boycotts is not to be expanded indiscriminately . . . ." *FTC v. Indiana Federation of Dentists, supra, 476 U.S.* ***[*68]*** *at , 90 L.Ed.2d at 456*. The per se approach generally has been limited to situations involving concerted efforts to deny competitors "relationships" (e.g., supplies or customers) they need to effectively compete. *Pacific Stationery, supra, 472 U.S. at 294*. Therefore, unless access to the withheld "relationships" is needed for the plaintiff to effectively compete, a refusal to deal should be scrutinized under the rule of reason. *See id. at 297*.

[16] Even if such a claim existed, it would not appear to entitle the plaintiff to any relief he could not obtain under one of his other anti-trust claims.

In this case, there is an alleged refusal to deal. The plaintiff alleges that Sacred Heart refused to allow him to practice radiology at the hospital. [17] However, it is not clear whether the plaintiff adequately establishes a *concerted* refusal to deal. Group boycotts, of course, do not encompass a unilateral refusal to deal. *See* *Klor's v. Broadway-Hale Stores, supra, 359 U.S. at 212*; *American Key Corp. v. Cole National Corp., 762 F.2d 1569, 1578 (11th Cir. 1985)*.

[*69] In the typical group boycott, the refusal to deal is prompted through coercion. Usually, a group of firms with market power threatens to boycott suppliers or customers in order to induce them not to do business with a competitor. *See* *FTC v. Indiana Federation of Dentists, 476 U.S. at __, 90 L.Ed.2d at 457*; *Weiss v. York Hospital, 745 F.2d 786, 819 (3rd Cir. 1984)*. This coercion makes the refusal to deal "concerted." However, the refusal to deal can be "concerted" in the absence of coercion. It is "concerted" whenever the refusal to deal is induced by competitors of the plaintiff, by whatever means. *Weiss v. York Hospital, supra, 745 F.2d at 819*. In accordance with this principle, the Third Circuit in *Weiss* found concerted action where the defendant Hospital's refusal to admit the plaintiff to its medical staff was not procured through coercion, but by virtue of the medical staff's control over the hospital's admission decisions. *Id.* Specifically, the medical staff was able to "induce" the hospital to refuse to admit Weiss because the staff, in effect, made the decision for the hospital.

In this case, the complaint says little about whether Hobgood or Post **[*70]** (alone, or in a conspiracy with others) induced Sacred Heart to refuse to allow the plaintiff to compete with them at the hospital. For example, nowhere does the plaintiff allege that the P.A.'s exclusive contract prompted the hospital to revoke the plaintiff's radiology privileges. In fact, the plaintiff's allegation that Sacred Heart has permitted other physicians to retain clinical privileges in violation of an exclusive contract suggests that the P.A./Sacred Heart contract was not the basis of the hospital's decision in this case.

Nor is concerted action indicated by the allegation that Haines, Hobgood, and Post met with some Sacred Heart employees to persuade them not to allow the plaintiff to retain his radiology privileges after his dismissal from the P.A. There is no indication in the complaint that Sacred Heart succumbed to this persuasion.

The plaintiff also alleges that "[t]he defendants by their actions conspire to have Sacred Heart refuse to permit Dr. Gould or other non-P.A. physicians to provide radiology services at Sacred Heart." (para. 95(b)) While this allegation indicates that Hobgood and Post, in combination with the other defendants, may have induced Sacred Heart **[*71]** to revoke the plaintiff's staff privileges, I conclude that it is impermissibly vague. ***HN36***[] A complaint that does not set out the facts which warrant the conclusion that an antitrust conspiracy existed will not survive a motion to dismiss. *Lombard's, Inc. v. Prince Manufacturing, Inc., supra, 753 F.2d at 975*. The conclusory allegation of conspiracy in Count XIII, therefore, does not adequately notify the defendants of the manner in which Sacred Heart was induced to revoke the plaintiff's radiology privileges.

Accordingly, Count XIII is also DISMISSED. [18]

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[17] I note that this is the only refusal to deal which the plaintiff has properly alleged. While the plaintiff has also alleged that the defendants met with various physicians to persuade them not to refer their patients to the plaintiff, there is no allegation that these physicians responded to the defendants' persuasion.

[18] The defendants argue that even if the plaintiff is able to state a claim for a group boycott, that claim should be evaluated under the rule of reason because, as the Supreme Court has recognized, "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 n.17, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975)*. In order to have the analytical flexibility to consider the unique characteristics of the professions, the defendants seem to contend, the rule of reason must govern. *See* *Hackett v. Metropolitan General Hospital, 465 So.2d 1246 (Fla. 2d DCA 1985)*. This issue cannot be resolved on a motion to dismiss. However, I point out that group boycotts characteristically are "not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Pacific Stationery, supra, 472 U.S. at 294*. If the defendants can show, therefore, that the refusal to deal arose, for example, from an arrangement which improved the quality of radiological services provided at Sacred Heart, then it appears that their conduct would be judged under the rule of reason. *See* *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 349, 102 S.Ct. 2466,*

[*72] N. *Count XIV*

The plaintiff alleges that the P.A. monopolized, and that all defendants conspired to monopolize, "the market for the provision of radiological services at Sacred Heart" by barring non-members of the P.A. from practicing radiology at the hospital, in violation of *Section 2* of the Sherman Act, Title *15, United States Code, Section 2*. The plaintiff urges that he also has stated a claim in this Count for an attempt to monopolize.

HN37[] *Section 2* of the Sherman Act prohibits monopolization, attempted monopolization, and conspiracy to monopolize. *15 U.S.C. § 2*; *North Mississippi Communications, Inc. v. Jones, 792 F.2d 1330, 1335 (5th Cir. 1986)*. The elements of monopolization are:

(1) The possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). *See Ad-Vantage Telephone Director Consultants, Inc. v. G.T.E. Directories Corp.,* No. 85-3970, Westlaw at 25 (11th Cir., Aug. 27, 1987).

Thus, ***HN38***[] monopoly **[*73]** power acquired through skill or luck, not exclusionary or anti-competitive practices, is not unlawful. *See* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596, 602, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)*; *United States v. Griffith, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948)*; *Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 84-85 (2d Cir. 1981)*. Exclusionary behavior includes practices which tend to impair the opportunities of rivals and which either do not advance competition or unnecessarily restrict it. *Aspen Skiing Co., supra, 472 U.S. at 605 n.32* (quoting 3 P. Areeda & D. Turner ***Antitrust Law*** 78 (1978)). A firm that attempts to exclude competitors on some basis other than efficiency has engaged in predatory conduct. *Id. at 605*.

On the theory that "'no monopolist monopolizes unconscious of what he is doing,'" *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., supra, 472 U.S. at 602* (quoting *United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945))*, ***HN39***[] a monopolization claim does not require proof of a specific intent to monopolize. *See* *United States v. Griffith, supra, 334* ***[*74]*** *U.S. at 105*. However, evidence of intent to monopolize is relevant to the question of whether the defendant's conduct was exclusionary or anti-competitive. *Aspen Skiing Co., supra, 472 U.S. at 602*.

HN40[] The existence of monopoly power can only be evaluated in the context of the relevant product and geographic market. *Walker Process Equipment v. Food Machinery and Chemical Corp., 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965)*. Determining the relevant market is a question of fact. *Ad-Vantage Telephone Director Consultants, supra*, at 26.

HN41[] Unlike a monopolization claim, conspiracy and attempt to monopolize require evidence of a specific intent to monopolize. Specifically, to establish an attempt to monopolize, the plaintiff must prove that the defendant:

(1) had the specific intent to monopolize, (2) took overt acts in furtherance of a scheme to monopolize, and (3) had a dangerous probability of success.

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73 L.Ed.2d 48 (1982); *National Society of Professional Engineers v. United States, 435 U.S. 679, 696* & n.22, *98 S.Ct. 1355, 55 L.Ed.2d 637 (1978)*.

North Mississippi Communications, Inc. v. Jones, supra, 792 F.2d at 1335.

See Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 540 (7th Cir. 1986).

The elements of a *Section 2* conspiracy to monopolize are:

(1) The existence of a specific intent to **[*75]** monopolize; (2) the existence of a combination or a conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce.

North Mississippi Communications, Inc., supra, at 1335.

See Great Escape, Inc., supra, at 540-41.

Upon a careful review of the allegations in Count XIV, I conclude that the plaintiff has stated claims for monopolization, attempted monopolization, and conspiracy to monopolize, and the defendants' motions are DENIED as to Count XIV.

O. *Count XV*

In this Count, the plaintiff reasserts the foregoing antitrust claims under the Florida Antitrust Act of 1980, Section 542.15, et seq., *Florida Statutes* (1985). The Florida statute adopts the body of ***antitrust law*** developed by the federal courts under the Sherman Act. *Ad-Vantage Telephone Director Consultants, supra*, at 25. However, under the Florida Antitrust Act, the plaintiff is not required to prove an effect on interstate commerce.

Id. at 30.

Since the claims asserted in Count XV, thus, must be analyzed under the same law as I applied in ruling on the federal antitrust claims, Count XV is DISMISSED **[*76]** to the extent and for the reasons provided above.

III. *Conclusion*

The defendants' motions to dismiss and to strike are GRANTED to the extent set out above. The plaintiff is granted leave to file an amended complaint, consistent with this order, within 15 days.

DONE AND ORDERED this *29th* day of June, 1988.

[Clamp-All Corp. v. Cast Iron Soil Pipe Inst.](#)

United States Court of Appeals for the First Circuit

June 30, 1988

No. 87-1697

Reporter
851 F.2d 478 *; 1988 U.S. App. LEXIS 8940 **; 7 U.S.P.Q.2D (BNA) 1429 ***; 1988-1 Trade Cas. (CCH) P68,115

Clamp-All Corporation, Plaintiff, Appellant, v. Cast Iron Soil Pipe Institute, et al., Defendants, Appellees

Prior History: **[**1]** Appeal from the United States District Court for the District of Massachusetts, Hon. Rya W. Zobel, U.S. District Judge.

Disposition: Affirmed.

Core Terms

couplings, prices, products, pipe, firms, competitors, practices, hubless, costs, price list, specification, anticompetitive, district court, certifying, advertisement, charges, anti trust law, low price, predatory, consists, standard-setting, interdependent, monopolization, manufacturers, unlawfully, antitrust, trademark, benefits, helps, sales

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN1[] **Actual Monopolization, Anticompetitive & Predatory Practices**

"Predatory pricing" occurs when a firm sets its prices temporarily below its costs, with the hope that the low price will drive a competitor out of business, after which the "predatory" firm will raise its prices so high that it will recoup its temporary losses and earn additional profit, all before new firms, attracted by the high prices, enter its market and force prices down.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN2[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Ordinarily the measure of a "predatory price" is price below "incremental cost," where the addition to total cost (to the firm) of producing and selling additional output would exceed the return from selling that additional output.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Actual Monopolization, Anticompetitive & Predatory Practices

The Sherman Act prohibits agreements, and the courts almost uniformly hold, at least in the pricing area, that individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under *Section 1* of the Sherman Act.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN4[] Actual Monopolization, Anticompetitive & Predatory Practices

A "basing point" pricing scheme essentially amounts to a device that could help a group of firms in a concentrated industry "police" interdependent pricing practices, practices that help them keep prices above competitive levels without the need for any formal price agreement.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] Actual Monopolization, Anticompetitive & Predatory Practices

"Basing point pricing" systems have normally been found unlawful.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > Elements

HN6[] Actual Monopolization, Anticompetitive & Predatory Practices

The only important element for a court to examine at the request of a competitor is the low price. Where a plaintiff does not show that the low price is unlawfully low, there is no reason to believe the low price is not self sustaining, there is no reason to believe it requires "external financing," and there is no reason to believe that any "price fixing" on any other products has anything significant to do with the matter.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

The "rule of reason" limits the Sherman Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications, though certain anticompetitive practices, such as price fixing, so typically lack justification as to be per se unreasonable.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

"Anticompetitive" has a special antitrust meaning. It refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. And, the law assesses both harms and benefits in light of the Sherman Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods.

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

HN9[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Activity that harms competitors because it lowers production or distribution costs or provides a better product carries with it an overriding justification.

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

HN10[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

There could be special circumstances, showing, in an individual case, that the standard setting serves no legitimate purpose, or that it is unnecessarily harmful. But the plaintiff would have to show the existence of such circumstances.

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[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

In deciding an antitrust claim, courts must take account of the importance of permitting parties to express their views freely before regulatory authorities.

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

HN12[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition, but efforts to influence private standard-setting organizations may violate antitrust laws.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN13[] **Consumer Protection, False Advertising**

The law does not automatically require a firm to publish unfavorable test results.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN14[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

All members of an industry should be eligible for membership in a trade association, but membership can be limited to those operating at a certain level in the distribution chain.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN15[] **Monopolies & Monopolization, Actual Monopolization**

A plaintiff must show "exclusionary conduct" in respect to its monopolization or attempted monopolization claims.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN16[] False Designation of Origin, Elements of False Designation of Origin

See the Lanham Act § 43, 15 U.S.C.S. § 1125(a).

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Palming Off

Trademark Law > Conveyances > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN17[] False Designation of Origin, Palming Off

The First Circuit narrowly interprets the Lanham Act to apply only to those sorts of unfair business practices or false statements that are of the same economic nature as those which involve infringement or other improper use of trade-marks, e.g., palming off one's goods as those of another.

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Andrew M. Higgins and Casner, Edwards & Roseman on brief for Appellee American Brass & Iron Foundry.

Judges: Campbell, Chief Judge, Breyer and Selya, Circuit Judges.

Opinion by: BREYER

Opinion

[*1430]** **[*481]** BREYER, Circuit Judge.

The plaintiff in this antitrust action, Clamp-All Corporation, sued the Cast Iron Soil Pipe Institute ("CISPI") and several of its members, charging that they had unlawfully restrained trade in (or monopolized or attempted to monopolize) **[**2]** the sale of hubless pipe couplings by means of improper pricing, improper behavior in respect to "quality-certification" provided by state and private organizations, and other improper trade practices. 15 U.S.C. §§ 1 & 2 (1982), 15 U.S.C. § 1125(a) (1982). The district court granted defendants' motion for summary judgment on the pricing (and certain other) counts, and, after hearing all the plaintiff's evidence, directed a verdict in defendants' favor; the plaintiff appeals. We have examined the lengthy record and conclude that the district court was correct. No reasonable jury could have found facts sufficient to show a violation of the antitrust laws. We therefore affirm the court's judgment.

I

To understand this highly fact-based appeal, one must keep in mind the following background:

1. Hubless couplings are used to join segments of pipe, such as water pipe or sewer pipe.

2. Several different manufacturers have made, and still make, various kinds of pipe couplings. The old fashioned method of joining segments of pipe apparently was to make one end slightly larger than the other, and then to fit the small end of one segment into the large end of the other. The larger opening was **[**3]** called the "hub" and the smaller end the "spigot." We think they looked about like this:

[SEE ILLUSTRATION IN ORIGINAL]

The newer method of joining pipe segments keeps both ends the same size. A sleeve fits around the two ends to be joined and a metal band holds the sleeve in place.

3. CISPI is a trade association of *pipe* manufacturers, all of whom sell, and many of whom also make, a particular type of coupling known as a CISPI coupling. It consists of a simple sleeve of the sort described. It fits between lugs each placed a bit away from the end of each pipe segment (perhaps they help hold the sleeve in place). We think the CISPI coupling looks something like this:

[SEE ILLUSTRATION IN ORIGINAL]

CISPI introduced hubless couplings to the market in 1963. CISPI controlled the patent on its coupling until 1984, licensing CISPI members to make and sell it.

4. Clamp-All is one of several firms that make competing pipe couplings. The Clamp-All and CISPI couplings appear quite similar, but the list price of Clamp-All's coupling is typically four to five times that of CISPI's, and the Clamp-All coupling will outperform the CISPI coupling in certain respects: it is wider, which makes **[**4]** it **[*482]** more secure and enables it to withstand greater water pressure; it is made of more durable (and more expensive) materials; and it is somewhat easier to install.

5. Exactly what share of the total market for water pipe couplings (outside of Massachusetts) CISPI couplings account for is a matter in dispute. Everyone agrees that CISPI's share is large, but they agree, too, that several companies other than Clamp-All and CISPI members sell a significant number of couplings. Inside Massachusetts, where Clamp-All had a monopoly for several years because only its coupling met the state's performance standard, Clamp-All controls about 65 percent of the coupling market. **[***1431]**

Basically, Clamp-All charges that its relative lack of success outside Massachusetts is due to various anti-competitive (indeed, anti-Clamp-All) practices employed by CISPI members; otherwise, says Clamp-All, its sales record elsewhere would resemble its record in Massachusetts. The CISPI defendants deny all anti-competitive behavior; they add that Clamp-All's Massachusetts success reflects Clamp-All's own, partly successful, efforts to convince certifiers and regulators to keep the less expensive CISPI coupling out of the **[**5]** state.

Our concern here is with Clamp-All's charges, not CISPI's. We have proceeded to evaluate the legal merits of Clamp-All's many different claims as follows. First, we have read the record, marshalling the evidence in respect to each charge. Second, we have assumed a set of facts as favorable to Clamp-All, in respect to each charge, as the evidence will reasonably permit. *See* *Goldstein v. Kelleher, 728 F.2d 32, 39* (1st Cir.), *cert. denied*, *469 U.S. 852, 83 L. Ed. 2d 107, 105 S. Ct. 172 (1984)*. Third, we have determined, as a matter of law, *see* 2 P. Areeda & D. Turner, ***Antitrust Law*** para. 315b (1978) [hereafter Areeda & Turner], whether that version of the facts reveals a violation of the antitrust laws; whether, for example, it shows predatory pricing, *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, or an "unreasonable restraint of trade," *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*.

We conclude that the facts do not show an antitrust violation. To explain our conclusions, we shall group Clamp-All's many charges into three categories: those concerning pricing practices, those concerning CISPI efforts to influence certification **[**6]** standards, and those concerning allegedly unreasonable marketing practices.

II

The significant evidence that we have found in respect to CISPI's pricing practices consists of the following:

1. The defendants published identical list prices for various products including couplings. One defendant testified that the prices on the list established a "defined differential" among different sizes of pipe, couplings, and related equipment.

2. Two CISPI firms, Tyler and American Brass & Iron Foundry ('AB & I'), firms that were defendants in this case initially, but which were no longer defendants at the time of trial, had price lists that showed "returns" to the firm to be less than "costs." To be more specific, the Tyler price list, in respect to "hubless couplings," showed in the column entitled "Return FOB Taylor" ".67," and in the column entitled "average unit cost," the figure ".78." In respect to AB & I's couplings, the evidence was conflicting. Although the category marked "Sales" was lower than that marked "Cost," the category marked "Unit Price" was *higher* than that marked "Unit Cost."

3. Two witnesses testified that Tyler's president once said at a CISPI meeting in 1981 that Tyler, **[**7]** the industry price leader, would not raise its prices until Central Foundry went out of business. A month later, Central Foundry did go out of business; Tyler then raised its prices, and the other CISPI members followed Tyler's lead.

4. Clamp-All's expert testified that CISPI members gave discounts on a geographical **[*483]** basis, which discounts did not reflect delivery cost differences, but, rather, reflected a "multiple basing point pricing scheme."

We conclude that this evidence does not show unlawfully low prices, prices that could hurt Clamp-All. Clamp-All comes closer to showing unreasonably high CISPI prices, but any such showing may reflect no more than an industry concentrated enough for each firm to set prices "interdependently" (each firm, aware that competitors will quickly match price cuts, may keep its prices high); and higher than competitive prices help Clamp-All rather than hurt it. *See* *Matsushita, 475 U.S. at 583*. We now consider each of Clamp-All's pricing claims in greater detail.

a. Clamp-All suggests that this evidence shows unlawful "predatory pricing." As we explained in detail in *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983)*, **[**8]** however, ***HN1***[] "predatory pricing" occurs when a firm sets its prices temporarily below its costs, with the hope that the low price will drive a competitor out of business, after which the "predatory" firm will raise its prices so high that it will recoup its temporary losses and earn additional profit, all before new firms, attracted by the high prices, enter its market and force prices down. *Id. at 232-35*; *see* *Matsushita, 475 U.S. at 588-95*. We said that ***HN2***[] *ordinarily* the measure of a "predatory price" is price below "incremental cost." *Barry Wright, 724 F.2d at 232-33*. That is to say, the addition to total cost (to the firm) of producing and selling additional output would exceed the return from selling that additional output.

The evidence in the record is insufficient to show such pricing by defendants here. For **[***1432]** one thing, the product price lists from Tyler and AB & I contain no explanation about what the numbers on them mean. Indeed, Tyler's list refers to a vast number of different products and contains many products in respect to which the number in the "NET FOB" column is lower than that in the "AVERAGE UNIT COST" column. Yet, the plaintiffs do not argue that Tyler was **[**9]** pricing large numbers of its products, including such products as thumbscrews, seal gaskets, seal lubricants, plugs, and something called a "No-hub San Tee," at predatory levels. Perhaps the list shows that Tyler, like a hardware store owner, keeps records that allocate certain costs (such as rent or electricity) among related products proportionately, but then Tyler recovers different amounts of those costs from the sales of different products. (A hardware store owner does not set prices to recover precisely the same percentage of his rent from the sale of each bolt, garden tool, or lightbulb; rather, he sets prices so that he recovers the totality of his overhead from the totality of all his sales with different products likely making different contributions.) Be that as it may, we do not see how a jury could know, without more precise evidence or an explanation, what either Tyler's or AB & I's price lists show, nor do we see how it could rest a conclusion of "price below incremental cost" on a few such unexplained lists alone. Nor does plaintiff correct the evidentiary deficiency by pointing to Tyler's president's remark at the 1981 CISPI meeting, for that remark (and subsequent **[**10]** conduct) simply shows (at best) a price increase after the demise of a competitor; it does not significantly help show that the relevant prices were unlawfully low to begin with.

For another thing, neither Tyler nor AB & I were defendants at the time of trial. Thus, plaintiff had to use this price list evidence to show that *other* firms set prices below *their* incremental costs. The fact that hubless couplings were simple products with similar costs may tend to show that Tyler's and AB & I's cost/price ratios and defendants' were the same. But, the equally important facts that Tyler and AB & I made many related products; that many costs of producing these products were likely related (*e.g.*, shared overhead); that present defendants produced a *different* mix of products; and that each of their product by product cost relationships (*e.g.*, comparative shares of overhead or other common costs) were therefore likely **[*484]** different from Tyler's and AB & I's, together make Tyler's and AB & I's price lists close to worthless as evidence that any of these *other* firms (the present defendants) priced couplings below its own incremental costs. The district court correctly concluded that **[**11]** a jury could not find, without impermissible speculation, that these defendants priced couplings below their costs, whether defined as "incremental costs" or any other arguably appropriate cost measure.

b. Appellant, taking an opposite tack, next argues that identical price lists and testimony about a "defined differential" indicate an agreement among CISPI defendants to fix prices, presumably higher than competitive prices. (The defendants, selling identical products, would not need to *agree* to keep prices low; a price cut by any one of them would likely force the others to follow.) Of course, any such agreement, by keeping coupling prices *up*, would likely help the plaintiff, not hurt it. *See* Matsushita, 475 U.S. at 583.

This is not to say that the evidence here would permit a jury to find any such agreement. Even if one assumes that the similar prices on the lists do not simply reflect ordinary forces of competition at work among firms selling virtually identical products, the price lists still show no more than what defendants concede: that each firm, acting individually, copied the price list of the industry leader. A firm in a concentrated industry typically has reason **[**12]** to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry. *See* 6 Areeda & Turner paras. 1432-33. And, the fact that the CISPI firms often set prices that deviated from their price lists helps support the inference that the similarity of price lists reflects *individual* decisions to copy, rather than any more formal pricing agreement.

Courts have noted that ***HN3***[] the Sherman Act prohibits *agreements*, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act. *See, e.g.,* Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2nd Cir. 1987); North Carolina v. Chas. Pfizer & Co., 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd*, 537 F.2d 67 (4th Cir.), *cert.* ***[**13]*** *denied*, *429 U.S. 870, 97 S. Ct. 183, 50 L. Ed. 2d 150 (1976)*; 6 Areeda & Turner para. 1433; *cf.* Aubin v. Fudala, 782 F.2d 280, 286 (1st Cir. 1983) (similar analysis in criminal conspiracy context **[***1433]**). That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for "interdependent" pricing. How does one order a firm to set its prices *without regard* to the likely reactions of its competitors? *See* 6 Areeda & Turner paras. 1432-33; 3 Areeda & Turner para. 840. The district court pointed out that the evidence here, consisting of little more than the price lists, would not permit a finding of more than such individual, interdependent, price setting. We agree.

c. Appellant points to the testimony of its expert, who said that the price lists show an agreement to follow ***HN4***[] a "basing point" pricing scheme. Such a scheme essentially amounts to a device that could help a group of firms in a concentrated industry "police" interdependent pricing practices, practices that help them keep prices above competitive levels without the need for any formal price agreement. As just mentioned, in principle, each firm in such an industry may set its **[**14]** prices knowing that a price cut would be quickly matched by others; each would also know that stable high prices, maintained by all firms, would benefit all. But, the problem for such firms (at least in principle) is that each also knows that for it alone the best of all possible worlds is to attract customers through a small price cut *not matched* **[*485]** by the others. Since *all* know this, how can they keep each other from cutting prices? How can they guarantee that industry prices stay high? How can they prevent the forces of competition from breaking out, with one or another firm yielding to the temptation to cut its own prices while hoping the others will *not match* the low price? Each firm realizes that any formal communication with its competitors about such matters could lead to antitrust prosecution and a finding of a traditional agreement. But each fears that, without such communication, its competitors will "chisel" on the tacit pricing arrangement, perhaps through secret or selective price cuts (which from the public's point of view should be encouraged). *See* *United States v. Container Corp. of America, 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)*.

In principle, "basing point pricing" **[**15]** is a practice that might help firms stop (what from the public's perspective would be desirable) "chiseling." It does so when firms in the industry typically sell many different, related products, in many different geographical markets, all at different prices, a fact that makes it that much more difficult for each firm to know whether its competitors may be "chiseling," say, by "swallowing" some of the freight costs. A "basing point" pricing system involves all firms charging identical freight costs (irrespective of plant location or actual freight costs) to any point in the United States. The "freight prices" charged are those that a railroad or trucker would set from a single, fixed location (say Chicago), not from where each plant is actually located. Such a system makes it far easier for each firm to know the "freight cost" that a competitor is "supposed" to charge its customers, thereby making it easier for each firm to detect whether a competitor is charging a particular customer a lower price for the product. To that extent, "basing point pricing" helps each firm detect "chiselers"; it lessens the fear of each that others may be "chiseling"; and it thereby helps them all maintain **[**16]** prices above competitive levels. (It also tends to permit firms to release "safely" any "competitive impulse," by selling, at greater expense and with less profit, to more distant locations all without changing the apparent price of the product, thereby helping further reinforce the stability of an industry's "high price" practices.) For these reasons, ***HN5***[] "basing point pricing" systems have normally been found unlawful. *See* 6 Areeda & Turner para. 1435f; *Federal Trade Commission v. Cement Institute, 333 U.S. 683, 92 L. Ed. 1010, 68 S. Ct. 793 (1948)*. Indeed, in the case of "basing point pricing," unlike simple "interdependent price setting," agencies, believing they can devise an appropriate remedy, have forbidden the practices even when the firms adopt it "interdependently," without any traditional agreement (perhaps through gradual, tacit evolution in the industry). *See* *Triangle Conduit & Cable Co. v. Federal Trade Commission, 168 F.2d 175 (7th Cir. 1948)*, *aff'd by an equally divided Court sub nom. Clayton Mark & Co. v. Federal Trade Commission, 336 U.S. 956, 93 L. Ed. 1110, 69 S. Ct. 888 (1949)* (Federal Trade Commission held basing point pricing unlawful even though there was no *agreement*).

Our description of **[**17]** "basing point pricing," while simplified, is sufficient to show that the evils of the practice lie in its tendency to help firms keep prices high, not low. Thus, if such a practice existed in respect to couplings, it kept CISPI prices *high*, making it easier for Clamp-All to compete. Clamp-All cannot base its damage suit upon a scheme that *helps* it sell its product. *Matsushita, 475 U.S. at 583*.

d. Finally, Clamp-All adds together its first and second theories. It argues that the defendants behaved unlawfully by agreeing to charge high prices on some products, and then used the proceeds of their high price sales to finance below cost coupling prices. The short answer to this claim, however, is that ***HN6***[] the only important element here for a **[***1434]** court to examine at the request of a competitor is the *low* price. If that price is unlawfully low, if, for example, it is a predatory price, it does not ordinarily matter whether the money to pay for the resulting temporary loss comes **[*486]** from a bank account, a legacy, a lottery prize, or the proceeds of a price-fixing conspiracy in respect to another product; regardless of financing source, the practice would be unlawful. Where, however, **[**18]** as here, a plaintiff does not show that the low price is unlawfully low, there is no reason to believe the low price is not self sustaining, there is no reason to believe it requires 'external financing,' and there is no reason to believe that any "price fixing" on any other products has anything significant to do with the matter. *See* *Shore Gas and Oil Co. v. Humble Oil & Refining Co., 224 F. Supp. 922, 926-27 (D.N.J. 1963)*. We do not see how a dubious kind of "financing source" could, in and of itself, convert a lawful low price into an unlawful one.

III

We turn next to Clamp-All's claims that the CISPI defendants agreed to engage in certain unreasonably anticompetitive activities, in violation of Sherman Act *§ 1*. In evaluating these claims, one must keep in mind the special antitrust meaning of the terms "reasonable" and "unreasonable," a meaning that draws its content from the basic objectives of ***antitrust law***'s "rule of reason." The Supreme Court adopted the "rule of reason" in order to provide an intellectually, administratively, and legally satisfactory way to limit the Sherman Act's broad language, which, if taken literally, might forbid all agreements, good and bad, **[**19]** that were in any sense at all "in restraint of trade." *See* *United States v. Trans-Missouri Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897)*. Chief Justice White pointed out (with only slight exaggeration) that without some such limitation, the Sherman Act might be taken as forbidding virtually "every conceivable contract or combination . . . anywhere in the whole field of human activity." *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*. ***HN7***[] The "rule of reason" limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications, 7 Areeda & Turner para. 1500 at 362-63, though certain anticompetitive practices, such as price fixing, so typically lack justification as to be *per se* unreasonable. 7 Areeda & Turner para. 1509.

HN8[] "Anticompetitive", too, has a special meaning. It refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. *Brown Shoe Co. v. United States, 370 U.S. 294, 319-20, 328-34, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *see* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. And, the **[**20]** law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods. *See* *Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9, 11-12 (1st Cir. 1987)*; 7 Areeda & Turner para. 1502.

The joint practices and agreements that appellant attacks here are not *per se* unreasonable. Thus, appellant must show that the likely anticompetitive effects of these practices outweigh their business justifications, or at least that the defendants might achieve any legitimate business objectives in a significantly less restrictive way. 7 Areeda & Turner para. 1505b.

A

Clamp-All's major attack concerns CISPI's promulgation of a standard called the 310 Designation. That standard is entitled

Specifications for

> CAST IRON SOIL PIPE INSTITUTE'S APPROVED COUPLING FOR USE IN CONNECTION WITH HUBLESS CAST IRON SOIL PIPE AND FITTINGS FOR SANITARY STORM DRAIN, WASTE AND VENT PIPING APPLICATIONS

The specification consists of several pages of detail. It also states,

> Several different types of hubless joints or couplings are available **[**21]** for use in hubless cast iron systems. . . . It is the purpose of this specification . . . to furnish **[*487]** information as to the approved characteristics of one of such type couplings which is approved by the Institute [CISPI].

And, it states on the first page,

> Members of the Institute who are licensed to use the Institute's Collective Mark CI NO-HUB and who sell hubless couplings manufactured by or for them which conform fully to this Specification may indicate their membership in the Institute and their conformance with this Specification by marking such couplings with the Institute's Collective Mark CI NO-HUB.

CISPI successfully persuaded various private standard-setting bodies, as well as state and local plumbing code authorities, to make reference to the 310 Designation as the kind **[***1435]** of coupling that would meet their respective standards.

a. Appellants seem to say that CISPI's very promulgation of this standard and its efforts to secure its adoption by certifying authorities amounts to an unreasonable restraint of trade. We do not see how that can be so. The standard, in specifying what counts as a CISPI coupling, provides a relatively cheap and effective way for a manufacturer **[**22]** or a buyer to determine whether a particular coupling is, in fact, (generically considered) a

CISPI coupling. The adoption by certifiers helps users quickly and effectively determine that a particular coupling (which meets CISPI standards) also meets state, local, or private certifiers' standards of acceptability. The *joint* specification development, promulgation, and adoption efforts would seem less expensive than having each member of CISPI make duplicative efforts. On its face, the joint development and promulgation of the specification would seem to save money by providing information to makers and to buyers less expensively and more effectively than without the standard. It may also help to assure product quality. If such activity, in and of itself, were to hurt Clamp-All by making it more difficult for Clamp-All to compete, Clamp-All would suffer injury only as a result of the defendants' joint efforts having lowered information costs or created a better product. *See* *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 558 & n. 19 (1st Cir. 1974)*. And, *that* kind of harm is not "unreasonably anticompetitive." It brings about the very benefits **[**23]** that the antitrust laws seek to promote. That is to say, ***HN9***[] activity that harms competitors because it lowers production or distribution costs or provides a better product carries with it an overriding justification.

Of course, what we have just written is true of 'legitimate' standard-setting activity. *See* *Whitten, 508 F.2d at 558 n. 19*. ***HN10***[] There could be special circumstances, showing, in an individual case, that the standard setting at issue serves no legitimate purpose, or that it is unnecessarily harmful. *Id.* (antitrust claim stated if market participant who establishes proprietary specifications coerces a standard-setting organization or conspires with it to get the specification officially adopted, or if it prevents competitors from competing for approval). But the plaintiff would have to show the existence of such circumstances; and, the plaintiff has not done so here. The best it can do is point to the word "approved" in the specification ("it is the purpose of this specification . . . to furnish information as to the approved characteristics of one of such type couplings which is approved by the Institute.") and to argue that that single word might mislead users into thinking **[**24]** that CISPI is a disinterested certifying organization, providing "approvals" for all hubless couplings, thereby hurting Clamp-All, unless, as Clamp-All seems to argue, CISPI considered Clamp-All's coupling for "approval" as well, *see* *Radiant Burners, Inc. v. Peoples Gas Light & Coke, 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)*; 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation*, § 6I.01 (1988); Wachtel, "Products Standards and Certification Programs," 13 *Antitrust Bull.* 1, 13 (1968).

The dispositive answer to this argument is that the record contains no significant evidence that the word "approved" misled anyone. The specification itself makes clear what it is, a specification that applies to *CISPI-type* hubless couplings, **[*488]** not to *all* hubless couplings. It contains no other language that might make one think that CISPI was some kind of general certifying organization. Buyers of hubless couplings are builders, plumbers, or contractors -- reasonably sophisticated users -- and there is no testimony that any of them was fooled. Plaintiff's best evidence consists of a comment by its expert that "people who normally use these things . . . could easily be misled," but, on cross examination, **[**25]** that same expert conceded that he had not talked to normal coupling users in forming that particular opinion. In our view, that opinion alone, so lacking in foundation, cannot take the issue of "being fooled" to the jury. And, if CISPI was not (or at least was not thought to be) a general certifying organization, why must it develop a specification for, or somehow "certify," a competitor's quite different product? After all, General Motors need not certify the quality of a Toyota, nor need a group of film producers certify the quality of competing live television programs.

b. Clamp-All argues that CISPI defendants prevented an important "standard-setting and approval-granting" organization, the American Society of Sanitary Engineers ("ASSE"), from approving a hubless coupling performance standard that would have benefitted Clamp-All. In theory, one can understand how joint activity of the kind Clamp-All alleges could be unreasonably anticompetitive. Suppose, for example, the ASSE was about to adopt a performance standard that both CISPI and Clamp-All could have met; suppose further that ASSE's adoption of such a standard would have led to the adoption of a similar standard by hosts **[**26]** of local and state regulatory, and private certifying authorities. Then Clamp-All simply could have pointed to the standard (and **[***1436]** its compliance) to show a contractor that its product was approved, just as CISPI does in states that have referenced the 310 Designation. If CISPI prevented the adoption of such a standard, it *may* have acted unreasonably.

The key word here, however, is "may." Certifiers may reasonably believe that they can do their job properly (a job that benefits consumers) only if all interested parties are allowed to present proposals, frankly present their views, and vote. Thus, we do not see how plaintiff could succeed on its antitrust claim unless (at a minimum) CISPI *both* prevented ASSE from adopting a national performance standard that would have benefitted Clamp-All *and* did so through the use of unfair, or improper practices or procedures. *See* Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (2nd Cir.) (antitrust claim stated where defendant conspired with other steel companies to block the approval of plaintiff's product by a national certifying organization; defendant acted within the letter of the organization's rules, but **[**27]** violated their spirit by paying for and packing a meeting with voters who had little to no professional interest in the subject matter), *aff'd*, 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) (affirming denial of *Noerr-Pennington* immunity for defendant's effort to influence *private* standard-setting organization; dismissing certiorari in respect to whether defendant's conduct was an unreasonable restraint of trade). ***HN11***[] In deciding whether this is so, courts must take account of the importance of permitting parties to express their views freely before regulatory authorities. *See* Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965) ***HN12***[] ("Joint efforts to influence *public* officials do not violate the antitrust laws even though intended to eliminate competition" (emphasis added)); *cf.* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) (efforts to influence *private* standard-setting organizations *may* violate antitrust laws).

The record here does not contain evidence sufficient to warrant presenting Clamp-All's **[**28]** claim to the jury. It shows that in 1979, at Clamp-All's request, the ASSE formed a subcommittee to write a hubless coupling standard. Clamp-All proposed a four-tier standard (rating couplings by their ability to withstand varying levels **[*489]** of water pressure). Initially, when only one CISPI representative was present, the subcommittee recommended a three-tier standard (which was also beneficial to Clamp-All). CISPI then decided to offer a single tier standard, which both the CISPI and Clamp-All couplings would have met. It wrote its members and urged them to attend the next meeting. At that next meeting, with six CISPI members attending out of a total of sixteen, the subcommittee changed its mind and voted for CISPI's proposed standard. The ASSE eventually decided not to accept its subcommittee's recommendation, and it took no further action.

We can find no concrete evidence in the record that CISPI acted improperly. The record here is unlike that in *Indian Head*, where the defendant "packed" the meeting by hiring lay voters in numbers that unfairly gave it overrepresentation. Nor is there concrete evidence that the submission of CISPI's proposal caused (or even influenced) ASSE's **[**29]** decision not to adopt any standard. Clamp-All points to a single statement by CISPI's general counsel that the CISPI one-tier proposal was "not really a performance standard." We do not see how that statement shows a significant abuse of ASSE's procedural standards or practices. Rather, as far as the record is concerned, CISPI acted within the letter and the spirit of the ASSE rules in presenting its proposal and urging its members to attend the meeting.

B

Clamp-All claims that the defendants have jointly engaged in several unreasonably anticompetitive "business practices." For the most part these claims amount to charges of state-law business torts, not violations of the federal antitrust laws. Whitten, 508 F.2d 547 at 560-62. We assume that point aside, however, for the sake of argument, and because of appellant's later Lanham Act claim, *see* pp. 491-92, *infra*. We have examined the evidence in respect to each alleged act, and we conclude that no reasonable jury could find a significant, unreasonably anticompetitive business practice that harmed Clamp-All.

a. Appellants say that CISPI marketed its trademarked pipe, fittings, and couplings together as a system, thereby deceptively **[**30]** suggesting that Clamp-All's coupling would not fit the system. The evidence appellant presented to show deception consisted of an advertisement that said:

> You cannot afford to use any other coupling but the CISPI stainless steel couplings for a COMPLETE CI NO-HUB system.

We have no reason to believe that CISPI's advertisement was significantly misleading **[***1437]** in the industry context. This language is of a kind characterized in *Whitten, 508 F.2d at 556*, as mere "sellers' talk." Moreover, CISPI aimed the advertisement at a technical audience, which would likely know enough not to find it significantly misleading in respect to whatever suggestion it might have made that Clamp-All's coupling would not fit the "system." (See the discussion under 'e' below.) We do not see how a jury, without more evidence than this vaguely worded advertisement, could find otherwise.

b. Appellant says that CISPI advertises its collective mark, CI NO-HUB, as a sign of quality, but, in fact, that advertising is deceptive because CISPI does not control the quality of the product. Clamp-All adds that there are "numerous examples of defective products bearing the CI NO-HUB trademark."

The record, however, **[**31]** contains only evidence of failures of CISPI *fittings* (curved pieces of pipe used to change the direction of the flow); it does not contain any evidence of any failure of any CISPI *coupling*. Appellant points to a Davidson Laboratory test as evidence, but that test shows that Clamp-All's more expensive coupling withstood strong water pressure more successfully than CISPI's; it did not show that CISPI's coupling was defective. Given the evidence, the logical links between "defective fittings," "no quality control," and "deceptive trademark use" in **[*490]** respect to coupling sales are too farfetched to warrant submission to the jury.

c. Clamp-All says that CISPI published test results favorable to its products but did not publish unfavorable test results. But ***HN13***[] the law, as far as we are aware, does not automatically require a firm to publish unfavorable test results.

Clamp-All adds that the favorable report -- the PTL report -- was misleading. The district court did not permit appellant to introduce that report, however, because it said the jury would not understand its significance without the help of an expert (and appellant had not designated an expert to testify about the report). We **[**32]** confess that we cannot understand the relevance of Clamp-All's complaint about the report. (It has something to do with the fact that the report explained that the ends of the pipes used in the test were "uncoated," but it did not explain that the ends were "machined off"). Our own inability to understand the relevance of Clamp-All contention leads us to conclude that the district court acted well within its powers in not admitting the report without expert explanation. *See* J. Weinstein & M. Berger, 3 *Weinstein's Evidence* para. 702[02] and cases cited at 702-9 n. 3 (1987).

d. Appellant says that CISPI members sometimes used the wrong trademark: they used the words "NO-HUB" instead of "CI NO-HUB." The only evidence that this is so, however, consisted of two of the defendants' price lists where the words "NO-HUB" appeared. The district court, noting that the lists contained all sorts of errors, concluded that this evidence would not permit a jury to find an intentional use of the wrong mark. We believe the court was correct.

e. Clamp-All says that CISPI improperly injured its reputation, first, by delivering (on several occasions during a six-month period) defective fittings to **[**33]** a site where contractors were using Clamp-All couplings, and second, by stating (at a press conference) that the Clamp-All coupling does not properly fit the CISPI system. The record presents uncontradicted evidence, however, that defective fittings are fairly common in the industry and that CISPI couplings tolerate common defects in the fittings, but Clamp-All couplings do not. That being so, a jury could not find, on the basis of this evidence, any deliberate plan to sabotage Clamp-All or its reputation, of a sort that could rise to the level of an antitrust violation. *See* *Whitten, 508 F.2d at 560-62*.

f. Clamp-All argues that CISPI should have allowed it to become a member. CISPI, however, is an association of pipe and fitting manufacturers, some, but not all, of whom also make CISPI couplings. Clamp-All does not make pipe or fittings (or, for that matter, CISPI couplings). There is, therefore, nothing unreasonable about CISPI's not accepting Clamp-All for membership. *See generally* 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 6I.02 (1988) ***HN14***[] (all members of an industry should be eligible for membership, but membership can be limited, for example, to "those **[**34]** operating at a certain level in the distribution chain").

We add two final points in respect to Clamp-All's antitrust claims. First, we cannot guarantee that we have found every bit of supporting evidence in the fourteen volumes of record. We have, however, examined the record with care, particularly those parts of it that the parties cited, and we are convinced there is no other evidence that could have made a difference to our conclusion. Second, appellant also brought charges of monopolization and attempted monopolization. *15 U.S.C. § 2 (1982)*. We have assumed, for the sake of argument, that CISPI manufacturers account for a large share of the coupling industry, but that they do not account for all, **[***1438]** or nearly all, its sales. (The district court properly refused to allow plaintiff's expert to present precise market share figures because that expert based his opinion significantly upon a few unmemorialized telephone calls, and estimated the reliability of his model as between "1 percent and 99 percent," *Fed. R. Evid. 403*; *see, e.g., American Bearing Company, Inc. v. Litton Industries, Inc., 540 F. Supp. 1163 (E.D. Pa.* ***[*491]*** *1982)*, *aff'd*, *729 F.2d 943* (3rd Cir.), *cert. denied*, **[**35]** *469 U.S. 854, 83 L. Ed. 2d 112, 105 S. Ct. 178 (1984)*.) That being so, the same reasons that have led us to find appellant's case inadequate in respect to the unreasonableness (or anticompetitive tendencies) of its *§ 1* "anticompetitive practice" claims and its pricing claims, lead us to conclude that ***HN15***[] it could not show "exclusionary conduct" in respect to its monopolization or attempted monopolization claims. *See* 3 Areeda & Turner para. 626 at 83, *cited in* *Barry Wright, 724 F.2d at 230*.

IV

The appellant's complaint also asserted a violation of § 43 of the Lanham Act, *15 U.S.C. § 1125(a) (1982)*, which reads, in relevant part, as follows:

> ***HN16***[] Any person who shall affix, apply, or annex, or use in connection with any goods or services, a false designation of origin, or any false description or representation, . . . shall be liable to . . . any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

The complaint alleged that "defendants have used false descriptions or representations in connection with the sale of hubless couplings." The district court dismissed this count of the complaint on the ground that ***HN17***[] this circuit's previous opinions have narrowly **[**36]** interpreted the Lanham Act to apply only to those sorts of unfair business practices or false statements that "are of the same economic nature as those which involve infringement or other improper use of trade-marks," *e.g.*, palming off one's goods as those of another. *Samson Crane Co. v. Union National Sales, Inc., 87 F. Supp. 218, 222 (D. Mass. 1949)*, *aff'd per curiam*, *180 F.2d 896 (1st Cir. 1950)*; *see also* *Litton Systems, Inc. v. Whirlpool Corp., 728 F.2d 1423, 1444-45 (Fed. Cir. 1984)*; *Quabaug Rubber Co. v. Fabiano Shoe Co., 567 F.2d 154, 160 (1st Cir. 1977)* ("The basis for an action under this section is use of a mark in interstate commerce which is likely to cause confusion or to deceive purchasers concerning the *source* of the goods [(emphasis added)]").

Appellant concedes it cannot meet this standard. But it notes that other circuits have adopted more liberal views of the statute, some indicating that it in essence creates a private right of action for ordinary "false advertising." *See* *U-Haul International, Inc. v. Jartran, Inc., 681 F.2d 1159 (9th Cir. 1982)*; *Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186 (2nd Cir.* ***[**37]*** *1980)*; *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649 (3rd Cir. 1954)*; *see generally* 2 J. McCarthy, *Trademark and Unfair Competition* § 27:4 (2nd ed. 1984). Appellant also points to cases where we have cast doubt on the validity of *Samson Crane. See* *Pignons S.A. de Mecanique v. Polaroid Corp., 657 F.2d 482 (1st Cir. 1981)* (plaintiff sought overturning of *Samson Crane*; court acknowledged merit of plaintiff's position, but declined to express an opinion); *Electronics Corporation of America v. Honeywell, Inc., 487 F.2d 513, 514 (1st Cir. 1973)* ("in relying on the district court opinion, we do not indicate necessary agreement with its conclusion that palming off is not an essential element of a Lanham Act claim"); *see also* *Camel Hair and Cashmere Institute of America, Inc. v. Associated Dry Goods, 799 F.2d 6 (1st Cir. 1986)* (harm is of traditional "protection of proprietary mark" variety, but does not involve palming off). Appellant asks us to reconsider the validity of *Samson Crane* in light of our, and other circuits', subsequent cases.

After examining the record, however, we have concluded that this is not an appropriate case **[**38]** in which to reconsider the validity of *Samson Crane*. Appellant had an opportunity to present its "false advertising" evidence in support of its antitrust claim, and we assume it did so. *See* pp. 489-90, *supra*. In light of that evidence, we believe it undesirable to prolong the case, for, even were we to reconsider *Samson Crane* and remand, it seems unlikely that appellant could win its action. We therefore continue to assume the validity of *Samson Crane*, and postpone its reconsideration for another day.

Finally, we affirm the pretrial dismissal of defendant American Brass & Iron **[*492]** Foundry on jurisdictional grounds for substantially the reasons noted by the district court. Appellant makes various other claims, which we find completely without merit. The judgment of the district court is

Affirmed.

[United States v. Seluk](#)

United States District Court for the District of Massachusetts

July 5, 1988, Decided

Criminal No. 88-107-K

Reporter

691 F. Supp. 525 *; 1988 U.S. Dist. LEXIS 6788 **

UNITED STATES OF AMERICA, v. JOSEPH SELUK, Defendant

Core Terms

lawmaking, Sentencing, courts, delegation, guidelines, powers, sentencing guidelines, Parole, judicial branch, decisions, substantive law, separation-of-powers, sentencing decision, executive branch, fashioning, regulation, forbidden, functions, branch of government, initiative, rulemaking, cases, legislative power, characterization, cooperative, placement, agencies, delegation of authority, decisionmaking, challenges

LexisNexis® Headnotes

Constitutional Law > Separation of Powers

HN1[] **Constitutional Law, Separation of Powers**

Accepting a label without examination of its substantive implications is precisely the kind of formalism in applying the doctrine of separation of powers that has been rejected. Fidelity to the caution against formalism requires an appraisal of the reality of how powers and functions have been allocated and exercised among the three branches in the system that had evolved up to the time of enactment of the statute at issue, as well as how they are allocated and will be exercised under the statute.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Courts

Criminal Law & Procedure > Commencement of Criminal Proceedings > Grand Juries > General Overview

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Jury

Governments > Courts > Authority to Adjudicate

HN2[] **Judicial Officers, Judges**

Judicial officers (including Article III judges) are not limited to performing the adjudicatory function of deciding cases and controversies. Their acknowledged powers and duties of office include non-adjudicatory tasks. Among such functions are disciplinary supervision of both bench and bar, rulemaking ancillary to the administration of the courts, and other functions, including supervision of grand juries and initiation of contempt proceedings, that do not necessarily or directly involve adversarial proceedings within a trial or appellate court.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Governments > Federal Government > US Congress

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > Sentencing > Ranges

HN3[] **Postconviction Proceedings, Parole**

All three branches of government have long exercised significant powers over the scope and extent of punishment of persons convicted of crimes. Indeed, one of the explicit premises of enactment of the Sentencing Reform Act, *28 U.S.C.S. § 991, et seq.*, was that the meaning of a sentence declared by a judge (within the very loose constraints imposed by Congress, despite its acknowledged power to enact more rigorous limitations upon sentencing range) had been obscured by the power of the Parole Commission to release a prisoner after he or she had served only a small part of the period of confinement announced as the judge's sentence. Thus, congress, courts, and the Parole Commission have substantially shared control in fact over the punishment imposed upon each individual defendant.

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN4[] **Constitutional Law, Separation of Powers**

The work of the Sentencing Commission is in essence prospective substantive lawmaking because it is developing guidelines for application in the future to reasoned rather than purely discretionary sentencing decisions. This reality, however, is not dispositive of a separation-of-powers challenge.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Governments > Federal Government > US Congress

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Postconviction Proceedings > Parole

Governments > Legislation > Enactment

HN5[] **Sentencing, Sentencing Guidelines**

The Sentencing Reform Act (SRA), *28 U.S.C.S. § 991, et seq.*, very sharply curtailed the executive branch's discretion as to length of the sentence of an individual offender by abolishing the Parole Commission. Also, it substantially reduced the exercise of discretion case by case in the judicial branch. These choices by congress are choices to enact a law that affects the severity of punishment for crime in a deeper way than merely setting statutory minimum and maximum terms of imprisonment. The SRA imposes much greater substantive constraints on the discretion of judges and others. The imposition of these substantive-law constraints upon individual sentencing decisions is lawmaking that is well within the scope of congress' legislative power unless the method congress chose to implement them is forbidden.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Governments > Courts > Judicial Precedent

Governments > Federal Government > US Congress

Governments > Legislation > Interpretation

HN6[] **Justiciability, Case & Controversy Requirements**

The Constitution does not require that any statute be a complete prescription for the area of law it addresses. By necessity, because of the limitations of human foresight, every lawmaking pronouncement by every entity that makes law is an incomplete statement of the law on the subject addressed. No precedent, no rule, and no statute ever answers all substantive law questions related to the subject matter it addresses. All lawmaking -- whether by congress, by courts, or by other governmental entities -- is to some degree left to further development. In part, further development occurs as the law is applied case by case. This is an inherent characteristic of the common law system in which each decision becomes precedent. In part also, however, further development occurs in other ways. One set of examples appears in judicial decisions that overrule precedent prospectively only, not retroactively even as to the case before the court. It may be observed that what the court declares in such instances about the future is not said in deciding the case or controversy then before the court. Nevertheless, the declaration about the future is, as a practical matter, effective lawmaking. A second set of examples appears in developments that follow a congressional authorization for agency development of "regulations" that have substantive and not merely procedural consequence.

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority

Governments > Federal Government > US Congress

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > Separation of Powers > Legislative Controls > General Overview

HN7[] **Legislative Controls, Implicit Delegation of Authority**

If the court determines that in enacting a statute congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. The power of an administrative agency to administer a congressionally created program requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by congress. If congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

Administrative Law > Judicial Review > General Overview

Constitutional Law > Congressional Duties & Powers > Presentment & Veto

Governments > Federal Government > US Congress

Constitutional Law > Separation of Powers

HN8[] **Administrative Law, Judicial Review**

All legislative powers granted shall be vested in a congress of the United States, which shall consist of a Senate and House of Representatives. *U.S. Const. art. I, § 1*. Interpreting this section of the Constitution as totally prohibiting participation of executive and judicial officials in lawmaking, however, would be disregarding the provisions of U.S. Const. art. I, § 7, under which no enactment by congress becomes law before it is presented to the President and either approved by him or disapproved by him and repassed by two-thirds of the Senate and House. Moreover, the third branch, exercising the constitutional power of judicial review, also has a lawmaking role in determining whether a statute enacted by congress and approved by the President is enforceable in cases and controversies before the courts. Thus, the Constitution as a whole does not support the argument that all lawmaking functions are a part of the "legislative powers" vested exclusively in congress. Neither the text of the Constitution nor the opinions construing it may properly be understood as supporting the argument that the label "legislative," in the *U.S. Const. art. I, § 1* sense, is aptly applied to all actions of courts and agencies in filling the interstices of constitutionally permissible statutory initiatives.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Constitutional Law > Congressional Duties & Powers > Delegation of Authority

Administrative Law > Judicial Review > General Overview

Administrative Law > Separation of Powers > Executive Controls

Governments > Federal Government > General Overview

Governments > Federal Government > US Congress

HN9[] **Separation of Powers, Legislative Controls**

Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both houses of congress and the president for the reason that the constitution does not so require. That kind of executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of congress to modify or revoke the authority entirely. A one-house veto is clearly legislative in both character and effect and is not so checked; the need for the check provided by *U.S. Const. art. I, §§ 1*, 7, is therefore clear. Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that congress can constitutionally control administration of the laws by way of a congressional veto.

Constitutional Law > Congressional Duties & Powers > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Governments > Federal Government > US Congress

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Stimulation of Commerce

Constitutional Law > Separation of Powers

HN10[] **Constitutional Law, Congressional Duties & Powers**

By enactment of the Sentencing Reform Act, *28 U.S.C.S. § 991, et seq.*, congress has initiated a dramatic change in the law of criminal sentencing. Substantive rules and obligations of reasoned choice and reasoned explanation now become central to each sentencing decision. When such a congressional initiative is taken, a new body of substantive law must be developed. In this instance, most of the traditional methods of developing the new body of law -- including the method of case-by-case development in courts -- would plainly be impractical. congress has chosen instead a method closer to those used in relation to such substantive law areas as price regulation, trade regulation, and environmental protection. The precise method chosen is not exactly like any previously used, but neither, for example, was the method chosen for price regulation when congress first determined, in the exercise of its constitutionally authorized power, that compelling national interests would be best served by price controls. The fact that this method of filling out the interstices of statutory law is to some degree innovative does not alone establish that it violates principles of separation of powers explicit or implicit in the Constitution.

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN11[] **Constitutional Law, Separation of Powers**

The Constitution does not require three airtight departments of government. The separation of powers inquiry is not so much a review of theoretical abstractions of "who ought to do what" as it is a pragmatic analysis of the extent to which an act by one branch of government prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. When judged by fidelity to the objectives of separation-of-powers doctrine -- preservation of the independence of each branch of government and protection against aggrandizement in any branch that would disturb the balance among them -- the Sentencing Reform Act, *28 U.S.C.S. § 991, et seq.*, survives a challenge on the ground of excessiveness of delegation.

Business & Corporate Law > Cooperatives > General Overview

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > Separation of Powers

HN12[] **Business & Corporate Law, Cooperatives**

The Constitution does not require three airtight departments of government. If all three branches are to participate in the task of developing substantive law, then sealing off each branch's participation from that of the other two, and requiring the three to act one at a time, in a succession of moves and countermoves to preserve a balance of powers, is more likely to impede than to advance the objective. Separation-of-powers doctrine places constraints upon cooperative efforts and joint decisionmaking, but it does not forbid them. Cooperative efforts shall not produce impediments to any branch's exercise of its powers and shall not produce aggrandizement that disturbs constitutional checks and balance. But no part of the text of the Constitution, and no principle implicit in it, forbids cooperative activity in which each branch preserves the integrity of its powers and representatives of two or all three branches, acting together, expedite lawmaking and enhance its quality. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN13[] **Constitutional Law, Separation of Powers**

Under the Sentencing Reform Act (SRA), *28 U.S.C.S. § 991, et seq.*, judges who participate in the work of the Sentencing Commission are not engaged in a constitutionally-forbidden "sharing" of judicial power with officials of the executive branch, nor are the latter "sharing" executive power with judge-members of the Commission. Each member, though participating in the work of the Commission, remains free to exercise that member's executive or judicial function without impairment. Of course, the lawmaking of the Commission under legislatively delegated authority thereafter affects individual case decisions in the judicial branch as well as further action implementing the SRA in the executive branch. It does so, however, only in the sense that law constrains the exercise of all powers in all three branches. Thus, the judiciary's later acceptance of the Commission's guidelines as law that controls individual case decisions is no more a demonstration of a forbidden "sharing" of power than is the judiciary's acceptance of statutes and administrative regulations as law that controls later judicial decisions, so long as the statutes do not offend constitutional mandates and the regulations do not offend either constitutional or statutory mandates.

Constitutional Law > Congressional Duties & Powers > Census > Composition of United States Congress

Governments > Courts > Judges

Administrative Law > Separation of Powers > Executive Controls

Constitutional Law > The Presidency > Removal of Officials

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Governments > Federal Government > US Congress

HN14[] **Census, Composition of United States Congress**

For the Sentencing Commission, judge-commissioners are appointed and removed by the President and serve on the Commission with two non-voting members of the executive branch. Although the particular composition congress chose for the Commission is not a "traditional" one, there is nothing in the Constitution that explicitly or implicitly bars such a composition. Nor is there any convincing argument that the joint service of executive and judicial officers on this Commission will impair the functioning of either branch. Congress had a rational basis for determining that the experience and insight of judges, developed from their judicial experience, would be useful in the work of the Commission. Because judge-members bring to this work a perspective characteristic of the judicial branch, it may even be said that their functioning on the Commission may appropriately be characterized as "judicial" in a broad sense. But, the judge-commissioners are not acting in an adjudicatory capacity when performing their Commission duties. Constraints applicable to influences upon performance of an adjudicatory function are therefore not apt. Nor is there any reasoned basis for determining that service on the Commission would disqualify judge-members from future judicial service generally. Recusals incident to service on the Commission do not impermissibly impair judicial performance.

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN15[] Constitutional Law, Separation of Powers

There is no injury to a defendant when he claims that the sentencing guidelines as a whole are unconstitutional and fails to show some way in which placement of the Sentencing Commission in the judicial branch causes injury to him that would not have occurred had the Commission been designated either as an agency of the executive branch or as an independent agency.

Constitutional Law > Congressional Duties & Powers > Census > Composition of United States Congress

Governments > Federal Government > Executive Offices

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN16[] Census, Composition of United States Congress

Neither executive nor judicial power is threatened by the participation of members of both these branches in the Sentencing Commission's work. Also, the Presidential power to remove individual members of the judiciary from membership on the Commission does not affect a person's continued service as a member of the judicial branch, even when no longer a member of the Commission. Although perhaps unprecedented, the composition of membership of the Commission does not appear to be a threat to the constitutional balance of powers. The limited degree of Presidential control over the Commission and its membership does not amount to a violation of constitutional principles of separation of powers.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN17[] Procedural Due Process, Scope of Protection

The work of the Sentencing Commission "dictates" a sentence only in the sense that law always dictates results in judicial decisionmaking. That consequence is, of course, the essence of a government of laws, in contrast with totally discretionary decisionmaking by each individual adjudicator. It plainly is true that in enacting the Sentencing Reform Act (SRA), *28 U.S.C.S. § 991, et seq.*, congress, with an explicit purpose of reducing sentencing disparity, has chosen to cause criminal sentencing decisions to be guided by law to much greater extent than in previous practice, and to correspondingly less extent to be determined by the exercise of discretion. That is a choice congress was constitutionally free to make. That choice is not offensive to due process standards.

Judges: [1]** Robert E. Keeton, United States District Judge.

Opinion by: KEETON

Opinion

[*526] ROBERT E. KEETON, UNITED STATES DISTRICT JUDGE.

The defendant, scheduled to be sentenced under mandatory sentencing guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act ("SRA" or "the Act"), *28 U.S.C. § 991 et seq.*, challenges the constitutionality of the Act and the guidelines as a whole. I conclude that the challenge lacks merit.

The defendant has not challenged separately any of the particular provisions that bear upon his sentence, and of course, I do not consider whether one or more among the many provisions within the guidelines may be held unconstitutional as applied in other circumstances, even though the guidelines as a whole survive challenge.

I. *Summary of Contentions*

The defendant contends that the creation of the Sentencing Commission, pursuant to the SRA, violates the Constitution in five ways. The first four are arguments that the SRA violates the doctrine of separation of powers because (1) through this Act Congress has assigned legislative power to a body (the Sentencing Commission) that not only is outside the legislative branch but also is part of the judicial branch, (2) the SRA makes an excessive **[**2]** delegation of legislative power, (3) the inclusion of three federal judges on the Commission threatens the independence and impartiality of the judiciary, and (4) the President's control over the Commission makes its members **[*527]** (including judges) subservient to the executive branch. The final argument is that (5) the sentencing guidelines deny due process by unduly restricting defendants' right to present information relevant to sentencing.

Essentially similar arguments, though with variations in detail, were presented to and rejected by Judge Mazzone in *United States v. Alves, 688 F. Supp. 70 (D. Mass.1988)*, and a number of other district courts, *see, e.g., United States v. Johnson, 682 F. Supp. 1033* (W.D. Mo.), *cert. granted sub nom. United States v. Mistretta, 486 U.S. 1054, 100 L. Ed. 2d 920, 108 S. Ct. 2818, 56 U.S.L.W. 3848 (1988)*; *United States v. Chambless, 680 F. Supp. 793 (E.D. La. 1988)*; *United States v. Ruiz-Villanueva, 680 F. Supp. 1411 (S.D. Cal. 1988)*. Decisions of other courts, even greater in number, sustained the challenge to constitutionality. *See, e.g., United States v. Tolbert, 682 F. Supp. 1517 (D. Kan. 1988)*; *United States v. Estrada, **[**3]** 680 F. Supp. 1312 (D. Minn. 1988)*; *United States v. Frank, 682 F. Supp. 815 (W.D. Pa. 1988)*; *United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988)*. I concur in the conclusions reached by Judge Mazzone in *Alves*, the only other case thus far decided in this district, and I write further only to consider the basic premises of the separation-of-powers and due-process arguments emphasized in the submissions before me and to address some points not explicitly addressed in the *Alves* opinion and others cited above as sustaining the SRA.

Underlying the first and second of the defendant's contentions is the characterization of the Commission's power to develop sentencing guidelines as a "legislative" power. This characterization is the foundation for contentions that the power may not be exercised by either the executive or the judicial branch of government, that the delegation made by Congress in this case is constitutionally excessive, and that, therefore, delegation to a commission placed in the judicial branch is twice forbidden -- both because of the extent of the delegation and because the SRA attempts to delegate to a commission that it purports to place **[**4]** in the judicial branch.

In response, first, the government argues that fashioning sentencing guidelines is essentially "executing" law rather than "making" law, and is analogous to the function previously performed by the Parole Commission, which served the objective of reducing disparity in sentences entered by hundreds of different judges by applying guidelines that it developed for general use and then applied case by case. Second, the Commission responds that governmental entities in the judicial branch, as well as administrative agencies (whether treated as part of the executive branch or as "independent" agencies) have an acknowledged power to promulgate rules affecting their administration, procedures, and operations, and that the sentencing guidelines developed by the Commission and challenged here are constitutionally permissible under this inherent rulemaking power. As to placement of the Commission in the judicial branch, the government does not oppose a ruling that this is impermissible but argues that this provision is severable. Counsel for the Commission, as amicus, defends the placement of the Commission in the judicial branch as well as all other features of the Act.

[5]** In order to assess the defense contentions and the responses of the government and the Commission, one must consider what is the most appropriate description of the nature of the function of fashioning sentencing guidelines such as those promulgated by the Commission and to what extent this function is like or unlike powers traditionally exercised in various branches of government, including agencies unknown in earlier years of our constitutional history but used with increasing profusion and variety in the last half century.

II. "*Legislative," "Rulemaking," and "Lawmaking" Powers*

At the outset, it may be observed that advocates of contrasting views predictably use different terminology with contrasting tendencies as hidden persuaders. Characterizing the power to develop sentencing guidelines as a "legislative" power encourages one to conclude that this power belongs only in the legislative branch. Similarly, **[*528]** on the other side, characterizing this power as a "rulemaking" power encourages one to conclude that it is an inherent power of every court, administrative agency, and commission.

HN1[] Accepting such an intuitive leap from a label adopted without examination of its substantive implications, **[**6]** however, is precisely the kind of formalism in applying the doctrine of separation of powers that the Supreme Court has rejected. *Nixon v. Administrator of General Services, 433 U.S. 425, 443, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977)*; *Buckley v. Valeo, 424 U.S. 1, 121, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)* (per curiam); *see also Morrison v. Olson, 487 U.S. 654, 1988 U.S. LEXIS 3034, 59-64, 101 L. Ed. 2d 569, 108 S. Ct. 2597 (1988)*. Fidelity to the Court's caution against formalism requires an appraisal of the reality of how powers and functions have been allocated and exercised among the three branches in the system that had evolved up to the time of enactment of the SRA, as well as how they are allocated and will be exercised under the Act.

Defendant characterizes the Commission's work as nonjudicial. Citing *Hayburn's Case, 2 U.S. (2 Dall.) 409, 1 L. Ed. 436 (1792)*, and *United States v. Ferreira, 54 U.S. (13 How.) 40, 52, 14 L. Ed. 42 (1852)*, defendant argues that the Supreme Court has recently explained these early cases as holding "that executive or administrative duties of a nonjudicial nature may not be imposed on [Article III] judges." *Buckley v. Valeo, 424 U.S. 1, 123, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)*. Defendant also calls attention to the declaration in *Springer v. Phillipine Islands, 277 U.S. 189, **[**7]** 72 L. Ed. 845, 48 S. Ct. 480 (1928)*, that "unless otherwise expressly provided or incidental to the powers conferred, . . . the judiciary cannot exercise either executive or legislative power." *Id. at 201-02*; *see also Keller v. Potomac Electric Power Co., 261 U.S. 428, 444, 67 L. Ed. 731, 43 S. Ct. 445 (1923)* (declaring legislation prescribing legislative function for Supreme Court invalid).

The defense argument continues that under Article III, Section 2, of the Constitution, the power of judges is narrowly and precisely limited to deciding cases and controversies. *See Massachusetts v. Mellon, 262 U.S. 447, 488, 67 L. Ed. 1078, 43 S. Ct. 597 (1923)*; *Muskrat v. United States, 219 U.S. 346, 55 L. Ed. 246, 31 S. Ct. 250 (1911)*.

If interpreted in this restrictive way, however, these precedents would invalidate much of the traditional work of Article III judges. Indeed, defendant has recognized that ***HN2***[] judicial officers (including Article III judges) are not limited to performing the adjudicatory function of deciding cases and controversies. Their acknowledged powers and duties of office include nonadjudicatory tasks. Among such functions are disciplinary supervision of both Bench and Bar, rulemaking "ancillary to the administration of the courts," *In re Certain Complaints Under* **[**8]** *Investigation, 783 F.2d 1488, 1505* (11th Cir.), *cert. denied*, *477 U.S. 904, 91 L. Ed. 2d 563, 106 S. Ct. 3273 (1986)*, and other functions, including supervision of grand juries and initiation of contempt proceedings, that "do not necessarily or directly involve adversarial proceedings within a trial or appellate court," *Morrison, 487 U.S. 654, 1988 U.S. LEXIS 3034 at 48 n.20, 101 L. Ed. 2d 569, 108 S. Ct. 2597*.

Defendant argues, however, that the judiciary may not "take part in the formulation of substantive law. *See Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S. Ct. 422, 85 L. Ed. 479 (1941)*." Defense Memorandum (Docket No. 13), page 9.

This broad assertion that courts and Article III judges may not "take part in the formulation of substantive law" is a vulnerable link in the defense chain of reasoning.

The premise that courts may engage in prospective "procedural" rulemaking but never in prospective "substantive" rulemaking not only is inconsistent with American legal tradition but also is flawed on theoretical grounds.

True, there was a time when prevailing legal theory suppressed the fact that courts make law. Among the grandest of all legal fictions was the notion that courts merely interpret and apply law either previously made by statute or simply existing as a "brooding **[**9]** omnipresence" in the absence **[*529]** of any statute in point. For at least a half century now, however, a more candid view of legal process has prevailed. Courts regularly "take part in the formulation of substantive law" in a variety of ways. First and most notably, they do so daily by making decisions that, under the common law system, are precedents. Of course, one might describe as *retroactive* the kind of lawmaking that is incident to recognition of judicial decisions as precedents; however, the law thus made not only determines the legal consequences of the past events involved in the case before the court but also is controlling, as precedent, over past events involved in cases yet to be decided as well as future events.

Subtler, perhaps, but even more influential as a factor in *prospective* lawmaking, is the court's duty (and not merely authority) to disclose reasons for its judgments. A candid disclosure of reasons inevitably says more about what law will be applied in future cases than need be said to decide the case at hand if the court were willing to state a reason of narrower scope than the more broadly applicable reason that did in fact influence the court to decide as **[**10]** it did.

Even today, as well as in time past, a common way of describing the lawmaking that occurs in judicial opinions -- perhaps even the most common way of describing it -- maintains formally the legal fiction that courts "find" law and do not "make" it. Thus, it is said that when a court decides one way first and later overrules that decision and applies the newly recognized substantive rule retroactively, the court did not "make" either the "old" or the "new" rule. Rather in its later decision the court "found" what the law had been all along, though for a time it had been incorrectly perceived. *Cf.* *Venturelli v. Cincinnati, Inc., 850 F.2d 825 (1st Cir.1988)* (applying recent product liability precedents retroactively to the manufacturing in 1947 of industrial machinery that contributed to an injury in 1981; "courts typically apply newer understandings of 'old' legal standards to 'old' sets of facts"; "they normally treat law as 'found,' not 'made'"). Nevertheless, in exceptional circumstances overruling decisions are given prospective effect *only* and are not even applied to the case before the court. *See, e.g.,* *Great Northern Ry. v. Sunburst* **[**11]** *Oil & Refining Co., 287 U.S. 358, 363-66, 77 L. Ed. 360, 53 S. Ct. 145 (1932)*. Somewhat more frequently, overruling decisions are given prospective effect *principally*; that is, the newly-fashioned rule is applied to the case before the court, and thus retroactively as to that one past set of events, but otherwise is applied prospectively only. *See, e.g.,* *Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)* (declining to apply the rule of *Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961)*, which overruled *Wolf v. Colorado, 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949)*, to other cases finally decided before *Mapp*). Both *Sunburst* (in a civil context) and *Mapp-Linkletter* (in a criminal context) are illustrations of lawmaking with respect to issues that incontrovertibly had substantive impact. Also, the types of decisionmaking they illustrate are prospective substantive lawmaking not only in practical effect but in form as well.

Other illustrations of prospective lawmaking involve the fashioning of "supervisory rules" that might be distinguished as procedural rather than substantive. *See, e.g.,* *Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90 (3d Cir. 1988)* (vacating sanctions award under *Fed. R. Civ. P. 11*; adopting **[**12]** "as a supervisory rule" a requirement that all motions for *Rule 11* sanctions be filed in the district court before the entry of a final judgment). Even decisions involving exercise of a court's supervisory powers, however, demonstrate that judicial power to make law is not limited to making law coincidentally, under the doctrine of *stare decisis*, by deciding a case or controversy. Rules of procedure are rules of law -- even if strictly procedural law rather than substantive law.

Moreover, along the spectrum from what is incontrovertibly substantive to what is incontrovertibly procedural, more distinctions have been drawn in precedents and in practice than simply one bright line dividing the universe of instances into two **[*530]** groups, one totally substantive in nature and the other totally procedural. Different definitions of substantive-procedural distinctions have been fashioned to serve the different objectives relevant to different contexts. *See, e.g., Hanna v. Plumer, 380 U.S. 460, 471, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965)*; *Sibbach, 312 U.S. at 9-14*.

Also, even among different contexts in which it is agreed that rulemaking is substantive rather than procedural, the particular nature and function **[**13]** of the substantive rulemaking bears upon the extent to which it is constitutionally permissible for substantive lawmaking to occur outside the legislative branch. The law of criminal sentencing is among the clearest historical examples of a field in which much substantive lawmaking did occur, before enactment of the SRA, in the courts and, through the work of the Parole Commission, in the executive branch.

HN3[] All three branches of government have long exercised significant powers over the scope and extent of punishment of persons convicted of crimes. Indeed, one of the explicit premises of enactment of the SRA was that the meaning of a sentence declared by a judge (within the very loose constraints imposed by Congress, despite its acknowledged power to enact more rigorous limitations upon sentencing range) had been obscured by the power of the Parole Commission to release a prisoner after he or she had served only a small part of the period of confinement announced as the judge's sentence. Thus, Congress, courts, and the Parole Commission have substantially shared control in fact over the punishment imposed upon each individual defendant. *See Geraghty v. United States Parole Comm'n,* ***[**14]*** *719 F.2d 1199, 1211 (3d Cir. 1983)*, *cert. denied*, *465 U.S. 1103, 80 L. Ed. 2d 133, 104 S. Ct. 1602 (1984)*.

I do not rest my judgment upon either (1) the assertion that fashioning sentencing guidelines is essentially "executing" law rather than "making" law, or (2) the assertion that fashioning sentencing guidelines is no more than an exercise of inherent "rulemaking" power. To accept either of those contentions would be at least problematic, and probably incorrect. *Cf.* *Estrada, 680 F. Supp. at 1327-29* (holding that the guidelines are substantive and -- contrary to the conclusion I have reached -- for that reason are unconstitutional). I conclude that in any event it would be inappropriate to accept those contentions in view of the Supreme Court's caution against formalism in analysis of separation-of-powers issues.

I accept as reality that ***HN4***[] the work of the Sentencing Commission is in essence prospective substantive lawmaking because it is developing guidelines for application in the future to reasoned rather than purely discretionary sentencing decisions. This reality, however, is not dispositive of the separation-of-powers challenge. In order to decide whether participation of Article III judges in the kind **[**15]** of lawmaking that is involved in the work of the Sentencing Commission is forbidden by separation-of-powers principles, we must examine more closely both the nature of this lawmaking and how it compares with other developments in our constitutional tradition.

III. *Incomplete Substantive Lawmaking and Delegation*

HN5[] The SRA very sharply curtailed the executive branch's discretion as to length of the sentence of an individual offender by abolishing the Parole Commission. Also, it substantially reduced the exercise of discretion case by case in the judicial branch. These choices by Congress are choices to enact a law that affects the severity of punishment for crime in a deeper way than merely setting statutory minimum and maximum terms of imprisonment. The SRA imposes much greater substantive constraints on the discretion of judges and others. The imposition of these substantive-law constraints upon individual sentencing decisions is lawmaking that is well within the scope of Congress' legislative power unless the method Congress chose to implement them is forbidden. One of the defense challenges to the method centers on the incompleteness of the congressional mandate. That is, the defense **[**16]** argues that the new substantive law enacted in the **[*531]** SRA is so incomplete (and thus depends so much on further lawmaking by other branches) that it offends constitutional constraints.

HN6[] The Constitution, however, does not require that any statute be a complete prescription for the area of law it addresses. By necessity, because of the limitations of human foresight, and not merely by choice, every lawmaking pronouncement by every entity that makes law is an incomplete statement of the law on the subject addressed. No precedent, no rule, and no statute ever answers all substantive law questions related to the subject matter it addresses. All lawmaking -- whether by Congress, by courts, or by other governmental entities -- is to some degree left to further development.

In part, further development occurs as the law is applied case by case. This is an inherent characteristic of the common law system in which each decision becomes precedent.

In part also, however, further development occurs in other ways. One set of examples, noted in Part II above, appears in judicial decisions that overrule precedent prospectively only, not retroactively even as to the case before the court. *See, e.g.,* ***[**17]*** *Sunburst, 287 U.S. 358, 77 L. Ed. 360, 53 S. Ct. 145 (1932)*. It may be observed that what the court declares in such instances about the future is not said in deciding the case or controversy then before the court. Nevertheless, the declaration about the future is, as a practical matter, effective lawmaking.

A second set of examples appears in developments that follow a congressional authorization for agency development of "regulations" that have substantive and not merely procedural consequence. One striking instance is a regulation of the Environmental Protection Agency, in relation to a matter to which expert knowledge and perception of the agency was relevant. A regulation of the agency was treated, both in essence and in legal theory, as having substantive-law effect and with the consequence that courts must defer to the agency's way of filling a gap in the statutory lawmaking. As the Court stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*:

> ***HN7***[] If . . . the court determines [that in enacting a statute] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary **[**18]** in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> "The power of an administrative agency to administer a congressionally created. . . program requires the formulation of policy and the *making of rules to fill any gap left*, implicitly or explicitly, by Congress." *Morton v. Ruiz, 415 U.S. 199, 231, [39 L. Ed. 2d 270, 94 S. Ct. 1055]* (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

Id. at 843-44 (footnotes omitted) (emphasis added).

The functioning of the Parole Commission during recent decades may be considered an even more dramatic and relevant illustration of congressional authorization for agency (in this instance, an agency in the executive branch) development of rules or regulations with substantive impact -- impact over the length of the deprivation of liberty in individual cases. That is, by a process that occurred apart from its making decisions on individual applications **[**19]** for parole, the Parole Commission developed "guidelines" for its parole decisions. Then, in deciding upon individual applications presented after those guidelines were in place, it generated "precedents" (though in a sense less precise and constraining than judicial precedents).

In upholding the statute authorizing the Parole Commission's fashioning of parole guidelines for prospective application, the Third Circuit observed:

> **[*532]** Yet, even if the statute could be construed as delegating some legislative power to the Commission, we think that compared to other administrative law precedents it withstands constitutional attack. Courts have consistently upheld much more expansive delegations of authority to agencies to regulate the conduct of members of the public. *See, e.g.,* *Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944)* (price controls imposed under Emergency Price Control Act of 1942); *Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, [84 L. Ed. 1263, 60 S. Ct. 907]* (1940) (sales tax imposed under Bituminous Coal Conservation Act); *United States v. Gordon, 580 F.2d 827* (5th Cir.), *cert. denied*, *439 U.S. 1051, 99 S. Ct. 731, 58 L. Ed. 2d 711 (1978)* (drug control standards established by the Comprehensive **[**20]** Drug Abuse Prevention and Control Act). In fact, the Supreme Court has declared statutes unconstitutional on the basis of an improper delegation of a legislative function on only two occasions. *See* *Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935)*; *Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935)*.

Geraghty, 719 F.2d at 1212-13.

Defendant's argument that the SRA attempts an unconstitutional delegation of "legislative" power, formal though the argument is, cannot be dismissed lightly. Indeed, it derives from the language of the Constitution.

> ***HN8***[] All *legislative* Powers herein granted shall be vested in a *Congress* of the United States, which shall consist of a Senate and House of Representatives.

Art. I, § 1 (emphasis added). Interpreting this section of the Constitution as totally prohibiting participation of executive and judicial officials in lawmaking, however, would be disregarding the provisions of Article I, § 7, under which no enactment by Congress becomes law before it is presented to the President and either approved by him or disapproved by him and repassed by two-thirds of the Senate and House. Moreover, the third branch, **[**21]** exercising the constitutional power of judicial review, also has a lawmaking role in determining whether a statute enacted by Congress and approved by the President is enforceable in cases and controversies before the courts. Thus, the Constitution as a whole does not support the argument that all lawmaking functions are a part of the "legislative Powers" vested exclusively in Congress.

Neither the text of the Constitution nor the opinions construing it may properly be understood as supporting the argument that the label "legislative," in the Article I, § 1 sense, is aptly applied to all actions of courts and agencies in filling the interstices of constitutionally permissible statutory initiatives. This conclusion is supported by a close examination of what was said and done by the Court in *INS v. Chadha, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983)*.

The government has cited *Chadha* in support of the contention that the work of the Sentencing Commission in fashioning guidelines is "executive" because it is merely a part of "executing" the laws on criminal sentencing enacted by Congress. As already noted, I reject that contention and recognize that fashioning sentencing guidelines is lawmaking. **[**22]** Nevertheless, when the Court in *Chadha* referred to the Attorney General's "exercise of legislatively delegated authority," *id. at 952-53*, it was not using "legislative" in a sense limited to the Article I, § 1 sense of exercise of a power that only Congress can exercise. If "legislative" were used in a sense limited to the exercise of "*Powers*" that only Congress could exercise, Congress could not delegate any "legislative" authority and all purported "legislatively delegated authority" would be forbidden.

The conclusion that the Court, in *Chadha*, was not using "legislative" in such a narrow sense is reinforced by attention to the nature of the issue before the Court in that case. The decision of the Court was that a "one-House veto" was unconstitutional. The Court observed:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, **[*533]** Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish **[**23]** desirable objectives, must be resisted.

Id. at 951. A footnote in *Chadha* responded to the contention of Congress that affirming the Court of Appeals decision against the one-House veto "will sanction 'lawmaking by the Attorney General . . . .'" *Id. at 953 n.16*. "Why," the brief presenting the contention of Congress asked, "is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?" Id. It was in this context that the Court quoted the observation that "in the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker," *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587, 96 L. Ed. 1153, 72 S. Ct. 863 (1952)*, and added that "when the Attorney General performs his duties . . . he does not exercise 'legislative' power." *Chadha, 462 U.S. at 953 n.16*. The footnote concludes:

> ***HN9***[] Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is **[**24]** always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely. A one-House veto is clearly legislative in both character and effect and is not so checked; the need for the check provided by Art. I, §§ 1, 7, is therefore clear. *Congress' authority to delegate portions of its power* to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto.

Chadha, 462 U.S. at 953-54 n.16 (emphasis added).

Two points are to be underscored. First, the Court treats recognized examples of "legislatively delegated authority" as instances of Congress' authorized delegation of "portions of its power." Whether we should call the exercise of that delegated power "legislative" action (as defendant might assert) or "executive" action (as the government asserts), or should describe it in some other way, may surely be debated. In no event, however, can it be denied that the delegation of a portion of Congress' power and the exercise of that power **[**25]** are things the Court has determined to be constitutionally permissible. The second point to be underscored, because of its bearing upon the relevance of *Chadha* to issues in the present case, is that the provision struck down in *Chadha* would have disturbed the balance of powers because of the absence of the "check" explicitly provided in two sections of Article I of the Constitution. In the present case, no comparable or analogous disturbance by the SRA of the constitutionally declared balance of powers has been identified.

The force of any contention that *Chadha* is precedent against the constitutionality of the SRA depends on the assertion that all "lawmaking" is an exercise of "legislative" power and that all condemns "lawmaking" by any branch other than Congress. To read *Chadha* in this way, however, would be to disregard the Court's explicit recognition of "Congress' authority to delegate portions of its power," *id*., as it regularly does when it chooses to enact a statute establishing legal rules that are quite general and leaves to other branches the task of completing the lawmaking thus initiated.

The conclusion reached here is supported also by the Court's emphasis, **[**26]** in *Morrison*, not upon "characterization" of the functions of an agency but upon "the real question" as to whether one branch is given a power that impedes another branch's ability **[*534]** to perform its constitutional duty. *487 U.S. 654, 101 L. Ed. 2d 569, 108 S. Ct. 2597, 1988 U.S. LEXIS 3034 at 64*.

With the foregoing generalizations about incomplete substantive lawmaking as background, I turn next to a closer examination of the kind of lawmaking that the SRA has initiated.

IV. *Distinctive Characteristics of Lawmaking by the Sentencing Commission*

Given the great freedom Congress has with respect to how it informs itself about all matters relevant to pending proposals for legislation, I conclude that Congress might have chosen to create a commission to study the problems of criminal sentencing and to propose sentencing guidelines. Congress might then have enacted guidelines generally like those that have been promulgated by the Sentencing Commission pursuant to the SRA. In reaching this conclusion, I have not considered and need not consider whether one or another among many details of the guidelines may be subject to challenge on other grounds beyond those addressed in this Opinion. The case before me presents no such challenge to **[**27]** any particular guideline. Instead, the defense challenge is to the guidelines as a whole.

The issue now to be addressed is whether Congress, rather than itself enacting sentencing guidelines, and from time to time amending them as needs for amendment become apparent, may instead create a commission (and the particular form of commission created by the SRA) to perform this function, subject always to congressional intervention should Congress choose to override, for the future at least, some part or all of the Commission's lawmaking through development and amendment of sentencing guidelines.

The general acceptance and apparent assumption of constitutionality of the functioning of the Parole Commission in recent decades is again relevant. That has been an instance in which Congress chose to enact a statute which has been treated as authorizing a commission (in the executive branch) to develop guidelines and amend them from time to time, and as well to apply them decisionally ("adjudicatively," one might say) case by case. Those guidelines were not *in form* constraints upon the exercise of discretion by judges in individual sentencing decisions, but *in substance* they did effect **[**28]** very deep constraints. For example, when a judge had determined that a sentence of confinement for ten years was appropriate, the Parole Commission could drastically alter the substantive effect of that sentence by releasing the prisoner on parole after only a third of the time had been served.

Thus, the power of the Parole Commission to fashion guidelines with such deep substantive impact was a power of lawmaking to fill interstices of the incomplete lawmaking of Congress. The statutes prescribed some firm constraints (such as maximum limits on sentences for particular offenses) upon the discretion of courts and of the Parole Commission, but left courts free to exercise very substantial discretion in individual sentencing decisions. Also, the statutes left courts free to perform the function of interstitial lawmaking in construing the statutes and to some limited extent in fashioning rules such as those developed in the small body of appellate decisions regarding sentencing. Finally, the statutes left to the Parole Commission (by "delegation," if one chooses that characterization) both an additional lawmaking function in developing guidelines and an additional decisional function **[**29]** (with potential precedential effect) in applying them case by case. The set of lawmaking functions of the Parole Commission was less extensive than the lawmaking function of the Sentencing Commission under the SRA, but they are nevertheless analogous in nature.

Our constitutional history includes many illustrations in which the function of further lawmaking of such extensive scope as that involved here has been left to courts, rather than to agencies or commissions. Illustrative are the very generalized standards prescribed in antitrust legislation, which left courts to develop the more precise meaning of the standards. *See, e.g.*, I Areeda & Turner, ***Antitrust Law*** para. 106 **[*535]** (1978) ("Inexplicit Statutes and Unilluminating Legislative History").

I conclude that the delegation of a lawmaking function to the Sentencing Commission presents a debatable issue of first impression because in no previous instance has Congress made such an extensive delegation as in the SRA to a commission or agency, rather than to courts.

Strongly material to the resolution of this issue of first impression is the distinctive nature of the federal law of criminal sentencing. As observed in Part II above, **[**30]** this body of law definitely includes substantive rules of law and not procedural rules only. Nevertheless, the substantive law of criminal sentencing, as it existed before enactment of the SRA, was unique in significant respects. Indeed, among the candidates for recognition as the most distinctive area of federal substantive law, patent, bankruptcy, and immigration law would rank high, but federal sentencing law as it existed before enactment of the SRA was still more distinctive and in a way especially relevant to the issue presented by the challenge to constitutionality of the SRA.

The point is illustrated dramatically by the contrasting sources of useful advice available to a trial judge considering a pending sentencing decision. As to matters involving most areas of law, the judge's most useful help in thinking through all relevant considerations comes from briefs and arguments of advocates and consultation with law clerks. In contrast, as to sentencing decisions before the SRA was enacted, briefs and memoranda were seldom filed and law clerks skilled in legal research and analysis would have little to offer in consultation, other than common sense and good judgment. The judge, **[**31]** if seeking experience-based advice beyond that provided by oral submissions of counsel, would turn to probation officers, who as likely as not would have had no formal legal training. In short, the strictly legal aspects of sentencing were quite limited and rarely in dispute. The more powerful influences on sentencing decisions were expressed not in rules of law but in factors weighed in the exercise of discretion. So strong was this tendency that appellate review was rare, both in theory and in practice. The sentencing decision was in most respects an exercise of discretion unconstrained by any duty of reasoned choice and reasoned explanation.

HN10[] By enactment of the SRA, Congress has initiated a dramatic change in the law of criminal sentencing. Substantive rules and obligations of reasoned choice and reasoned explanation now become central to each sentencing decision. When such a congressional initiative is taken, a new body of substantive law must be developed -- just as, for example, a new body of ***antitrust law*** had to be developed after enactment of the Sherman Act in 1890. In that instance, Congress left the development of that new body of law to the courts. In this instance, most **[**32]** of the traditional methods of developing the new body of law -- including the method of case-by-case development in courts -- would plainly be impractical. Congress has chosen instead a method closer to those used in relation to such substantive law areas as price regulation, trade regulation, and environmental protection. The precise method chosen is not exactly like any previously used, but neither, for example, was the method chosen for price regulation when Congress first determined, in the exercise of its constitutionally authorized power, that compelling national interests would be best served by price controls. The fact that this method of filling out the interstices of statutory law is to some degree innovative does not alone establish that it violates principles of separation of powers explicit or implicit in the Constitution.

HN11[] "The Constitution does not require three airtight departments of government." *Geraghty, 719 F.2d at 1210* (citing *Nixon v. Administrator of General Services, 433 U.S. at 443*).

> The separation of powers inquiry is not so much a review of theoretical abstractions of "who ought to do what" as it is a pragmatic analysis of the extent to which **[**33]** an act by one branch of government prevents another from performing its assigned **[*536]** duties and disrupts the balance among the coordinate departments of government. *Nixon, 433 U.S. at 443, 97 S. Ct. at 2790*.

Geraghty, 719 F.2d at 1211.

When judged by fidelity to the objectives of separation-of-powers doctrine -- preservation of the independence of each branch of government and protection against aggrandizement in any branch that would disturb the balance among them -- the Sentencing Reform Act survives the defense challenge on the ground of excessiveness of delegation.

V. *Joint Legislative, Executive, and Judicial Participation in Developing Sentencing Guidelines*

The caution against formalism encourages closer scrutiny also of what I believe to be an implicit premise of some of the separation-of-powers arguments advanced as a challenge to the constitutionality of the SRA. To expose this issue, let us accept the point that it would be unfair to characterize the defense contentions as asserting that governmental powers are distributed among three airtight compartments, with lawmaking power allocated only to the legislative branch. Rather, let us understand the argument to be **[**34]** twofold. First is the argument that the degree of lawmaking power left to the Sentencing Commission by the SRA is excessive. That is the point addressed immediately above. Second, and remaining to be examined further, is the argument that the particular method of exercise of that power by the Sentencing Commission under the SRA is forbidden because it involves the cooperation of participants from all three branches of the government in the work of the development of sentencing guidelines pursuant to the SRA.

It is true that sentencing guidelines that serve as substantive law constraints upon the discretion of judges in making sentencing decisions in particular cases, developed under the SRA, are the product of lawmaking activity in all three branches. As shown in Part III above, it was not novel for Congress to take an initiative that was in itself incomplete and required further lawmaking in other branches of the government. It cannot be plausibly denied, however, that the particular method that the SRA provides for implementation of the congressional initiative differs in one significant way from traditional methods. The work of the Commission involves -- and in a way that is unprecedented **[**35]** -- cooperation, consultation, and joint action by persons currently holding positions in the executive and judicial branches. Is this kind of cooperative, joint action forbidden by separation-of-powers principles? Is joint action of this kind to be distinguished from the participation of all three branches in successive steps proceeding from congressional initiative, through issuance of administrative regulations with substantive impact, to judicial decisionmaking with precedential effect?

Joint action such as the SRA mandates would be forbidden if one took as a premise that government in our separation-of-powers system is a process in which all inter-branch joint decisionmaking is forbidden and the participation of separate branches must always occur in separate steps. Joint action would be forbidden, also, if one took as a premise a fixed-sum view of governmental powers under which the sum of governmental powers to achieve a governmental objective is neither increased nor decreased by the way those powers are allocated and exercised. Under each of these premises, powers would merely be redistributed by cooperative action, one branch giving up to another some of its legitimate powers **[**36]** in order to reach an accommodation that produces a joint decision -- such as a lawmaking decision on sentencing guidelines.

Each of these premises, however, is basically at odds with the established principle that ***HN12***[] "the Constitution does not require three airtight departments of government." *Geraghty, 719 F.2d at 1210* (citing *Nixon v. Administrator of General Services, 433 U.S. at 443*). If all three branches are to participate in the task of developing substantive law, then sealing off each branch's participation from **[*537]** that of the other two, and requiring the three to act one at a time, in a succession of moves and countermoves to preserve a balance of powers, is more likely to impede than to advance the objective. Separation-of-powers doctrine places constraints upon cooperative efforts and joint decisionmaking, but it does not forbid them. Cooperative efforts shall not produce impediments to any branch's exercise of its powers and shall not produce aggrandizement that disturbs constitutional checks and balance. But no part of the text of the Constitution, and no principle implicit in it, forbids cooperative activity in which each branch preserves the integrity of its **[**37]** powers and representatives of two or all three branches, acting together, expedite lawmaking and enhance its quality.

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 96 L. Ed. 1153, 72 S. Ct. 863 (1952) (Jackson, J., concurring) (quoted with approval in *Morrison, 487 U.S. 654, 1988 U.S. LEXIS 3034 at 69, 101 L. Ed. 2d 569, 108 S. Ct. 2597*).

In short, the exercise of governmental powers is not a rigid process in which any agreement or accommodation necessarily represents some surrender of legitimate power by at least one branch. Cooperation, if conducted in a way that does not offend the underlying principles and objectives of separation of powers, is constitutionally permissible.

The Court in *United States v. Nixon, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974)*, made the point that "'the judicial power of the United States' vested in the federal courts by *Article III, § 1 of the Constitution* . . . [cannot] be *shared* with the Executive branch," *id. at 704* (emphasis added), the Chief Executive cannot "*share* **[**38]** with the Judiciary the veto power," *id*. (emphasis added), and Congress cannot "*share* with the Judiciary the power to override a Presidential veto," *id*. (emphasis added). Nevertheless, the Court, focusing on substantive concerns rather than mere form, held in *Nixon* that the prohibition of sharing of power implicit in separation-of-powers doctrine does not insulate the exercise of the power of each branch in a way that would sustain a claim of absolute Presidential privilege of immunity from judicial process in all circumstances. "The separate powers were not intended to operate with absolute independence." *Id. at 707*. The Court rejected the broad claim of privilege because the recognition of such a privilege "would upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Art. III." *Id*.

HN13[] Under the SRA, judges who participate in the work of the Sentencing Commission are not engaged in a constitutionally-forbidden "sharing" of judicial power with officials of the executive branch, nor are the latter "sharing" executive power with judge-members of the Commission. Each member, though participating in the work **[**39]** of the Commission, remains free to exercise that member's executive or judicial function without impairment. Of course, the lawmaking of the Commission under "legislatively delegated authority" thereafter affects individual case decisions in the judicial branch as well as further action implementing the SRA in the executive branch. It does so, however, only in the sense that law constrains the exercise of all powers in all three branches. Thus, the judiciary's later acceptance of the Commission's guidelines as law that controls individual case decisions is no more a demonstration of a forbidden "sharing" of power than is the judiciary's acceptance of statutes and administrative regulations as law that controls later judicial decisions (so long as the statutes do not offend constitutional mandates and the regulations do not offend either constitutional or statutory mandates).

HN14[] Focusing upon particular characteristics of the Sentencing Commission, defendant argues that judge-commissioners will find it impossible to maintain their **[*538]** independence and impartiality in the courtroom when they are appointed and removed by the President and serve on the Commission with two non-voting members of **[**40]** the executive branch, including the Attorney General. Although the particular composition Congress chose for the Commission is not a "traditional" one, defendant has pointed to nothing in the Constitution that explicitly or implicitly bars such a composition. Nor has any convincing argument been made that the joint service of executive and judicial officers on this Commission will impair the functioning of either branch.

Congress had a rational basis for determining that the experience and insight of judges, developed from their judicial experience, would be useful in the work of the Commission. Because judge-members bring to this work a perspective characteristic of the judicial branch, it may even be said that their functioning on the Commission may appropriately be characterized as "judicial" in a broad sense. But, the judge-commissioners are not acting in an adjudicatory capacity when performing their Commission duties. Constraints applicable to influences upon performance of an adjudicatory function are therefore not apt.

Nor has any reasoned basis been advanced for determining that service on the Commission would disqualify judge-members from future judicial service generally. **[**41]** As Judge Mazzone has stated, "although the participation of judges on *some* types of extra-judicial agencies may possess some ability to affect the impartiality of particular judges, service on the Commission does not carry that risk." *Alves, 688 F. Supp. at 77*.

I concur also in Judge Mazzone's conclusion that recusals incident to service on the Commission do not impermissibly impair judicial performance. *Id*.

VI. *Placement of the Sentencing Commission and Presidential Control*

Perhaps more than any of the other arguments of either party in this matter, the defense contention regarding placement of the Commission in the judicial branch depends on accepting the view that form is critically important to the matter at issue. The Sentencing Commission has responded that placing the Commission in the judicial branch may be seen in part as merely a "housing," "housekeeping," "budgetary," or "administrative" choice. Whether or not any of these particular characterizations should be accepted, the underlying point that this choice does not affect the substantive rights of the defendant is valid unless placement of the Commission in the judicial branch has substantive implications in **[**42]** relation to one of the other constitutional challenges.

I conclude that no such substantive implication has been identified. ***HN15***[] Defendant shows no injury to himself when he claims only that the sentencing guidelines as a whole are unconstitutional and fails to show some way in which placement of the Commission in the judicial branch causes injury to him that would not have occurred had the Commission been designated either as an agency of the executive branch or as an independent agency.

With one exception, no reasoned basis has been advanced for determining that substantive implications are involved in the formal placement of the Sentencing Commission in the judicial branch. The exception is the argument that the Commission must be placed in one or another of the branches of government recognized in the Constitution and wherever it is placed it will have members from at least one other branch serving outside their branch. This is, in substance, a formal argument that the separation-of-powers doctrine not only forbids aggrandizement that threatens the balance of powers fashioned in the Constitution but also forbids joint decisionmaking by officials of different branches, even when they **[**43]** respectively surrender no power.

One of the decisions sustaining defense challenges to the SRA has reasoned:

> In *Bowsher* [*v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986)*,] an officer of the legislative branch was not allowed to serve in the executive branch; nor should a member of the judiciary serve in that capacity.

[*539] *United States v. Molander, 683 F. Supp. 701, 707 (W.D. Wis. 1988)*. In *Bowsher*, however, the Court reasoned that Congress had reserved "for itself the power of removal of an officer charged with the execution of the laws" by means other than impeachment and that "to permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws." *478 U.S. at 726, 106 S. Ct. at 3188*. No comparable threat to the constitutional balance of powers appears here. ***HN16***[] Neither executive nor judicial power is threatened by the participation of members of both these branches in the Commission's work. Also, the Presidential power to remove individual members of the judiciary from membership on the Commission does not affect a person's continued service as a member **[**44]** of the judicial branch, even when no longer a member of the Commission. Although perhaps unprecedented, the composition of membership of the Commission does not appear to be a threat to the constitutional balance of powers. I conclude that the constitutional challenges to the membership of the Commission and to its placement in the judicial branch cannot be sustained.

I concur in Judge Mazzone's determination that the limited degree of Presidential control over the Commission and its membership does not amount to a violation of constitutional principles of separation of powers. *Id. at 14-15*.

In summary, I conclude that the defense challenges to the guidelines on separation-of-powers grounds lack merit.

VII. *Due Process*

In summarizing his due process contentions, defendant argues that "the work of the Commission . . . essentially dictates the sentences to be imposed on the vast majority of federal criminal defendants." Defense Memorandum (Docket No. 13), page 5. The reality, however, is that ***HN17***[] the work of the Commission "dictates" only in the sense that law always dictates results in judicial decisionmaking. That consequence is, of course, the essence of a "government of laws," **[**45]** *cf*. Mass. Const. Pt. I, Art. XXX, in contrast with totally discretionary decisionmaking by each individual adjudicator. It plainly is true that in enacting the SRA Congress, with an explicit purpose of reducing sentencing disparity, has chosen to cause criminal sentencing decisions to be guided by law to much greater extent than in previous practice, and to correspondingly less extent to be determined by the exercise of discretion. That is a choice Congress was constitutionally free to make. That choice is not offensive to due process standards.

For the foregoing reasons, defendant's several challenges to the constitutionality of the sentencing guidelines are denied.

LexisNexis

Genetic Systems Corp. v. Abbott Laboratories

United States District Court for the District of Columbia

July 13, 1988, Decided ; July 13, 1988, Filed

Civil Action No. 87-1722

Reporter

691 F. Supp. 407 *; 1988 U.S. Dist. LEXIS 7039 **; 1988-2 Trade Cas. (CCH) P68,142

GENETIC SYSTEMS CORPORATION, Plaintiff, v. ABBOTT LABORATORIES, et al., Defendants

Core Terms

Regions, blood, competitors, allegations, group boycott, Sherman Act, conspiracy, suppliers, monopolize, conspiring, purchaser, horizontal, amended complaint, screening, summary judgment, motion to dismiss, transfusion, Counts, concerted, tests, conspiracy to monopolize, tortious interference, plaintiff's claim, anti trust law, blood supply, contracted, specific intent, Clayton Act, vertical, entity

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Counsel for Defendant The American National Red Cross: John H. Shenefield, Esq., Robert S. Scholssberg, Esq., Michael S. Kelly, Esq., Washington, District of Columbia.

Judges: Joyce Hens Green, District Judge.

Opinion by: GREEN

Opinion

[*409] MEMORANDUM OPINION

JOYCE HENS GREEN, DISTRICT JUDGE.

This matter now comes before the Court on the motion of defendant The American National Red Cross ("Red Cross") to dismiss or for summary judgment on all four counts of asserted against it in the amended [1] **[**2]** complaint and the motion of defendant Abbott Laboratories ("Abbott") to dismiss or for summary judgment on the

[1] The Court granted plaintiff's motion for leave to amend the complaint on March 9, 1988, but expressly declined to comment at that time on the sufficiency of plaintiff's new allegations. Order, Mar. 9, 1988, at 4. The Court also advised the parties that it would stay its consideration of defendants' then-pending motions to dismiss several counts of the original complaint (referred to herein as "Defendants' First Motion") until the completion of briefing on defendants' motions to dismiss the counts added by the amended complaint ("Defendants' Second Motion"). *Id*. at 5.

fourth, [2] fifth, and sixth claims of the amended complaint. For the reasons set forth below, the motions of the Red Cross and Abbott are granted.

I. Factual Background [3]

The Red Cross, established as a corporation by Congress in 1905, 36 U.S.C. § 1, supplies 55% of the approximately eleven million pints of blood donated annually for transfusions in the United States. [4] The Red Cross has established 56 blood service regions ("Red Cross Regions") to assist in the collection of blood for transfusion. [5] **[**4]** The regions work with the local Red Cross chapters under the direction and supervision of the Red Cross National Headquarters. [6] The chapters and blood service regions are not separate corporations and are not allowed to be constituted as separate legal entities. [7] **[**3]** The Red Cross Regions, like the Red Cross chapters, all operate pursuant to the same license granted to the Red Cross by the Food and Drug Administration. [8] The Red Cross has the authority to dictate the method of operation of each Red Cross Region and the products it may purchase. [9]

Transfusion blood donated to the Red Cross and independent blood centers is screened for transmissible diseases, including hepatitis [10] **[**5]** and the HTLV antibody **[*410]** (AIDS). [11] To support its testing program, the Red Cross annually contracts with private suppliers of blood testing equipment. For many years, Abbott has been the exclusive or dominant supplier of equipment used for screening transfusion blood. [12] From 1978 to 1984, when the only virus for which transfusion blood was routinely screened was hepatitis, Abbott supplied equipment for virtually all hepatitis tests [13] and was the exclusive supplier to the Red Cross. In recent years, however, other competing

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[2] Abbott joins in the Red Cross's motion to dismiss or in the alternative for summary judgment on Count IV of the original complaint, which is identical to Count IV of the amended complaint.

[3] As defendants have consistently pointed out, much of the factual discussion presented by Genetic Systems in its oppositions to defendants' motions will not be relevant until the merits of this action are tried and the "rule of reason" is applied. Some of those factual allegations are nonetheless presented here to provide context for the discussion that follows.

[4] Amended Complaint, para. 8; Declaration of Terrance J. Bieker, Vice President, Sales and Marketing, Genetic Systems Corporation ("Bieker Decl."), para. 4. The remainder of the blood for transfusion is collected by more than 150 independent blood centers.

[5] Declaration of Stephen H. Richards, Secretary and General Counsel of The American National Red Cross ("Richards Decl."), paras. 7-8.

Plaintiff has referred to the Red Cross' Blood Service Regions as "affiliates" and, sometimes, as chapters. Red Cross "chapters" are, however, entities distinct from the Regions, and the Red Cross Regions are not considered "affiliates." Supplemental Declaration of Victor W. Schmitt, Vice President, Medical Operations, The American National Red Cross ("Schmitt Supp. Decl.") para. 3. The term "affiliation" is used by the Red Cross in paragraph 4 of its 1987 contract with Abbott to refer to independent non-Red Cross blood centers to which Abbott may agree to extend the contract prices in the event the Red Cross and the independent center enter into a cooperation agreement. *Id*. para. 11. As further discussed below, however, no such extension has been made to date nor are any would-be affiliates parties to the Red Cross-Abbott contract. Id.

[6] Richards Decl. para. 8.

[7] Richards Decl. para. 10.

[8] Schmitt Supp. Decl. para. 2.

[9] *Id*. para. 5.

[10] Amended Complaint, para. 11; Bieker Decl. para. 7.

[11] *Id*. para. 9.

[12] Amended Complaint, para. 10.

[13] The two hepatitis tests are Hepatitis B Surface Antigen ("surface") and Hepatitis B Core Antibody ("anti-core").

suppliers, including plaintiff Genetic Systems Corporation ("Genetic Systems") [14] and E.I. duPont de Nemours, Inc. ("duPont") have entered the market. [15] The circumstances leading up to the contract that prompted this litigation -- an exclusive two-year contract between the Red Cross and Abbott for testing equipment -- involve disputed facts that will be outlined here only for contextual purposes.

In February 1986, when Abbott was the exclusive supplier to the Red Cross of hepatitis and AIDS test equipment, the Red Cross Task Force To Evaluate Infectious Disease Test Kits compared the AIDS tests of several different suppliers, including those of Genetic Systems [16] and Abbott. [17] The Task Force called Genetic Systems' AIDS test the "test of choice" and recommended that, upon FDA approval, Genetic Systems "be given the largest market share (not less than 80% of total collections)." [18] The Task Force recommended against any exclusive arrangement with Abbott, expressed strongly that the "microplate" technology offered by Genetic Systems was superior to the "bead" technology offered by Abbott, and concluded that the Red Cross should **[**6]** encourage development of the former type of test equipment. [19]

In April 1986, an internal Red Cross survey indicated that twenty-two of the Regions (accounting for more than 2.8 million pints) ranked Genetic Systems as their first choice of suppliers, and twenty-nine (accounting for 2.6 million pints) ranked Abbott as their first choice among suppliers of testing equipment. [20]

By the Summer of 1986, the Red Cross had contracted with Abbott, Genetic Systems, and duPont to supply blood screening test equipment for the period July 1, 1986 through June 30, 1987. After discussions with the Red Cross Regions, the Red Cross determined that six of its fifty-six Regions would be supplied test equipment from Genetic Systems. [21] This volume represented 15% of the AIDS tests performed by the Red Cross and was the first major contract for a Genetic **[**7]** Systems product. [22] The Red Cross contracted with Abbott to supply the remaining approximately 85% of the 21.6 million tests for hepatitis and AIDS for the same 1986-87 contract period. [23]

[*411] In July 1986, studies presented at the National Institutes of Health Conference on AIDS indicated that the Abbott AIDS test then in use by the Red Cross was less sensitive to detecting contaminated blood than the test of Genetic Systems. [24] That same month, Victor W. Schmitt, Vice President of Medical Operations of the Red Cross, inquired of Genetic Systems how long it would take for it to supply all Red Cross Regions with their requirements for

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[14] Genetic Systems is a subsidiary of Bristol-Meyers, Inc. Amended Complaint, para. 2.

[15] When the complaint was filed, Genetic Systems enjoyed an 8% market share; this has now apparently declined to 5-6%. Amended Complaint, para. 27; Bieker Decl. para. 19.

[16] Genetic Systems' AIDS test received approval from the Food and Drug Administration in February 1986. Bieker Decl., para. 9.

[17] Amended Complaint, para. 12.

[18] Declaration of Jay Kelly Wright, counsel for Genetic Systems, ("Wright Decl."), Exh. 8 (ANRC 03283-84).

[19] *Id*. at (ANRC 03284-86).

[20] *Id*., Exh. 15 (ANRC 02828).

[21] Schmitt Supp. Decl. para. 7.

[22] Bieker Decl. para. 11.

[23] Abbott received a contract for 100% of the Red Cross' "surface" hepatitis test (for one year), 100% of the Red Cross' "anti-core" hepatitis test (for two years), and 85% of the AIDS tests (for one year). Declaration of Richard A. Gonzales, Marketing Manager, U.S. Field Operations, Diagnostics Division, Abbott Laboratories ("Gonzales Decl."), para. 18; Schmitt Supp. Decl. 6, Exh. 1 (July 1, 1986 contract between the Red Cross and Genetic Systems).

[24] The National Institute of Health "Multicenter AIDS Cohort Study" found that "the Abbott test missed significantly more AIDS-contaminated blood samples in the study than the Genetic Systems test." Bieker Decl. para. 10. Abbott disputes the validity of that study, Gonzales Decl. para. 32, and claims that the second phase of the study demonstrated that the Abbott test was in fact superior to that of Genetic Systems. Gonzales Decl. paras. 32-33.

AIDS tests. [25] Genetic Systems **[**8]** advised the Red Cross that it could do so within four weeks. [26] In the meantime, the Red Cross continued to use the Abbott test and Abbott sought FDA approval of a new, "improved" AIDS test.

By November 1986, the Red Cross was aware that the new Abbott test would not be available until December 1986; that availability date was later delayed to January 1987. [27] The Red Cross became frustrated at the regulatory delays, however, and developed various strategies in response to the problem. [28] Initially, the Red Cross adopted a "contingency plan" under which it would become a "co-investigator" with Abbott to facilitate **[**9]** licensure by the Food and Drug Administration. [29] This contingency plan was never put into effect, [30] however, and the Red Cross adopted a second contingency plan to purchase blood test equipment from alternative suppliers. [31] This second plan was also never implemented because Abbott's new test received FDA approval in January 1987. [32]

One month after Abbott received approval for its new test, the Red Cross received proposals from Genetic Systems, Abbott, and duPont to supply the Red Cross' requirements for AIDS and the two hepatitis tests for a multi-year period commencing July 1, 1987. [33]

[10]** The record clearly reflects, and defendants do not deny, that a variety of views, some "strongly held and sharply conflicting," [34] **[**11]** emerged within the Red Cross as to the desirability of contracting with the various test equipment suppliers for the next contract period. For example, in March 1987, the Red Cross Task Force found that the test kits of Genetic Systems, DuPont, and Abbott "all appear to perform with comparable sensitivity and specificity at this time" and would be "acceptable" [35] but recommended that Genetic Systems continue to have a "significant part" of the Red Cross' AIDS test business in light of the **[*412]** dissatisfaction with the Abbott test in 1986. [36] The Task Force concluded that it was important for Genetic Systems to "remain competitive in this field and continue to develop improved microplate reagents and equipment." [37] Several Red Cross administrators expressed strong support for extending a contract to Genetic Systems over Abbott. [38] After considering the relative

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[25] Bieker Decl. para. 11; Supplemental Declaration of Terrance J. Bieker ("Bieker Supp. Decl.") para. 3(A).

[26] *Id*.

[27] Wright Decl., Exh. 10 (ANRC 02967), Exh. 11 (ANRC 02969).

[28] Transcript of Oral Argument, October 5, 1987 ("Tr.") at 4-5; Wright Decl., Exh. 10 (ANRC 02967).

[29] Tr. at 5; Wright Decl., Exh. 10 (ANRC 02967).

[30] Second Supplemental Declaration of Victor W. Schmitt ("Schmitt Second Supp. Decl.") at para. 3.

[31] Tr. at 5; Wright Decl., Exh. 11 (ANRC 02969).

[32] Red Cross' Reply on First Motion, at 5; Tr. at 5.

[33] Bieker Decl. para. 12. The Red Cross invited Genetic Systems to bid for both the hepatitis surface and the anticore tests, but the latter only for the period commencing July 1, 1988 because Abbott already had the contract with the Red Cross to supply the anti-core test until that time. Genetic Systems' bid was also conditioned upon FDA approval of its anti-core test. At the time the proposals were solicited, only Abbott was licensed for all three tests. Declaration of Victor W. Schmitt ("Schmitt Decl.") para. 6 (Schmitt notes that all three suppliers sought to be the sole supplier of AIDS tests for the Red Cross).

[34] Red Cross' Reply to Defendants' First Motion, at 5.

[35] Wright Decl., Exh. 13 (ANRC 02887); *see also* Schmitt Decl. para. 8.

[36] Wright Decl., Exh. 12 (ANRC 02434-35).

[37] *Id*.

benefits and costs of the various bids (facts highly disputed in this litigation), [39] the Red Cross determined to award the contract exclusively to Abbott for a two-year period.

On May 5, 1987, the Red Cross informed Genetic Systems that it had decided to enter into an agreement with Abbott effective July 1, 1987 through June 30, 1989 for the supply of all the Red Cross' requirements for the fifty-six Regions for the three blood **[**12]** tests. [40] Under the contract, the Red Cross Regions order directly from Abbott and pay for the tests pursuant to their budgets that have been approved by the Red Cross. [41]

In addition to the test kits, [42] Abbott is to supply the Red Cross Regions with a data management system ("DMS"), which analyzes the data from all the Red Cross' routine tests, "at no charge" during the contract period. [43] **[**13]** After the contract expires, the regions will be required to pay a separate leasing charge for continued use of the DMS in the event that they switch to a supplier other than Abbott. [44] Currently, DMS is not compatible with the test instrumentation of other suppliers, but under the contract, Abbott agrees to make DMS compatible. [45]

In short, Genetic Systems contends that the two-year exclusive contract between Abbott and the Red Cross effectively froze Genetic Systems out of the market for blood test equipment and has jeopardized the company's ability to survive as a competitor. With this sketch of the facts in mind, defendants' arguments that plaintiff has either failed to state or **[**14]** cannot prove the alleged violations of the antitrust laws shall be examined.

[*413] II. Analysis

A. Plaintiff's Allegations

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[38] *See* Wright Decl., Exh. 13 (ANRC 02887) (Memorandum of Dr. S. Gerald Sandler, Associate Vice President, Medical Operations of the Red Cross); *id*., Exh. 14 (ANRC 03299) (Memorandum of Dr. Frans Peetoom, Director of Blood Services, Red Cross Pacific Northwest Region); *id*., Exh. 16 (ANRC 02898).

At the same time, the record reflects that Abbott itself appeared to have some doubts about the quality of the new test. *See* Declaration of Dennis G. Terez, counsel for Genetic Systems (March 7, 1988) ("Terez Decl."), Exh. 5 (A01405 - Confidential), Exh. 6 (A03192 - Confidential), Exh. 7 (A02630 - Confidential).

[39] Schmitt Decl. para. 15; *see* Memorandum Opinion, June 29, 1987, at 14-15 & nn. 23-24; *see also* Plaintiff's Opposition to Defendants' First Motion, at 19-20.

[40] Bieker Decl. para. 14.

[41] Schmitt Supp. Decl. para. 10.

[42] Another part of the contract challenged by Genetic Systems provides that Abbott will reduce the price on its existing contract with the Red Cross that ended June 30, 1988 for the anti-core test. Bieker Decl. para. 15(a); Gonzales Decl. para. 26.

[43] Plaintiff contends that the DMS was a "give away" under the contract, but according to the Red Cross and Abbott, the contract did not provide a separate charge for the DMS because that the cost of the DMS was part of the total contract price. Schmitt Decl. para. 12. Genetic Systems' proposal was identical in this respect. Id. PP 11-12; Wright Decl., Exh. 2 (ANRC 03025).

The Red Cross estimates the total value of this portion of the contract to be $ 4.3 million for the two-year period, plus $ 7 million in labor savings. Wright Decl., Exh. 23 (ANRC 03013).

[44] *Id*., Exh. 3 (ANRC 02170). While plaintiff characterizes this charge as a significant "penalty" amounting to as much as $ 2.8 million per year for all Regions, creating a strong disincentive for the Regions to switch away from Abbott, Second Supplemental Memorandum of Plaintiff, at 7, Bieker Supp. Decl. para. 7, Abbott claims that it is merely "reasonable compensation" for Regions' continued use of the DMS system. Abbott's Reply on Defendants' First Motion, at 4. The contract provides that the monthly leasing charge will range from $ 960 to $ 2580 per center depending on whether the Region chooses an alternative supplier for only one or all three of the tests. Wright Decl., Exh. 3 (ANRC 02170).

[45] Wright Decl., Exh. 3 (ANRC 02170); Bieker Supp. Decl. paras. 6, 7; Gonzales Decl. para. 24, 27; Schmitt Decl. para. 13.

In the amended complaint, plaintiffs allege six counts, two against Abbott alone and four against both defendants:

I. Against Abbott for violation of Sherman Act § 2 in that Abbott's conduct constitutes a monopolization and an attempt to monopolize;

II. Against Abbott and the Red Cross for violation of Sherman Act § 1 in that the conduct of Abbott and the Red Cross constitutes a "contract, combination . . . or conspiracy in restraint of trade or commerce";

III. Against Abbott and the Red Cross for violation of Clayton Act § 3 in that the conduct of Abbott and the Red Cross constituted an exclusive dealing arrangement the effect of which may be to substantially lessen competition or tend to create a monopoly;

IV. Against Abbott and the Red Cross for *per se* violation of Sherman Act § 1 in that the conduct of Abbott and the Red Cross constitutes a concerted refusal to deal, and an unlawful conspiracy of combination to boycott plaintiff with respect to purchases of transfusion blood screening equipment by Red Cross affiliates, which are capable of choosing **[**15]** independently between Abbott and plaintiff as competing suppliers;

V. Against Abbott and the Red Cross for violation for Sherman Act § 2 in that the conduct of Abbott and the Red Cross constitutes monopolization, conspiracy to monopolize, and an attempt to monopolize; and

VI. Against Abbott for tortious interference with prospective economic advantage and unfair competition in that Abbott engaged intentionally and maliciously to deprive plaintiff of actual and prospective business relationships, advantages, and opportunities.

Plaintiff also now alleges in the amended complaint the existence of two relevant product markets: (1) the market for transfusion blood screening equipment and (2) the "supply of blood for transfusions and the services associated with such supply." [46]

Defendant Red Cross moves to dismiss or in the alternative for summary judgment on all four counts asserted against it (II-IV), and Abbott moves to dismiss or for summary judgment as to only Counts IV, V, and VI of the amended complaint.

B. Standards of Review

In viewing a motion to dismiss, a complaint should not be dismissed for failure to state a claim unless it "appears **[**16]** beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. The factual allegations of the complaint must be presumed true and liberally construed in favor of plaintiff. *Ramirez de Arellano v. Weinberger, 240 U.S. App. D.C. 363, 745 F.2d 1500, 1506 (D.C. Cir. 1984)*, *vacated on other grounds*, *471 U.S. 1113, 86 L. Ed. 2d 255, 105 S. Ct. 2353 (1985)*; 5 C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d*, § 1357, at 594 (1969). If the court considers matters outside the pleadings in determining the existence of disputed issues of material fact, then a motion to dismiss should be converted into a motion for summary judgment. *Fed. R. Civ. P. 12(b)*.

Summary judgment is appropriate when there is "no genuine issue as to any material fact." *Fed. R. Civ. P. 56*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)*. In considering a motion for summary judgment, the "evidence of the non-movant is to believed, and all justifiable inferences are to be drawn in his favor," *id*. *106 S. Ct. at 2513*, but at the same time, *Rule 56* places a burden on the nonmoving party to "go beyond the pleadings and by her own affidavits, **[**17]** or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex **[*414]** Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)*.

When discovery is incomplete, a court should decline to grant summary judgment if the nonmoving party demonstrates that further discovery may reveal additional facts showing disputed issues of material fact for trial. *See* 10A, C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d*, § 2741, at 549 (1983); *Celotex,*

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[46] Amended Complaint, paras. 23-24.

106 S. Ct. at 2554-55; *see also* *Cowan v. J.C. Penney Co. Inc., 790 F.2d 1529, 1532 (11th Cir. 1986)*. In the instant case, discovery has commenced and a substantial number of documents have been produced, but depositions have been stayed pending resolution of the parties' motions to dismiss or for summary judgment. [47] Of course, the incompleteness of discovery is not a consideration where plaintiff's allegations are not adequately pleaded or where only an issue of law is involved. As discussed further below, plaintiff has raised a number of disputed issues, on some of which it claims it needs additional discovery, but has failed **[**18]** to show the necessary materiality of those facts to the issues now before the Court. While such disputes may well be relevant to any future "rule of reason" analysis, that does not preclude dismissal on the counts now at issue.

C. Counts II and III: Violation of Sherman Act § 1 -- Conspiracy in Restraint of Trade and Violation of Clayton Act § 3 -- Exclusive Dealing Contract

In Count II of the amended complaint, Genetic Systems asserts that Abbott and the Red Cross violated Section 1 of the Sherman Act, which prohibits a "contract, combination . . . or conspiracy in restraint of trade of commerce." Plaintiff further alleges in Count III that the conduct of Abbott and the Red Cross constituted an exclusive dealing arrangement in violation of Section 3 of the Clayton Act. The Red Cross, but not Abbott, moves to dismiss or for summary judgment on both counts. The thrust of the Red Cross' motion is that a buyer in an exclusive dealing contract cannot be held liable under Section 3 of the Clayton Act, and that, absent liability under that section, a claim for violation of the Sherman Act **[**19]** Section 1 cannot stand. The Court agrees.

Section 3 of the Clayton Act, *15 U.S.C. § 14*, provides that:

> It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Though few courts have ever addressed the issue, [48] plaintiff has not pointed to any case where a court found a purchaser liable for an exclusive dealing contract, and it appears from the plain language of the statute, the relevant legislative history, and the observations of commentators that Section 3 does not impose liability on purchasers for exclusive dealing contracts. *See* *McGuire v. Columbia Broadcasting System, Inc., 399 F.2d 902 (9th Cir. 1968)* ("Here, [the defendant] is not the seller and consequently no cause of action is created against it"); 2 E. Kintner, *The Legislative History* ***[**20]*** *of the Antitrust Laws and Related Statutes*, 1425 (1978) (reprinting 51 Cong. Rec. 9388 (daily ed. May 28, 1914)); [49] **[**21]** **[*415]** 3 J. von Kalinowski, *Antitrust Laws and Trade Regulation*, § 12.02[3] (1988) ("Section 3 itself does not define the words 'any person' except to indicate that he must be a seller or a lessor."); IV E. Kintner, *Federal* ***Antitrust Law***, § 32.10 & n. 89 (1984) ("only sellers and lessors are subject to [Section 3's] prohibitions") (citing *McGuire, 399 F.2d at 906*). [50] This conclusion, drawn from the clear import of the

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[47] Order, April 19, 1988; *see* Plaintiff's Second Supplemental Memorandum at 2 n.2.

[48] *See* *McGuire v. Columbia Broadcasting System, Inc., 399 F.2d 902, 906 (9th Cir. 1968)* ("While no case which holds to this effect has been drawn to our attention, the language of the statute seems plain.").

[49] Representative Seldomridge commented: "This provision, as I read it, seems to affect the seller of goods and not the purchaser."

Plaintiff's argument that this portion of the legislative history is not relevant because the term "contract for sale" was not then included in the statute is unpersuasive since that term does not alter, but merely broadens, the obvious intent of Section 3, which is directed at the conduct of sellers.

[50] The argument of Genetic Systems that the Red Cross should not be dismissed from this action because it is a properly joined party, Plaintiff's Opposition to the First Motion of the Red Cross, at 27-30, is without merit since joinder rules do not override the substantive requirements of the antitrust laws that form the basis for this Court's jurisdiction over plaintiff's claims. *Carroll v.*

statutory language, is also consistent with the fundamental antitrust concept that the alleged sins of sellers should not be visited on buyers because of the risk of chilling competition. *See* *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 211 (9th Cir. 1987)*; *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1108-09 (7th Cir. 1984)*, *cert. denied*, *470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)*.

In the face of the Red Cross' argument that buyers cannot be liable under Section 3, plaintiff seeks to characterize the Red Cross as more than solely a purchaser. Plaintiff contends that it is entitled to challenge "the totality of the Red Cross' conduct in eliminating the competition of Genetic Systems with full knowledge of the risks inhering in placing the responsibility for blood safety solely in Abbott's hands. That conduct includes, but is clearly not limited to, the signing of the 1987 contract." [51] For example, Genetic Systems suggests that the Red Cross entered into "active collaboration" with **[**22]** Abbott when the Red Cross adopted (although it never implemented) a plan to become co-investigator with Abbott on its "improved" AIDS test. Plaintiff further contends that the Red Cross "knowingly joined" in the exclusionary contract with Abbott and thus violated the antitrust laws. [52] For the reasons discussed above and further below, this attempt to fit the square conduct of the Red Cross into the round hole of Section 3 cannot succeed. These characterizations of a purchaser's conduct do not change its competitive contracting posture, and plaintiff has cited no case where a purchaser has been considered a proper defendant in an exclusive dealing contract case under Section 3 of the Clayton Act or Section 1 of the Sherman Act. [53]

[23]** Accordingly, the Red Cross is entitled to dismissal of Count III based on the Clayton Act, Section 3. This conclusion and the same reasoning also mandates the dismissal of Count II alleged against the Red Cross brought under the broader proscription [54] of Section 1 of the Sherman Act. [55] **[*416]** Here, too, the absence of any cases holding purchasers liable for exclusive dealing contracts under Section 1 confirms the implicit intent of Congress.

[24]** *D. Count IV: Per Se Violation of Sherman Act § 1 -- Concerted Refusal to Deal and Group Boycott*

Plaintiff alleges in Count IV a *per se* violation of Section 1 of the Sherman Act in that the conduct of the Abbott and the Red Cross constitutes a concerted refusal to deal or unlawful group boycott by the Red Cross and its "affiliates." Defendants contend that plaintiff has failed to state a claim because no horizontal agreement to restrain trade can be demonstrated. The Court is persuaded that plaintiff's claim fails as a matter of law.

Brotherhood of R.R. Trainmen, 417 F.2d 1025, 1027 (1st Cir. 1969), *cert. denied*, ***397 U.S. 1039, 25 L. Ed. 2d 650, 90 S. Ct. 1359 (1970)***; *Letmate v. Baltimore and Ohio R.R., 311 F. Supp. 1059, 1062 (D. Md. 1970)*.

51 Plaintiff's Opposition to Defendants' First Motion, at 31.

52 *Id*. at 32.

53 In response to the Court's request at oral argument that plaintiff cite any cases holding a purchaser liable, plaintiffs pointed to footnote 51 of the Supreme Court opinion in *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. Genetic System's Supplemental Memorandum at 1. In a case involving an exclusive dealing contract between a hospital and a firm of anesthesiologists, the Court rejected the plaintiff's contention that the hospital was engaged in a *per se* illegal tying arrangement but commented in a footnote that, had the plaintiff presented such proof, "the contract" might have been illegal under the Sherman Act, Section 1. The Court's general observation, however, obviously provides no guidance on the issue of purchaser liability since it suggest only that "the contract" might be found violative of the antitrust laws.

54 *See* *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 335, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)* (if a requirements contract is not within the broader proscription of Section 3 of the Clayton Act, it is not forbidden by Section 1 of the Sherman Act); *American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1239 (3d Cir. 1975)* (exclusive dealing arrangement legal under Clayton Act would "*a fortiori* be lawful under the less restrictive provision of the Sherman Act").

55 Plaintiff's arguments based on the plain language of provision are similarly unavailing with respect to Section 1. *See* *National Society of Professional Engineers v. United States, 435 U.S. 679, 687-88, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)* ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says.").

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 declared to be illegal." *15 U.S.C. § 1*. It is well-settled that *Section 1* was intended to prohibit only "unreasonable" restraints of trade. *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 98, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*; *Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*. Ordinarily, concerted action under *Section 1* is analyzed under the "rule of reason," *Continental T.V., Inc. v. GTE Sylvania, **[**25]** Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, however, the courts have identified certain limited categories of anticompetitive conduct that have such a "pernicious effect on competition and lack any redeeming virtue" as to make them illegal *per se* without a case-by-case evaluation. *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 1519, 99 L. Ed. 2d 808 (1988)*. These include horizontal and vertical price fixing agreements, division of markets between competitors, tying arrangements, and certain collective refusals to deal or "group boycotts." *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186 (5th Cir. 1972)*, *cert. denied*, *409 U.S. 1109, 34 L. Ed. 2d 690, 93 S. Ct. 912 (1973)* (citations omitted). These categories are narrow, however, and the conclusive presumption of invalidity imposed by the *per se* rule is not to be lightly indulged. *Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173, 1181 (D.C. Cir. 1978)*.

Group boycotts found sufficiently repugnant to justify *per se* treatment can be categorized in three groups: (1) horizontal agreements among traders to exclude direct competitors, *see*, *e.g.*, *Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, **[**26]** 58 L. Ed. 1490, 34 S. Ct. 951 (1914)*; (2) vertical combinations that are "widespread" in nature to exclude competitors of some members of the combination, *see, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; and (3) combinations designed to influence trade practices of boycott victims rather than to eliminate them as competitors. *Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 124 (8th Cir. 1973)*, *cert. denied*, *415 U.S. 918, 39 L. Ed. 2d 473, 94 S. Ct. 1417 (1974)*. Plaintiff in this case asserts that the group boycott was of the second type -- a vertical group boycott -- consisting of plaintiff's direct competitor Abbott and the purchasers of plaintiff's product, the Red Cross *and* the Red Cross Regions. The caselaw and the facts do not, however, support plaintiff's allegations that the conduct of these entities constitutes a group boycott.

A mere exclusionary agreement between businesses at different levels of competition does not necessarily constitute the type of "vertical" agreement determined to be an illegal *per se* group boycott. A vertical group boycott, in the absence of price fixing (which is not alleged here), is actually somewhat of a misnomer since it is really an **[**27]** "admixture of the horizontal," *Products Liability Insurance Agency, Inc. v. **[*417]** Crum & Forster Insurance Co., 682 F.2d 660, 663 (7th Cir. 1982)*, that is, plaintiff must still show that "*multiple* manufacturers or *multiple* distributors" were involved in the alleged conspiracy. *Id. at 663* (emphasis added) (citing *Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404, 412-13 (6th Cir. 1982))*. The only distinction appears to be that some vertically related entity is also involved in the alleged boycott.

Klor's, relied on heavily by plaintiff, was, in fact, "not a case of a single trader refusing to deal with another nor even of a manufacturer and a dealer agreeing to an exclusive dealership," but rather involved a "wide combination consisting of manufacturers, distributors, and a retailer" that moved the conduct from the "rule of reason" arena to the realm of *per se* invalidity. *Klor's, 359 U.S. at 212*; *see* *Products Liability, 682 F.2d at 665*. The lower courts have indeed interpreted *Klor's* to require more than a unilateral agreement, *see, e.g., McQuade, 467 F.2d at 186-87* (describing the agreement between the manufacturers, the wholesalers, and a retailer **[**28]** in *Klor's* as a "three cornered" agreement), and the Supreme Court recently reaffirmed that *Klor's* involved a "*horizontal combination* . . . at the manufacturer and wholesaler levels." *Business Electronics Corp., 108 S. Ct. at 1525* (emphasis added). Thus, in the absence of concerted horizontal action, a group boycott cannot be alleged. *See* *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 590 (8th Cir. 1987)* ("refusal to deal involving no concerted action between horizontal competitors does not constitute *per se* unlawful group boycott"), *cert. denied*, *484 U.S. 1010, 98 L. Ed. 2d 658, 108 S. Ct. 707 (1988)*; *Westman Commission Company v. Hobart International, Inc., 796 F.2d 1216, 1224 n.1 (10th Cir. 1986)* ("For a group boycott to exist, there must be an agreement among conspirators whose market positions are horizontal to each other."); *Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1490-92 (D.C. Cir. 1984)*; *Dunn & Mavis, Inc. v. Nu-Car*

Driveaway, Inc., 691 F.2d 241, 244-45 (6th Cir. 1982); *Products Liability, 682 F.2d at 665*; *Worthen Bank & Trust Co., 485 F.2d 119*; *McQuade Tours, 467 F.2d at 187-88*, *cert. denied*, *409 U.S. 1109, 34 L. Ed. 2d 690, 93 S. Ct. 912* ***[**29]*** *(1973)* (no *per se* group boycott where no allegation that defendant airlines conspired with competitors of plaintiff tour operators); *Pro Football, 193 U.S. App. D.C. 19, 593 F.2d 1173, 1179-80* ("'group boycott' designation . . . is properly restricted to concerted attempts by competitors to exclude horizontal competitors; it should not be applied, and has never been applied by the Supreme Court to concerted refusals that are not designed to drive out competitors but to achieve some other goal").

In sum, merely alleging a "vertical" group boycott does not relieve plaintiff of its obligation to show a combination or conspiracy by more than one entity at the same level of competition. Thus, here, since plaintiff has not alleged that any of its competitors other than Abbott were involved in the exclusionary contract, plaintiff can only survive the motion to dismiss by alleging that such an agreement was reached at the purchaser level, *i.e.*, by the Red Cross and its Regions. Although plaintiff makes such an allegation in the amended complaint, the Court finds it defective as a matter of law because the Red Cross is legally incapable of conspiring with its Regions in the purchase of blood testing **[**30]** equipment.

Plaintiff's argument that the Red Cross and its Regions are capable of conspiring for purposes of Sherman Act *Section 1* [56] is, as the Red Cross has consistently, vigorously, and correctly contended, without merit because the Red Cross and its Regions are clearly considered one entity for antitrust purposes. The Supreme Court made evident in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, that a parent corporation is incapable of conspiring **[*418]** with its wholly-owned subsidiaries within the meaning of *Section 1* of the Sherman Act. [57] **[**33]** Concomitantly, unincorporated divisions of a corporation cannot conspire with the corporation itself. [58] *Id. at 770*. That "actions taken by an unincorporated division in concert with the management of its corporation do not, under the cases, constitute a conspiracy" has, in fact, been taken for granted in ***antitrust law***. 2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 6.01[2] n.62 (1988). The cases suggested by plaintiff to the contrary are inapposite. In *Poller v. Columbia Broadcasting System, Inc., 109 U.S. App. D.C. 170, 284 F.2d 599, 603 (D.C. Cir. 1960)*, *rev'd on other grounds*, *368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, the majority **[**31]** of the Court of Appeals held that CBS could not conspire with its unincorporated but autonomous divisions, and the Supreme Court "avoided the question by finding the requisite plurality of action from allegations of a conspiracy between the corporation and an outsider." 2 Von Kalinowski, *supra*, § 6.01[2] n.62; *see also* *Rothery Storage & Van Co. v. Atlas Van Lines, 253 U.S. App. D.C. 142, 792 F.2d 210, 214-15 (D.C. Cir. 1986)*, *cert. denied*, *479 U.S. 1033, 107 S. Ct. 880, 93 L. Ed. 2d 834 (1987)* (finding *Copperweld* inapplicable because agents of Atlas were independent and separately incorporated and, alternatively, because Atlas' board of directors consisted of some of its actual or potential competitors); *Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381* (9th Cir.), *cert. denied sub nom. National Football League v. Oakland Raiders, 469 U.S. 990, 83 L. Ed. 2d 331, 105 S. Ct. 397 (1984)* (28 separately owned NFL teams not part of common parent corporation held capable of conspiring). While the inquiry as to the corporate status of the Red Cross and its Regions may be factual in nature, *Los Angeles Memorial Coliseum, 726 F.2d at 1387*, under

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56 Plaintiff's Memorandum in Support of its Request for a Temporary Restraining Order, at 37 ("In conjunction with and at the behest of Abbott, Red Cross had joined with the Regional Blood Services Centers to boycott Genetic Systems' test kits.").

57 The Court in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 763, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, expressly rejected the line of reasoning that had arisen from the Court's prior "ambiguous" holding in *United States v. Yellow Cab Co., 332 U.S. 218, 227-28, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947)*, that the "corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." The *Copperweld* Court expressly held that the affiliation of the defendants in *Yellow Cab* was irrelevant because the original acquisitions of the cab companies by a controlling shareholder "were *themselves* illegal." *467 U.S. at 761* (emphasis in original). The Court went on to distinguish other prior decision that "seemed to acquiesce in the intra-enterprise conspiracy doctrine," *id. at 766*, and cleared the precedential deck for confirming a bright line test for the conspiratorial ability of corporations.

58 The Court also held that officers and employees of the same firm cannot provide "the plurality of actors imperative for a *§ 1* conspiracy." *Copperweld, 467 U.S. at 769*.

Copperweld, the inquiry need only be brief, as the essential fact is undisputed: **[**32]** the Red Cross Regions are not separate corporations.

Plaintiff does not contest that the Red Cross is a corporation and that the Regions are not separately incorporated. [59] Plaintiff argues, nonetheless, that since the Regions exercise autonomy in certain business decisions (*e.g*., in employment matters), [60] they should be considered separate entities capable of conspiring with the Red Cross. This type of challenge is, however, clearly precluded by *Copperweld*: "At least when the subsidiary is wholly owned, these factors [measuring 'separateness'] are not sufficient to describe a separate economic entity for purposes of the Sherman Act. These factors simply describe the manner in which the parent chooses to structure a subunit of itself." *467 U.S. at 772 n.18*. Even were such a functional inquiry proper, it would not resuscitate plaintiff's claim in this case since the Red Cross, not its Regions, exercises ultimate contracting authority over contracts to purchase blood test kits. [61] Indeed, **[*419]** here, plaintiff's complaint stems from the fact that the Red **[**34]** Cross exercised complete control over its Regions in selecting Abbott over Genetic Systems for the two-year contract. Thus, plaintiff cannot sustain its claim that the Red Cross could have conspired with its own Regions in boycotting Genetic Systems.

[35]** Implicitly recognizing the necessity to show the horizontal nature of its group boycott allegation, plaintiff argues alternatively that Abbott and the Red Cross are in fact in a horizontal relationship not because they are direct competitors (for clearly they are not), but because the Red Cross at one time adopted a contingency plan to become a co-investigator with Abbott for the purposes of securing the FDA license for Abbott's "improved" AIDS test. This argument, while creative, is unpersuasive. First, plaintiff does not deny that the "contingency plan" was never implemented. Furthermore, by the time Abbott had received FDA approval for its new test, the Red Cross had adopted a "second" contingency plan that called for obtaining AIDS tests from *another supplier* had Abbott's new test not received approval, [62] negating plaintiff's assertion that Abbott wandered into the suppliers' arena. Even assuming that the Red Cross' co-investigator status would have raised a fact issue as to whether it should be assimilated to the position of a seller and competitor with plaintiff (an illogical conclusion because even as a "co-investigator," the Red Cross would still have been a purchaser **[**36]** in relation to Genetic Systems), that contingency never occurred. The Red Cross was never put in a position horizontal to plaintiff.

Plaintiff suggests as a second theory that a horizontal agreement to boycott can be found between the Red Cross and non-existent, unidentified independent blood centers to which the Red Cross may extend Abbott's pricing should they choose to "affiliate" with the Red Cross under the 1987-89 contract. Again, this argument is unavailing. At most, the agreement provides only that Red Cross may extend Abbott's prices to the affiliated centers; they would not, however, be bound to deal exclusively with Abbott. [63] In addition, the Red Cross has not yet entered into any "letters of cooperation" with any independent centers under the Abbott contract, nor has plaintiff alleged that such agreements are imminent. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d*

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[59] Richard Decl. para. 10.

[60] Wright Decl., Exh. 28 (ANRC 1058). The fundamental corporate operations of the Regions (including budget, licensing, and contracting) are, however, directly controlled by the Red Cross. Richards Decl. paras. 7, 8, 10; Schmitt Supp. Decl. paras. 2, 3, 10.

[61] Schmitt Supp. Decl. para. 5. Plaintiff seeks to dispute this statement by pointing to its 1986 contract to supply only 6 of the 56 Regions. The contract itself, however, supports defendants' position because it makes clear that Genetic Systems was contracting with "the Red Cross" and not with the Regions.

Schmitt Supp. Decl. para. 6, Exh. 1. The Red Cross determined which of the 56 Regions would be supplied the tests from Genetic Systems. *Id*. para. 7. That the regions may individually order quantities under the contract, establish their own delivery schedules, and individually pay for their equipment, Bieker Decl. para. 11, Schmitt Supp. Decl. para. 10, does not transform them into independent contracting entities for antitrust purposes.

[62] Wright Decl., Exh. 11 (ANRC 02969).

[63] Tr. at 9, 17; Wright Decl., Exh. 3 para. 4.

129, 89 S. Ct. 1562 (1969). [64] Thus, plaintiff has not shown that the "affiliation" provision of the contract supports its claim of a group boycott.

In **[**37]** conclusion, plaintiff has failed to allege or to support its allegations that the conduct of Abbott, the Red Cross, and the Red Cross Regions constituted a group boycott in *per se* violation of *Section 1* of the Sherman Act. Count IV, therefore, must be dismissed in its entirety.

E. Count V: Violation of Sherman Act § 2 -- Conspiracy to Monopolize

Plaintiff alleges for the first time in the amended complaint that Abbott and the Red Cross engaged in a monopoly, conspiracy to monopolize, and an attempt to monopolize in violation of Section 2 of the Sherman Act. [65] **[**38]** Plaintiff's theory is that the two defendant participated in a single conspiracy to assist each other in pursuing their monopolization objectives in their respective markets -- for Abbott, the blood **[*420]** test kit market and, for the Red Cross, the transfusion blood supply market. [66] Both defendants argue that such an allegation of interdependent intent to conspire, even assuming plaintiff's allegations are true, is not recognized in ***antitrust law*** and move to dismiss. [67] Again, the Court finds itself in agreement with defendants.

A plaintiff must demonstrate the existence of four elements to state a claim for conspiracy to monopolize: (1) the existence of a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize a designated segment of commerce. *Association of Retail Travel Agents, Ltd. v. Air Transport Ass'n of America, 635 F. Supp. 534, 538 (D.D.C. 1986)*; *Bowen v. New York News, Inc., 522 F.2d 1242, 1258 (2d Cir. 1975)*, *cert. denied*, *425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1667 (1976)*.

As a preliminary matter, the Court finds that Genetic Systems, as neither a competitor nor a purchaser in the *blood supply* market, lacks standing to challenge any alleged antitrust violations of the Red Cross in that market. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 545-46, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, the Supreme Court **[**39]** emphasized that not every person injured by an antitrust violation has standing to bring an action. Noting that the plaintiff in that case was "neither a consumer nor a competitor in the market in which trade was restrained," *id. at 539*, the Court found that the plaintiff, a union, lacked standing to challenge an agreement reached by members of the defendant organization to not hire union workers. As in the instant case, the Supreme Court concluded in *Associated General Contractors* that:

> the [plaintiff's] allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the [plaintiff], are insufficient as a matter of law. Other relevant factors -- the nature of [plaintiff's] injury, the tenuous and speculative nature of the relationship between the alleged antitrust violation and the [plaintiff's] alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy --weigh heavily against judicial enforcement of the [plaintiff's] antitrust claim.

Id. at 545. [68] *See also* *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 543 **[**40]** (9th Cir. 1987)*; *General Industries Corp. v. Hartz Mountain Corp., 810 F.2d 795, 809 (8th Cir. 1987)*; *Eastway Construction Corp. v. City of New York,*

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[64] Tr. at 8, 17; Schmitt Supp. Decl. para. 11.

[65] Plaintiff makes the identical claim in Count I, but against only Abbott. Essentially, Count V is only a "conspiracy" claim as to both defendants.

[66] Amended Complaint, para. 23-24.

[67] Defendants do not move for summary judgment on this Count, but only for dismissal. Red Cross' Reply on Second Motion, at 2; Abbott Reply on Second Motion, at 3.

[68] The principles enunciated in *Associated General Contractors* have been firmly applied by the Court of Appeals for this Circuit. *See*, *e.g.,* *Adams v. Pan American World Airways, Inc., 264 U.S. App. D.C. 174, 828 F.2d 24, 26-31 (D.C. Cir. 1987)* (rejecting

762 F.2d 243, 254 (2d Cir. 1985). Similarly, in this case, plaintiff is admittedly not a competitor, nor a consumer, in the blood supply market. Genetic Systems' allegations of harm to it from any monopolization by the Red Cross in the blood supply market are, not surprisingly, vague and speculative; [69] **[*421]** clearly, there are more direct victims of such monopolization should the allegation prove well-founded -- for example, the several hundred independent blood centers, which "compete" with the Red Cross. Plaintiff, accordingly, does not have standing to complain about alleged antitrust violations committed by the Red Cross in the blood supply market. At most, plaintiff has standing to complain about the alleged conspiracy by Abbott and the Red Cross to monopolize the market for blood *screening test equipment*. That claim, too, however, suffers from its own fatal defects.

The weakness of plaintiff's allegation in Count V is evident from the strained antitrust theory proffered to the Court. Unable to allege or show **[**41]** that the Red Cross had a specific intent to monopolize a market in which it does not participate (the test equipment market), plaintiff suggests that the alleged intent of the Red Cross to monopolize the blood *supply* market can somehow be transferred and combined with Abbott's alleged intent to monopolize the blood *screening equipment* market. That argument is wholly unpersuasive. As defendants contend, Genetic Systems cannot create a whole conspiracy in this case that is greater than the sum of its parts.

The Supreme Court recently confirmed that a plaintiff cannot avoid the pleading requirements of a claim for conspiracy to monopolize by constructing a theory or evidence of conspiracies in related markets. In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, the plaintiff, a domestic producer of televisions, argued that a group of Japanese manufacturers had engaged in several conspiracies, one of which was to monopolize the market in which plaintiff competed. The Court rejected the proposition that evidence of other conspiracies was adequate to support a claim of conspiracy to monopolize the domestic market under Section 2: "The argument **[**42]** is a mistake. However one decides to describe the contours of the asserted conspiracy -- whether there is one conspiracy or several -- respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief . . . . That showing depends in turn on proof that petitioners conspired to [harm competition] in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury." *Id. at 584 n.7*. Accordingly, Genetic Systems must demonstrate, with respect to the market in which it has standing (the blood screening equipment market) that defendants had the specific intent to cause it antitrust injury and took overt acts in furtherance of that intent. Here, plaintiff has failed to make sufficient factual allegations.

[43]** That the Red Cross may desire to exercise monopolistic control over the national blood supply does not support plaintiff's claim that it contracted with Abbott with the specific intention of causing competitive injury to Genetic Systems or the blood screening equipment market. Plaintiff's attempt to bolster its legal arguments with speculative economic theory is unpersuasive. [70] **[**44]** As the Court observed in *Matsushita*, "evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another." *Id. at 595-96*. [71]

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standing argument of suppliers of labor to transatlantic air transportation market), *cert. denied*, ***485 U.S. 961, 99 L. Ed. 2d 425, 108 S. Ct. 1225 (1988)***.

[69] Amended Complaint, para. 8 ("Red Cross has an objective, however, of controlling the total supply of transfusion blood in the United States"). Even the statements of the Red Cross highlighted by plaintiff, however, do not suggest the sinister motive suggested by plaintiff. *See* Wright Decl., Exh. 4 (ANRC 1050) (a purpose of the Red Cross is "to participate in the national effort to develop and maintain an integrated, not-for-profit blood supply system for the United States"), Exh. 5 (ANRC 1060) ("Members of regional blood services management have a responsibility to expand the program whenever a need is evident"), and Exh. 6 (ANRC 1197) ("efforts to achieve and sustain total supply/total service must be reflected in all Red Cross regional planning").

[70] *See* Declaration of Terry A. Hausman, Professor of Economics, Massachusetts Institute of Technology.

[71] The handwritten notes from a meeting between the Red Cross and Abbott stating that the Red Cross considered the contract to "link the most key component of [the Red Cross'] operations public confidence in the safety of the blood supply,' with the fortunes and capabilities of Abbott," Wright Decl., Exh. 1 (ANRC 03296), do not strengthen plaintiff's allegations because, like plaintiff's other "facts," it does not show specific intent to cause antitrust injury.

The absence of specific intent allegations renders a conspiracy to monopolize claim legally insufficient. *Association for Intercollegiate Athletics for Women v. NCAA, 236 U.S. App. D.C. 311, 735 F.2d 577, 586 n.13 (D.C. Cir. 1984)*; *see also* *Superturf, Inc. v. Monsanto Co., 660 F.2d 1275, 1283 (8th Cir. 1981)* (plaintiff failed to show that defendant's **[*422]** alleged coconspirator "shared its specific intent to create a monopoly").

Plaintiff responds that it has alleged that defendants had "mutual purposes and intended effects," [72] including that Genetic Systems be excluded as a competitor of Abbott. Mere use of the word "intent," however, does not constitute a *factual allegation* of specific intent. Plaintiff's claim that "all of the conspiratorial activity alleged in the complaint is related to the injury suffered by Genetic Systems in the market for transfusion blood screening equipment," [73] reveals the vagueness of plaintiff's theory and does not remedy this legal deficiency. Plaintiff's complaint is not supported by meaningful factual allegations. *Association of Retail Travel Agents, 635 F. Supp. at 538*; *Mizlou Television Network **[**45]** Inc. v. National Broadcasting Co., 603 F. Supp. 677, 684 (D.D.C. 1984)*. Furthermore, that a purchaser such as the Red Cross would conspire with a supplier such as Abbott to facilitate the supplier's monopolization of the market to allow, for example, the supplier to charge the purchaser "non-competitive, monopoly prices" is sufficiently implausible to limit any inference of an antitrust violation. [74] *Matsushita, 475 U.S. at 594*; *see also* *Car Carriers Inc., 745 F.2d at 1110* (in "considering a motion to dismiss the court is not required to don blinders and ignore commercial reality"); *see also* *Dunn & Mavis, 691 F.2d at 244-45*; *Coastal Transfer, 833 F.2d at 211* (rejecting plaintiff's claim that defendant purchaser intended to harm competition in seller's market as "illogical"). Since the essential element of intent is lacking, the Court need not address whether plaintiff has sufficiently alleged overt acts by defendants.

[46]** In short, plaintiff does not have standing to complain about any attempt by the Red Cross to monopolize the blood supply market. The Red Cross' intent cannot be theoretically transferred from one market to another. As to the test equipment market, plaintiff has failed to allege any specific intent on the part of the Red Cross to assist Abbott's monopolization. Accordingly, Count V must be dismissed.

F. Count VI: Tortious Interference with Prospective Economic Advantage and Unfair Competition

Plaintiff's last claim is under state law [75] against only Abbott for tortious interference with prospective economic advantage and unfair competition, that is, plaintiff claims that Abbott intentionally and maliciously deprived plaintiff of actual and prospective business relationships, advantages, and opportunities in entering into the contract with the Red Cross. Abbott moves to dismiss (or for summary judgment) on the basis that plaintiff has not adequately pled or supported its allegations.

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[72] Amended Complaint, para. 20.

[73] Plaintiff's Opposition to Defendants' Second Motion, at 16.

[74] Plaintiff argues at length that Count V involves issues of fact, such as "plausibility," that cannot be properly decided as a motion to dismiss. For the reasons discussed above, however, the Court finds that the motion raises only issues of law and plaintiff's arguments that defendants have presented misleading facts or that further discovery would support its claim are irrelevant.

Indeed, plaintiff itself apparently recognized this at the onset of this case when its Vice President for Sales and Marketing, Terrance Bieker, commented that "while Abbott's actions may offer the Red Cross an apparent temporary economic benefit, in the long run Abbott's actions deprive the Red Cross of the benefits of competitively-determined prices and product quality." Bieker Decl. para. 17. The declaration of plaintiff's economist attempts to explain the theoretical rationality that could have motivated the Red Cross, but fails to persuade that such speculation is allowed under the antitrust laws.

[75] Plaintiff cites the laws of several jurisdictions -- the District of Columbia (the headquarters of the Red Cross), Illinois (the headquarters and principal facility of Abbott Laboratories), and Washington State (all of Genetic Systems' facilities) -- but has not yet indicated on which State's law it relies. For present purposes, however, any distinctions among these jurisdictions' laws are irrelevant.

[47]** To establish a claim for tortious interference with prospective economic advantage, a plaintiff ordinarily must plead (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, **[*423]** (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage. *See, e.g., Fishman v. Estate of Wirtz, 807 F.2d 520, 545 (7th Cir. 1986)*; *Richard Short Oil Co., Inc. v. Texaco, Inc., 799 F.2d 415, 419 (8th Cir. 1986)*; *Rickards v. Canine Eye Registration Foundation, Inc., 704 F.2d 1449, 1456 (9th Cir. 1983)*, *cert. denied*, *464 U.S. 994, 78 L. Ed. 2d 683, 104 S. Ct. 488 (1983)*; *Belden Corp. v. Internorth, Inc., 90 Ill. App. 3d 547, 552, 413 N.E.2d 98, 101, 45 Ill. Dec. 765 (1980)*. "Unfair competition" is essentially an unprivileged interference with prospective advantage. *Business Equipment Center, Ltd. v. De-Jur Amsco Corp., 465 F. Supp. 775, 778 (D.D.C. 1978)*; *Belden, 413 N.E.2d 98, 101-02, 90 Ill. App. 3d at 552*. "Motive or purpose to disrupt ongoing business relationships is of central concern in a tortious interference case . . . and a strong showing of intent is **[**48]** required to establish liability." *Rickards, 704 F.2d at 1456*. A general intent to interfere or knowledge that conduct will injure the plaintiff's business dealings is insufficient to impose liability. *Id*. A competitor's conduct must be more egregious, for example, it must involve libel, slander, physical coercion, fraud, misrepresentation, or disparagement. *Business Equipment Center, 465 F. Supp. at 788*; *PPX Enterprises v. Audio Fidelity Enterprises, Inc., 818 F.2d 266, 269 (2d Cir. 1987)*; *Belden, 90 Ill. App. 3d at 553, 413 N.E.2d at 103*.

A thorough review of the amended complaint fails to surface any allegations sufficient to support plaintiff's claim for tortious interference with prospective economic advantage. While plaintiff does allege that it had a valid business relationship or expectancy in business with the Red Cross, [76] its allegations that Abbott intentionally interfered, induced, or caused a breach or termination of this relationship or expectancy are too vague to withstand defendants' motions. At most, the amended complaint alleges that the Red Cross solicited proposals from both Abbott and Genetic Systems and that Abbott realized that an exclusive **[**49]** contract with the Red Cross would substantially exclude Genetic Systems from the market for blood screening equipment. [77] As even the cases relied on by plaintiff make clear, however, such knowledge or such effect alone, without allegations of *intent to interfere* by Abbott, cannot support plaintiff's claim. *See also Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1105 (11th Cir. 1983)* (competition for business does not constitute tortious interference); *Nifty Foods Corp. v. The Great Atlantic & Pacific Tea Co., Inc., 614 F.2d 832, 838 (2d Cir. 1980)* (no tortious interference where no evidence that sole motive was to inflict injury or of unlawful means used). Plaintiff's antitrust claims do not alone excuse the necessity for plaintiff to fulfill the pleading requirements of this independent state law claim. Count VI must be dismissed.

III. Conclusion

Accordingly, after full consideration of the parties' pleadings and motions, the declarations of record, the exhibits, and for the reasons set forth above, it is hereby

ORDERED that the motion of the Red Cross to dismiss Counts **[**50]** II, III, IV, and V of the amended complaint be and it hereby is granted; it is

FURTHER ORDERED that the motion of Abbott to dismiss Counts IV, V, and VI of the amended complaint be and it hereby is granted; it is

FURTHER ORDERED that the Red Cross is hereby dismissed as a defendant from this action; and it is

FURTHER ORDERED that Genetic Systems and Abbott, by counsel, must attend the status call scheduled for July 15, 1988 at 9:15 a.m., to discuss further proceedings on the remaining Counts I, II, and III of the complaint.

IT IS SO ORDERED.

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[76] Amended Complaint, paras. 14-17.

[77] Amended Complaint, para. 20(a).

West Allis Memorial Hospital, Inc. v. Bowen

United States Court of Appeals for the Seventh Circuit

December 9, 1987, Argued ; July 14, 1988, Decided

No. 87-1974

Reporter

852 F.2d 251 *; 1988 U.S. App. LEXIS 10011 **

WEST ALLIS MEMORIAL HOSPITAL, INC., a Wisconsin non-profit corporation, Plaintiff-Appellant, v. OTIS BOWEN, in his capacity as Secretary of the United States Department of Health and Human Services, along with his successors, agents, servants, employees and attorneys; EDWIN MEESE, in his capacity as Attorney General of the United States, along with his successors, agents, servants, employees and attorneys; and ST. LUKE'S HOSPITAL, INC., a Wisconsin non-profit corporation, along with its officers, agents, servants, employees and attorneys, Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 87-C-0053 -- Terence T. Evans, Judge.

Core Terms

district court, enjoin, unfair competition, injunctive relief, preliminary injunction, antitrust, preliminary injunctive relief, injunction, merits, common law claim, present case, provisions, criminal prosecution, fail to demonstrate, irreparable harm, parties, courts

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Standards of Review, Abuse of Discretion**

In reviewing the decision of a district court to grant or deny a preliminary injunction, the United States Court of Appeals for the Seventh Circuit continues to invoke the phrase "abuse of discretion" in articulating the applicable standard. Under *Fed. R. Civ. P. 52(a)*, the district court is required to make findings of fact and conclusions of law in support of its decision to grant or refuse preliminary injunctive relief. The ultimate decision, however, rests within the court's discretion. The district court's findings of fact are reviewed under the clearly erroneous standard of *Fed. R. Civ. P. 52(a)*; with the legal conclusions subject to de novo review. A factual or legal error may alone be sufficient to establish that the court abused its discretion in making its final determination. However, in the absence of such an error, the district judge's weighing and balancing of the equities should be disturbed on appeal only in the rarest of cases.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

A party seeking a preliminary injunction bears the burden of showing: (1) that it has no adequate remedy at law; (2) that it will suffer irreparable harm if the preliminary injunction is not issued; (3) that the irreparable harm it will suffer if the preliminary injunction is not granted outweighs the irreparable harm the defendant will suffer if the injunction is granted; (4) that it has a reasonable likelihood of prevailing on the merits; and (5) that the injunction will not harm the public interest.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Elements

Public Health & Welfare Law > Social Security > Medicaid > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview

HN3[] **Types of Contracts, Lease Agreements**

42 U.S.C.S. § 1395nn(b)(2)(B) provides that whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any item or service for which payment may be made in whole or in part under this subchapter shall be guilty of a felony and upon conviction thereof, shall be fined not more than $ 25,000 or imprisoned for not more than five years, or both.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN4[] **Appeals, Appellate Jurisdiction**

Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review. When the lower court lacks jurisdiction, an appellate court has jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > Statutory Remedies & Rights

HN5[] Federal & State Interrelationships, Federal Common Law

A strong presumption exists against the creation of such implied rights of action. The factors which a court should consider in determining whether such a right exists include: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff; and, (4) whether the cause of action was one traditionally relegated to state law. The ultimate question, however, is whether Congress intended to provide such a right in enacting the statute.

Governments > Federal Government > Claims By & Against

Governments > Legislation > Statutory Remedies & Rights

HN6[] Federal Government, Claims By & Against

Where a statute is framed as a general prohibition or command to a federal agency, as it is in the present case, a private right of action will seldom be implied.

Public Health & Welfare Law > Social Security > Medicare > General Overview

HN7[] Social Security, Medicare

See *42 U.S.C.S. § 1320a-7b(b)(3)*.

Civil Procedure > Remedies > Injunctions > General Overview

Criminal Law & Procedure > ... > Miscellaneous Offenses > Nuisances > General Overview

Real Property Law > ... > Remedies > Injunctions > General Overview

HN8[] Remedies, Injunctions

There are three recognized exceptions to the equitable doctrine against enjoining criminal activity: national emergencies, widespread public nuisances, and where a specific statutory grant of power exists authorizing injunctive relief.

Civil Procedure > Remedies > Injunctions > General Overview

HN9[] Remedies, Injunctions

There is a heavy presumption against enjoining pending or threatened criminal prosecutions. In the absence of a showing of exceptional circumstances, a federal court generally will not use its equitable powers to prevent the enforcement of a criminal statute which is concededly valid and constitutional.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN10[] **Regulated Practices, Private Actions**

See 15 U.S.C.S. § 26.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN11[] **Regulated Practices, Private Actions**

See Wis. Stat. Ann. § 133.16.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN12[] **Jurisdiction, Jurisdictional Sources**

When exercising pendent jurisdiction over the state law claims, the district court has the same equitable powers as the state court.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[] **Regulated Practices, Private Actions**

Under Wisconsin law, injunctive relief is available to a private entity in an action for unfair competition based on misappropriation. Injunctive relief is also statutorily provided for under Wis. Stat. Ann. § 100.20 which prohibits unfair methods of competition in business, although it appears from the language of the statute that only the state has the authority to seek such relief.

Counsel: Robert H. Friebert, Friebert, Finerty & St. John, South Carolina, Milwaukee, Wisconsin, Attorneys, for Plaintiff.

Kathy L. Nusslock, Cook & Franke, South Carolina, Milwaukee, Wisconsin; John J. Meyer, AUSA (Patricia J. Gorence-USA), Milwaukee, Wisconsin, Attorneys, for Defendants.

Judges: Cummings and Flaum, Circuit Judges, and Grant, Senior District Judge. *

Opinion by: GRANT

Opinion

* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

[*252] ROBERT A. GRANT, SENIOR DISTRICT JUDGE

West Allis Memorial Hospital, Inc. ("West Allis") brought suit against St. Luke's Hospital, Inc. ("St. Luke's"), the Secretary of Health and Human Services, Otis Bowen, and the Attorney General of the United States, Edwin Meese (the "federal defendants"), challenging the applicability of the Medicare-Medicaid antifraud provisions of *42 U.S.C. § 1395nn(b)(2)(B)* to a program instituted and advertised by St. Luke's and known as "Freedom 55/65." [1]

[2]** The "Freedom 55/65" program was commenced on or about January 1, 1987, [2] and offers a number of advantages to Medicare patients who enroll in the program. This lawsuit focuses on but one of those advantages -- the waiver of the deductible and coinsurance obligations of Medicare patients who receive items or services from St. Luke's in the event the patient does not have supplemental insurance which would otherwise pay those obligations. The waiver program applies to items and services covered under both Medicare Part A and B. [3]

[3]** As a competitor for Medicare patients in the Milwaukee area, West Allis fears the effects St. Luke's waiver program will have on its ability to remain competitive. West Allis maintains that it is prepared to meet that threat by implementing its own waiver program, but believes such a program to be violative of the anti-fraud provisions **[*253]** of *42 U.S.C. § 1395nn(b)(2)(B)* and fears criminal prosecution under the statute if it chooses to implement such a program.

Fearing the loss of business on the one hand, and the risk of prosecution on the other, West Allis turned to the courts for resolution of its dilemma. In its complaint, West Allis alleges that St. Luke's waiver program is violative of not only *§ 1395nn(b)(2)(B)*, but also federal and state antitrust laws, and the Wisconsin common law against conspiracy, tortious interference with prospective contractual relations, and unfair competition. West Allis moved for preliminary injunctive relief against St. Luke's under each count of the complaint, and for alternative injunctive relief against the federal defendants under *§ 1395nn(b)(2)(B)*. With respect to the *§ 1395nn* claim, West Allis asked that the district court either declare St. **[**4]** Luke's waiver program violative of the statute and enjoin St. Luke's continuation of that program, or alternatively declare such programs nonviolative of *§ 1395nn(b)(2)(B)* and enjoin the federal defendants from enforcing the provisions thereof against Medicare providers such as West Allis which may seek to implement a similar program.

A hearing on West Allis' motion for preliminary injunction was conducted on January 23, 1987, and on May 28, 1987, the district court issued an order denying the motion in its entirety. *West Allis Memorial Hospital, Inc. v. Bowen, 660 F. Supp. 936 (E.D. Wis. 1987)*. This appeal followed.

I. *Standard of Review*

HN1[] "In reviewing the decision of a district court to grant or deny a preliminary injunction, this court has continued to invoke the phrase 'abuse of discretion' in articulating the applicable standard." *Darryl H. v. Coler, 801 F.2d 893, 897 (7th Cir. 1986)*; *see also* *Baja Contractors, Inc. v. City of Chicago, 830 F.2d 667, 674 (7th Cir. 1987)*, *cert. denied*, *485 U.S. 993, 108 S. Ct. 1301, 99 L. Ed. 2d 511 (1988)*. Under *Fed. R. Civ. P. 52(a)*, the district court is required to make findings of fact and conclusions of law in support of its decision to grant or refuse preliminary **[**5]** injunctive relief. The ultimate decision, however, rests within the court's discretion. *Baja*

[1] In 1987, *§ 1395nn* was repealed and the statute renumbered and amended by §§ 4 and 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987, *42 U.S.C. § 1320a-7b*.

[2] The "Freedom 55/65" program was commenced prior to the August 18, 1987 enactment of the Medicare and Medicaid Patient and Program Protection Act. While the language of *§ 1320a-7b(b)(2)(B)* is virtually identical to that of former *§ 1395nn(b)(2)(B)*, we will continue to refer throughout our discussion to *§ 1395nn* as it existed prior to its 1987 amendment.

[3] Medicare Part A provides insurance coverage for inpatient hospital care and certain other kinds of medical services. *See* *42 U.S.C. § 1395c, et seq.* Medicare Part B (outpatient services) provides for a system of optional supplemental insurance for medical care not covered under Medicare Part A. *See* *42 U.S.C. § 1395j, et seq.*

Contractors, 830 F.2d at 674; Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429, 1436-37 (7th Cir. 1986). The district court's findings of fact are reviewed under the clearly erroneous standard of Fed. R. Civ. P. 52(a); with the legal conclusions subject to *de novo* review. Baja Contractors, 830 F.2d at 674; Manbourne, Inc. v. Conrad, 796 F.2d 884, 887 (7th Cir. 1986); Lawson Products, 782 F.2d at 1437. "[A] factual or legal error may alone be sufficient to establish that the court 'abused its discretion' in making its final determination. . . . However, in the absence of such an error, the district judge's weighing and balancing of the equities should be disturbed on appeal only in the rarest of cases." Lawson Products, 782 F.2d at 1437. We review the district court's denial of a preliminary injunction in the present case with these principles in mind.

II. *Discussion*

West Allis, as ***HN2***[] the party seeking a preliminary injunction, bears the burden of showing:

> (1) that it has no adequate remedy at law; (2) that it will suffer irreparable harm if the preliminary injunction **[**6]** is not issued; (3) that the irreparable harm it will suffer if the preliminary injunction is not granted outweighs the irreparable harm the defendant will suffer if the injunction is granted; (4) that it has a reasonable likelihood of prevailing on the merits; and (5) that the injunction will not harm the public interest.

Baja Contractors, 830 F.2d at 675; Manbourne, Inc., 796 F.2d at 887; Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 386-88 (7th Cir. 1984). Under the "sliding scale" approach adopted by this circuit, the likelihood of success that West Allis needs to show will vary inversely with the degree of harm it will suffer if the injunction is not granted. Illinois Psychological Ass'n v. Falk, 818 F.2d 1337, 1340 (7th Cir. 1987); Brunswick Corp. v. ***[*254]*** Jones, 784 F.2d 271, 275 (7th Cir. 1986); Roland Machinery Co., 749 F.2d at 387. If, however, "both parties are likely to suffer the same amount of irreparable harm, so far as estimation is possible, then likelihood of success becomes decisive." Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 252 (7th Cir. 1986), *rev'd on other grounds*, 481 U.S. 69, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987).

A. *Medicare* ***[**7]*** *Fraud:* 42 U.S.C. § 1395nn(b)(2)(B)

West Allis sought preliminary injunctive relief against St. Luke's waiver program under ***HN3***[] 42 U.S.C. § 1395nn(b)(2)(B) which provides:

> Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person -- to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any item or service for which payment may be made in whole or in part under this subchapter . . . shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

In denying the preliminary injunction, the district court assumed, without specifically finding, that great irreparable harm would be suffered by West Allis if the injunction were to be denied, but concluded that there was "almost no likelihood that West Allis [would] succeed on the merits," because it could not show any entitlement to the injunctive relief sought. West Allis Memorial Hospital, 660 F. Supp. at 938-39. In so ruling, the court relied on a long-standing doctrine that **[**8]** "equity will not enjoin the commission of a crime," and found that no exception to that doctrine was warranted under the circumstances. Id. at 939-40. The district court therefore did not reach the ultimate issue of whether St. Luke's waiver program was violative of § 1395nn(b)(2)(B).

West Allis contends on appeal that the district court abused its discretion when it found that it could not employ its equitable powers to enjoin the criminal activity complained of. While West Allis acknowledges that courts generally will not enjoin a crime, it maintains that the present case falls within one of the recognized exceptions to that doctrine under which a court may enjoin criminal activity when statutorily authorized to do so. United States v.

Jalas, 409 F.2d 358, 360 (7th Cir. 1969). Arguing that such authority exists under *§ 1395nn*, and that the statute creates an implied private right of action in favor of Medicare providers, West Allis concludes that the denial of the preliminary injunction constitutes a reversible error of law. We do not agree.

While the district court did not address the issue of standing under an implied right of action, our review must begin at that point, **[**9]** for the power of the federal courts to entertain an action is not unlimited. As the Supreme Court recently noted in *Bender v. Williamsport Area School District, 475 U.S. 534, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)*:

> ***HN4***[] Every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," . . . . *Mitchell v. Maurer, 293 U.S. 237, 244, 79 L. Ed. 338, 55 S. Ct. 162 (1934)*. See *Juidice v. Vail, 430 U.S. 327, 331-332, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977)* (standing). . . . "[When the lower court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick, 298 U.S. 435, 440, 80 L. Ed. 1263, 56 S. Ct. 829 (1936)* (footnotes omitted).

475 U.S. at 541.

To the extent West Allis asserts standing under *§ 1395nn*, based on a perceived implied private right of action, we find its arguments unpersuasive. ***HN5***[] A strong presumption exists against the creation of such implied rights of action. *Community & Economic Development Ass'n of Cook County, Inc. v. Suburban Cook County Area Agency on Aging, 770 F.2d 662, 664 (7th Cir. 1985)*. The factors which a court **[*255]** should consider in determining **[**10]** whether such a right exists include: (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted"; (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether it is "consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff"; and, (4) whether "the cause of action was one traditionally relegated to state law." *Cort v. Ash, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975)* (citations omitted). The ultimate question, however, is whether Congress intended to provide such a right in enacting the statute. *Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 145-48, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985)*; *Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 377-78, 72 L. Ed. 2d 182, 102 S. Ct. 1825 (1982)*; *Cort v. Ash, 422 U.S. at 78*; *City of Evanston v. Regional Transportation Authority, 825 F.2d 1121, 1123 (7th Cir. 1987)*, *cert. denied*, *484 U.S. 1005, 108 S. Ct. 697, 98 L. Ed. 2d 649 (1988)*.

In the present case, we find that neither the structure of *§ 1395nn* nor its legislative history suggests that Congress intended to provide a private remedy to Medicare providers such as West Allis which may be injured **[**11]** as a result of a competitor's noncompliance with the provisions of that statute. The Secretary of Health and Human Services is charged with the administration of the Medicare program pursuant to *42 U.S.C. § 1395kk*. He is aided in that endeavor by the Attorney General, whose duty it is to enforce the laws and Constitution of the United States. ***HN6***[] Where a statute is framed as a "general prohibition or command to a federal agency," as it is in the present case, a private right of action will seldom be implied. *City of Evanston v. Regional Transportation Auth., 825 F.2d at 1123*, quoting *Rapid Transit Advocates v. Southern California Rapid Transit District, 752 F.2d 373, 376 (9th Cir. 1985)*. The legislative history of *§ 1395nn* further supports the conclusion that it is the Government, and not private parties, which is charged with the enforcement of the Medicare program where it identifies the purpose of *§ 1395nn* as:

> Legislation to amend the Social Security Act to strengthen the capability *of the Government* to detect, prosecute, and punish fraudulent activities under the Medicare and Medicaid programs. . . .

1977 U.S. Code Cong. & Admin. News 3039, 3040. (Emphasis added). Whether **[**12]** this purpose would be better achieved by arming providers such as West Allis with the authority to enforce the provisions of *§ 1395nn* is a judgment better left to Congress. *See* *Drake v. Honeywell, Inc., 797 F.2d 603, 611 (8th Cir. 1986)*.

Finding no intent on the part of Congress to create a private right of action in favor of West Allis, "we need not carry the *Cort v. Ash* inquiry further." *Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 94 n.31, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981)*; *see also* *Massachusetts Mutual Life Insurance Co., 473 U.S. at 148*. The resolution of the question of standing also obviates the need for this court to determine whether a waiver program such as St. Luke's violates the language of *§ 1395nn(b)(2)(B)* -- an issue which Congress has clearly recognized and chosen to deal with in its own way. [4]

[13] [*256]** Even assuming West Allis had the requisite standing to bring an action under *§ 1395nn*, we would concur with the district court in finding that no exception to the equitable doctrine against enjoining criminal activity was warranted. ***HN8***[] There are three recognized exceptions to the doctrine: national emergencies, widespread public nuisances, and where a specific statutory grant of power exists authorizing injunctive relief. *United States v. Jalas, 409 F.2d at 360*. West Allis does not contend that it falls within the first two exceptions, and we find nothing in the language of *§ 1395nn* which would authorize the issuance of an injunction against violators thereof. Absent such specific statutory authority, the district court was powerless to enter the injunctive relief requested.

We find that West Allis' claim for preliminary injunctive relief against the federal defendants is similarly without merit. In denying such relief, the district court found: (1) that equity jurisprudence barred the court from acting to restrain a criminal prosecution where the movant had an adequate remedy at law, and the only harm suffered was the "anxiety, cost, and inconvenience of having to defend against **[**14]** a criminal prosecution," *Trainor v. Hernandez, 431 U.S. 434, 52 L. Ed. 2d 486, 97 S. Ct. 1911 (1977)*; (2) that "West Allis ha[d] only the remotest of chances . . . of being prosecuted if it institute[d] a waiver program" and therefore lacked standing to seek injunctive relief against any prospective criminal prosecution; and, (3) that even assuming that West Allis was sufficiently threatened with prosecution to establish standing, the court should defer to the Department of Justice in determining who should be prosecuted under *§ 1395nn* where, as here, the statute itself was not challenged as constitutionally invalid. *West Allis Memorial Hospital, 660 F. Supp. at 940*.

We find no error in the district court's ruling. Even if we assume, as did the district court, that West Allis has established the requisite standing, ***HN9***[] there is a "heavy presumption against enjoining pending or threatened criminal prosecutions." *Downstate Stone Co. v. United States, 651 F.2d 1234, 1238 (7th Cir. 1981)*. In the absence of a showing of exceptional circumstances, a federal court generally will not use its equitable powers to prevent the

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[4] Section 14(a) of the Medicare and Medicaid Patient and Program Protection Act of 1987 amending former *§ 1395nn* (now *§ 1320a-7b*) provides:

> ***HN7***[] The Secretary of Health and Human Services, in consultation with the Attorney General, not later than 1 year after the date of the enactment of this Act [Aug. 18, 1987] shall publish proposed regulations, and not later than 2 years after the date of the enactment of this Act shall promulgate final regulations, specifying payment practices that shall not be treated as a criminal offense under section 1128B(b) of the Social Security Act [*42 U.S.C. § 1320a-7b(b)*] and shall not serve as the basis for an exclusion under section 1128(b)(7) of such Act. Any practices specified in regulations pursuant to the preceding sentence shall be in addition to the practices described in subparagraphs (A) through (C) of section 1128B(b)(3) [*42 U.S.C. § 1320a-7b(b)(3)*].

See Pub. L. 100-93 § 14(a), Standards for Anti-Kickback Provisions; Regulations, set out as a note under *42 U.S.C. § 1320a-7b*. In enacting § 14(a), Congress recognized that the statutory language of *§ 1395nn(b)(2)(B)* "has created uncertainty among health care providers as to which commercial arrangements are legitimate, and which are proscribed," S. Rep. No. 109, 100th Cong., 1st Sess. 25, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 707, and expressed its intention to deal with the problem. Once enacted, the HHS regulations will be entitled to the same judicial enforcement accorded Congressional legislation. *Batterton v. Francis, 432 U.S. 416, 425 n.9, 53 L. Ed. 2d 448, 97 S. Ct. 2399 (1977)*; *United States v. Mersky, 361 U.S. 431, 437-38, 4 L. Ed. 2d 423, 80 S. Ct. 459 (1960)*.

enforcement of a criminal statute which is concededly valid and constitutional. *See Spielman* ***[**15]*** *Motor Sales Co., Inc. v. Dodge, 295 U.S. 89, 95, 79 L. Ed. 1322, 55 S. Ct. 678 (1935)*; *Downstate Stone Co., 651 F.2d at 1238*; *Ivy v. Katzenbach, 351 F.2d 32, 34-35* (7th Cir.), *cert. denied*, *382 U.S. 958, 15 L. Ed. 2d 362, 86 S. Ct. 437 (1965)*. West Allis has failed to demonstrate that such circumstances exist in the present case, and that judicial interference is warranted.

B. *The Antitrust and Common Law Claims*

The district court summarily denied West Allis' claim for preliminary injunctive relief under each of the remaining seven counts of the complaint, stating that:

> Although the requests brought under the Sherman Act, the Clayton Act, the Wisconsin Antitrust Act, and the Wisconsin common law are on somewhat different footing, they also rely on the fact that St. Luke's is allegedly committing a crime in order to, for instance, attempt to monopolize the market.

West Allis Memorial Hospital, 660 F. Supp. at 940. [5] The court's decision was **[*257]** presumably based on its previous conclusion that it was powerless to enjoin the commission of a crime. In so ruling, however, the district court failed to recognize that authority may exist under each of West Allis' remaining claims for the issuance of an injunction.

To the extent West **[**16]** Allis has demonstrated a viable claim under the Sherman Act, *15 U.S.C. §§ 1* and *2*, independent of its claim under the Medicare fraud provisions of *42 U.S.C. § 1395nn(b)(2)(B)* (a matter which the parties dispute), the Clayton Act, *15 U.S.C. § 26*, expressly provides the court with the statutory authority to enjoin the criminal activity complained of. [6]

[17]** Wisconsin law provides similar relief for violations of its antitrust laws. W.S.A. *§ 133.16* specifically provides that:

> ***HN11***[] Any circuit court may prevent or restrain, by injunction or otherwise, any violation of this chapter. The department of justice, any district attorney or any person by complaint may institute actions or proceedings to prevent or restrain a violation of this chapter, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing be enjoined or prohibited. When the parties informed against or complained of have been served with a copy of the information or complaint and cited to answer it, the court shall proceed, as soon as may be in accordance with its rules, to the hearing and

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[5] With respect to West Allis' claim under *section 1* of the Sherman Act, *15 U.S.C. § 1*, which was added in an amended complaint and made the subject of a supplemental motion for preliminary injunction, the district court concluded that:

> The illegal conduct which forms the basis for the Sherman Act claim is the violation of *section 1395nn*. Accordingly, for the reasons stated in denying the original request for a preliminary injunction, the [supplemental] request is denied.

West Allis Memorial Hospital, 660 F. Supp. at 941.

[6] *15 U.S.C. § 26* provides in pertinent part:

> ***HN10***[] Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

determination of the case; and pending the filing of the answer to such information or complaint may, at any time, upon proper notice, make such temporary restraining order or prohibition as is just. . . .

HN12[]

When exercising pendent jurisdiction over the state law claims, the district court has the same equitable powers as the state court. *See* *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)* (federal courts exercising **[**18]** pendent jurisdiction bound to apply state substantive law). The district court erred in failing to recognize that antitrust activity may be enjoined under both federal and state law, and in so doing committed an error of law. [7]

While West Allis makes several conclusory statements about the power of the district court to enjoin activity which may also violate Wisconsin common law, it specifically addresses only its claim of unfair competition, and generally abandons its remaining common law claims, making only cursory arguments in its reply brief. The burden was on West Allis to demonstrate an abuse of discretion on the part of the district court with respect to each of its claims. In failing to present any authority for its proposition that a state court, and thus the district court, was empowered to enjoin a common law conspiracy or tortious **[**19]** interference with a prospective contractual relation, West Allis failed to meet that burden. We accordingly limit our discussion to West Allis' claim of unfair competition.

St. Luke's does not dispute the availability of injunctive relief under the Wisconsin **[*258]** common law against unfair competition, but argues that unfair competition is limited to misappropriation and that West Allis has failed to demonstrate elements of a misappropriation claim, and has thus failed to demonstrate a likelihood of success on the merits of its claim.

HN13[] Under Wisconsin law, injunctive relief is indeed available to a private entity in an action for unfair competition based on misappropriation. *See Mercury Records v. Economic Consultants, 91 Wis.2d 482, 283 N.W.2d 613 (Wis. App. 1979)*. Injunctive relief is also statutorily provided for under W.S.A. *§ 100.20* which prohibits unfair methods of competition in business, although it appears from the language of the statute that only the state has the authority to seek such relief.

Whether injunctive relief would be available to West Allis only in an action based on misappropriation, or is available when other methods of unfair competition are alleged, and whether **[**20]** West Allis has sufficiently demonstrated a reasonable likelihood of success on the merits of its unfair competition claim are questions better left for the district court to determine. We find merely that in denying the preliminary injunction without recognizing that authority may exist under state law for the issuance of an injunction the district court committed an error of law.

While it would appear from the extensive arguments presented on appeal that the parties would prefer *de novo* review by this court of the merits of West Allis' antitrust and common law claims, we regretfully cannot oblige. Our *de novo* review is limited to legal issues and conclusions. *See* *Thornburgh v. American College of Obstetricians, 476 U.S. 747, 757, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986)*; *Baja Contractors, Inc. v. City of Chicago, 830 F.2d at 674*; *Faheem-El v. Klincar, 814 F.2d 461, 467 (7th Cir. 1987)*. Even then we may decide the merits of legal issues which were not addressed by the district court only when the facts on which those conclusions must be based are not in dispute. *Faheem-El, 814 F.2d at 467*. In the present case, there are a number of factual disputes which

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[7] The type of factual and legal analysis which was required in the present case is similar to that undertaken in *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 603 F. Supp. 1077 (S.D. Ind. 1985)*, *aff'd*, *784 F.2d 1325 (7th Cir. 1986)* (a case which we find to be similar in many respects to that presented by West Allis).

prohibit our consideration of the legal **[**21]** issues presented by West Allis' antitrust and unfair competition claims -- disputes which were not resolved by the district court in making its findings of fact. [8]

By limiting its legal analysis to only one of the five factors necessary to support preliminary injunctive relief, the district court leaves us with but one alternative -- to reverse its decision with respect to West Allis' federal and state antitrust claims, and its common law claim of unfair competition, and remand for further consideration. [9] *See* *American Can Co. v. Mansukhani, 742 F.2d 314, 326 (7th Cir. 1984)* ("When the district court's error is the very predicate of its order, the order must be reversed as an improvident exercise of the court's discretion.")

[22]** III. *Conclusion*

For the foregoing reasons, we now AFFIRM the decision of the district court in part, and REVERSE AND REMAND in part. Finding that West Allis lacks the requisite standing to assert a claim against St. Luke's under *42 U.S.C. § 1395nn(b)(2)(B)*; that the statute does not provide the injunctive relief which West Allis seeks; and that West Allis has failed to demonstrate extraordinary circumstances warranting injunctive relief against the federal defendants, we AFFIRM the district court's denial **[*259]** of preliminary injunctive relief under *§ 1395nn(b)(2)(B)*. We also AFFIRM the decision of the district court with respect to West Allis' common law claims of conspiracy and tortious interference with prospective contractual relations, as West Allis has failed to demonstrate any abuse of discretion on the part of the district court with respect to those claims. We, however, REVERSE the district court's denial of preliminary injunctive relief with respect to West Allis' federal and state antitrust claims and its common law claim of unfair competition, and REMAND for further consideration.

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[8] Factual disputes exist, for example, as to the size of the "relevant market" and extent of the parties' "market share" (facts which go to whether St. Luke's is capable of monopolizing trade under *15 U.S.C. § 2*); and as to whether St. Luke's and Good Samaritan, both owned by the same parent corporation, are capable of conspiring to restrain trade in violation of *15 U.S.C. § 1*.

[9] While we do not require that a district court address each of the five factors necessary to support a preliminary injunction in every case in which such relief is denied, *see* *Curtis v. Thompson, 840 F.2d 1291, 1297 (7th Cir. 1988)*, by limiting its analysis to a single factor, the district court has seriously restricted the scope of review on appeal -- a result which might have been avoided by a more detailed analysis and consideration of each of the factors.

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FTC v. Illinois Cereal Mills, Inc.

United States District Court for the Northern District of Illinois, Eastern Division

July 18, 1988, Decided

No. 88 C 4891

Reporter

691 F. Supp. 1131 *; 1988 U.S. Dist. LEXIS 7552 **; 1988-2 Trade Cas. (CCH) P68,191

FEDERAL TRADE COMMISSION, Plaintiff, v. ILLINOIS CEREAL MILLS, INC., ELDERS IXL LIMITED, and ELDERS GRAIN, INC., Defendants

Core Terms

corn, products, industrial, dry, acquisition, geographic, markets, percent, ships, concentration, producers, preliminary relief, competitors, customers, merger, FTC Act, shipments, grits, firms, rescission, Consumer, merits, preliminary injunction, HSR Act, memorandum, parties, Grain, four-firm, food, consummated

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN1[] **Railroads & Rail Transportation, Rates & Tariffs**

The Staggers Rail Act of 1980, *49 U.S.C.S. § 10101 et seq.*, deregulating the rail and trucking industries, has made negotiated transportation rates for long distance rail and truck shipments the norm in the dry corn milling industry.

Mergers & Acquisitions Law > Antitrust > Premerger Notifications

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > General Business Considerations > Securities Laws

HN2[] **Antitrust, Premerger Notifications**

The Hart-Scott-Rodino Act (HSR Act) provides that before stock or asset acquisitions of a particular size can be consummated, both the prospective sellers and purchasers must comply with certain reporting and waiting requirements. *15 U.S.C.S. §§ 18a(a)-(b)*. The purpose of the HSR Act is to provide the Federal Trade Commission and the Department of Justice with information and time necessary to determine whether a proposed transaction, if consummated, may violate antitrust laws.

Mergers & Acquisitions Law > General Business Considerations > Securities Laws

HN3[] General Business Considerations, Securities Laws

The statutory coverage of the Hart-Scott-Rodino Act turns on three tests, all of which must be satisfied before the Act applies. First, one of the parties must be engaged in commerce or in activities affecting commerce. *15 U.S.C.S. § 18a(a)(1)*. Second, the parties must meet the size-of-person test set forth in *15 U.S.C.S. § 18a(a)(2)*. Third, the size of the transaction must exceed one of two specified thresholds. *15 U.S.C.S. § 18a(a)(3)*. One such threshold is passed when the total amount of securities or assets acquired exceeds $ 15 million.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > General Overview

HN4[] Remedies, Injunctions

The Federal Trade Commission (Commission) is empowered under of the Federal Trade Commission Act, § 13(b), *15 U.S.C.S. § 53(b)*, to seek preliminary relief pending the completion of administrative proceedings challenging a merger or acquisition. Because preliminary injunctive relief is an extraordinary and drastic remedy, such relief is granted only upon a showing by the Commission that a substantial likelihood of success on the merits exists, that preliminary injunctive relief is the only available means of ensuring the availability of a final remedy, and that the public interest favors the issuance of preliminary relief. To demonstrate a likelihood of success on the merits, the Commission must prove: not that the merger in question may possibly have an anti-competitive effect, but rather that it will probably have such an effect. And the government must have demonstrated a likelihood that it can meet this burden.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN5[] Remedial Powers, Federal Trade Commission Act

Because a preliminary injunction blocking or rescinding an acquisition will often spell doom for the transaction, the Federal Trade Commission (Commission) must establish that the preliminary injunction sought is necessary to ensure the availability of an effective final remedy and that divestiture after the completion of proceedings on the merits would not provide suitable relief. In addition to the foregoing, the Commission must show that the equities favor issuing the relief sought. *15 U.S.C.S. § 53(b)*. Essentially, this requires the Commission to establish that the harm to the parties and to the public resulting from the preliminary injunction is outweighed by any harm to competition that would occur in the period between denial of a preliminary injunction and a final adjudication on the merits.

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN6[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act, § 7, prohibits a corporation engaged in commerce from acquiring the assets of another corporation engaged in commerce where such acquisition may substantially lessen competition or tend to create a monopoly in a particular line of commerce in any section of the United States. *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] **Trade Practices & Unfair Competition, Federal Trade Commission Act**

The Federal Trade Commission Act (FTC Act), *§ 5* makes all unfair methods of competition and unfair or deceptive acts or practices in commerce unlawful. *15 U.S.C.S. § 45*. Any act or practice which is prohibited by antitrust laws is viewed as an unfair method of competition under of the FTC Act *§ 5* .

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN8[] **Relevant Market, Product Market Definition**

The Supreme Court outlined a two-step process for product market analysis. First, the outermost boundaries of a product market are identified by determining reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it. Cross-elasticity of demand measures how far buyers will go to substitute one commodity for another. After the outer boundaries of a product market are defined, further analysis is required to determine whether well-defined submarkets exist which, by themselves, may constitute separate product markets for antitrust purposes.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9[] Regulated Practices, Market Definition

The boundaries of individual product markets may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's particular characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. The overriding principle in this two-step analysis is to identify meaningful competition where it actually exists.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] Regulated Practices, Market Definition

Cross-elasticity of supply or production substitutability may also play a role in defining product markets for antitrust analyses. The cross-elasticity of supply refers to the capability of other production facilities to be converted to produce a substitutable product.

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN11[] Antitrust & Trade Law, Clayton Act

In addition to defining a relevant product market, the Clayton Act, § 7 requires a determination of the effects the acquisition is likely to have on a section of the country or relevant geographic market.

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN12[] Antitrust, Market Definition

Analysis of a merger's competitive significance begins with consideration of market shares of the combined firms and proceeds from there to a review of qualitative factors to determine whether the merger poses a significant threat to competition.

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN13[] Mergers & Acquisitions Law, Antitrust

Among the qualitative factors most important to consider in assessing the potential for a merger to cause competitive harm are the difficulty of entry into the market and other market characteristics that may be conducive to interdependent or noncompetitive behavior.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN14[] Regulated Practices, Market Definition

As concentration in a particular product and geographic market increases, greater is the likelihood that parallel policies of mutual advantage not competition, will emerge.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > General Overview

HN15[] Regulated Practices, Market Definition

Concentration is commonly measured by calculating both the four-firm concentration ratio and the more sensitive Herfindahl-Hirschman Index. Under either method, the acquisition at issue raises concentration significantly in an already highly concentrated market.

Communications Law > ... > Regulated Practices > Introducing Competition > Signal Carriage

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN16[] Introducing Competition, Signal Carriage

Difficulty of entry is a factor, which increases concern over competitive effects of an acquisition. High entry barriers may be a signal that a particular merger carries a potential for impairing competition, but barriers need not reach some predetermined level before an anticompetitive effect becomes possible.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN17[] Regulated Practices, Market Definition

Major producers recognize that entry into the industrial corn milling industry requires the construction of a large and expensive facility. Recent and past experience has shown that a new entrant cannot come into the market without first securing substantial contracts to minimize the risk.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN18[] **Injunctions, Preliminary & Temporary Injunctions**

Once a substantial likelihood of success on the merits is demonstrated, the court must consider whether the equities favor the issuance of preliminary relief and if so what type of relief is necessary and appropriate.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN19[] **Injunctions, Preliminary & Temporary Injunctions**

Although private interests may be considered when balancing equities, they are subordinate to public interests and cannot alone support the denial of preliminary relief.

Counsel: [1]** Ronald B. Rowe, Esq., Timothy T. Hughes, Esq., Federal Trade Commission, Chicago, Illinois, David C. Shonka, Esq., Norris Washington, Esq., Patricia Shapiro, Esq., Federal Trade Commission, Washington, District of Columbia, appeared on behalf of the Plaintiff.

James H. Sneed, Esq., David Marx, Jr., Esq., Lizbeth Levinson, Esq., McDermott, Will & Emery, Chicago, Illinois, appeared on behalf of Defendant Illinois Cereal Mills, Inc.

Kael B. Kennedy, Esq., Kirk D. Messmer, Esq., Matkov, Salzman, Madoff & Gunn, Chicago, Illinois, Eugene Meigher, Esq., Arent, Fox, Kintner, Plotkin & Kahn, Washington, District of Columbia, appeared on behalf of Defendant Elders.

Judges: Nicholas J. Bua, United States District Judge.

Opinion by: BUA

Opinion

[*1133] MEMORANDUM ORDER

NICHOLAS J. BUA, UNITED STATES DISTRICT JUDGE.

Before this court is plaintiff's motion for preliminary relief under § 13(b) of the Federal Trade Commission Act and plaintiff's motion for reconsideration of this court's denial of leave to file an amended complaint to add a claim under the Hart-Scott-Rodino Act. For the reasons stated herein, plaintiff's motion for reconsideration of leave to file a Hart-Scott-Rodino Act claim is denied, but plaintiff's motion for preliminary relief in the form of injunction ordering rescission of the consummated acquisition **[**2]** of Lincoln Grain Company's assets by defendant Illinois Cereal Mills, Inc., from defendant Elders Grain, Inc., is granted subject to conditions described below.

FINDINGS OF FACT

I. *Background*

1. Defendant Illinois Cereal Mills, Inc., ("ICM") is a Delaware corporation having its principal place of business in Illinois. (Plaintiff's Exhibit ("PX") 1.) ICM owns and operates industrial dry corn mills in Indianapolis, Indiana and Paris, Illinois. (*Id*.) Defendant Elders Grain, Inc., ("Elders") is a wholly owned subsidiary of Elders IXL, Ltd., an Australian corporation, and is licensed to do business in Illinois. (PX 2.) Elders owns and operates the Lincoln Grain Company ("Lincoln") in Atchison, Kansas. (*Id*.) Lincoln is also an industrial dry corn mill. (*Id*.)

2. In early June 1988, ICM purchased certain dry corn milling assets of Lincoln from Elders. (*See* PX 45-49.) According to the purchase agreement, ICM acquired a dry corn mill and approximately 90 rail cars for $ 14 million. (*See* PX 45.) In addition, ICM procured a five-year option for $ 100,000 to purchase a 21-million-bushel grain elevator located adjacent to the dry corn mill and entered into an agreement **[**3]** to lease one sixth of the space in the elevator for $ 250,000 a year plus handling charges. (*See* PX 46-49.)

[*1134] 3. On June 6, 1988, plaintiff Federal Trade Commission ("Commission") instituted the present action seeking either rescission of the Lincoln asset sale or the appointment of a receiver to operate and manage the acquired assets pending the outcome of administrative litigation before the Commission. (*See* Complaint.) Elders' parent company, Elders IXL Ltd., was initially named in the complaint as a defendant but was later voluntarily dismissed by the Commission.

4. The complaint alleges that ICM's purchase of Lincoln's dry corn milling assets violates § 7 of the Clayton Act, *15 U.S.C. § 18*, and *§ 5* of the Federal Trade Commission Act ("FTC Act"), *15 U.S.C. § 45*, because the acquisition may substantially lessen competition or tend to create a monopoly in the relevant product and geographic markets. (Complaint at para. 12.) The complaint alleges the relevant product market consists of all major products produced by dry corn milling for food use and defines the relevant geographic market as the United States. (*Id*. at para. 13.) The complaint asserts that the Lincoln asset **[**4]** acquisition may substantially lessen competition in the relevant markets by eliminating actual and potential competition between ICM and Elders and facilitating anticompetitive interdependent conduct among remaining competitors in the dry corn milling business. (*Id*. at para. 14.) The effect of the foregoing conditions, according to the complaint, increases the likelihood that competitors will increase prices and decrease output both in the near future and long term. (*Id*.) The complaint avers that the re-establishment of Lincoln as a viable independent competitor after the conclusion of administrative litigation poses serious if not insurmountable difficulties and a strong likelihood of substantial interim harm to competition exists if the sale is not enjoined or rescinded. (*Id*. at para. 15.) Asserting that the Commission possesses a substantial likelihood of success on the merits and the entry of preliminary relief is in the public interest, the complaint requests a preliminary injunction pursuant to § 13(b) of the FTC Act, *15 U.S.C. § 53(b)*, rescinding the sale of Lincoln's milling assets by Elders to ICM or appointing a receiver to manage the assets as an independent **[**5]** concern pending administrative litigation before the Commission.

5. Chief Judge Grady, sitting as emergency judge, denied the Commission's motion for a temporary restraining order on June 6, 1988. (*See FTC v. Illinois Cereal Mills*, No. 88 C 4891 (N.D. Ill. June 6, 1988).) Hearings on the Commission's motion for a preliminary injunction were scheduled for June 9 and 10. The morning of June 9, prior to presenting its case-in-chief, the Commission moved to amend its complaint to add a claim under the Hart-Scott-Rodino Act ("HSR Act"), *15 U.S.C. § 18a(g)(2)*. Under its proposed *§ 18a(g)(2)* claim, the Commission sought rescission of the noted asset sale on the grounds that defendants failed to comply with the preacquisition notice and waiting requirements of the HSR Act because the actual value of the Elders-ICM transaction exceeded the Act's $ 15 million reporting threshold. Because permitting the proposed amendment would have necessitated additional discovery and resulted in delay of the hearing, the Commission's motion to file an amended complaint was denied. (*See FTC v. Illinois Cereal Mills*, No. 88 C 4891 (N.D. Ill. June 9, 1988).)

6. After receiving testimony, exhibits and **[**6]** written arguments from the parties, this court issued a minute order on June 14, 1988, granting the Commission's motion for rescission of the acquisition pending administrative litigation. (*See FTC v. Illinois Cereal Mill*, No. 88 C 4891 (N.D. Ill. June 14, 1988).) However, the rescission order was stayed pending appeal of this court's decision to the Seventh Circuit. (*Id*.) During the interim period, the terms of an agreed hold separate order were to apply. (*Id*.) The Commission's motion for reconsideration of its motion to amend its complaint adding HSR Act claims, however, was denied. (*Id*.) Finally, it was indicated that a memorandum order containing findings of fact and conclusions of law would follow. (*Id*.)

[*1135] II. *Dry Corn Milling Industry*

7. The dry corn milling industry is composed of two segments, each of which serves a different type of customer. (PX 1 at para. 4.) "Industrial" dry corn mills typically process yellow corn into a variety of products used by food producers who manufacture a wide spectrum of food products for resale to the public. (*Id*.) "Consumer" dry corn mills process mostly white corn into products packaged for consumption by the general **[**7]** public. (*Id*.)

8. An industrial dry corn mill removes the outer covering or "bran" of the corn and separates the soft portion or "germ" from the remainder of the kernel. (PX 1 at para. 4; Tr. at 123.) Further processing reduces certain parts to "grits," while other parts are ground into meal and flour. (PX 1 at para. 4.) The milling process ultimately produces three classes of products: prime products, hominy feed, and corn oil. (*Id*.)

9. Prime products, listed in decreasing order of size, include flaking grits, brewer's grits, corn meal, and corn flour. (PX 1 at para. 5.) Prime products derive from the degermed portion of the kernel. (*Id*.) Flaking grits, the largest particles produced in the milling process, are used in the manufacture of corn flakes for breakfast cereal. (*Id*.) Brewer's grits, the second largest particle size produced, are used in the process of brewing beer. (*Id*.) Corn meal and corn flour, the third and fourth largest size particles, are used in a variety of food applications such as baking mixes, snacks, and cereals. (PX 1 at paras. 5, 10.) Some industrial dry corn mills further process the granulations and produce products such as pregelatinized corn **[**8]** flour ("pregel"), used in the manufacture of certain cereals, and corn/soya/milk ("CSM"), which is purchased by the United States Government for use in various PL480 feeding programs in foreign countries. (PX 1 at para. 14.)

10. Hominy feed and corn oil are considered by-products of the milling process. Corn oil is extracted from the germ of the corn after being severed from the kernel and is used in the manufacture of margarine and as a cooking oil. Hominy feed is a collection of unused portions of the processed corn and is sold as livestock food. (PX 1 at para. 6.)

11. Whenever a corn miller attempts to make grits of a particular particle size, the miller not only gets that size, but also a series of smaller grit particles with some meal and flour. (PX 1 at para. 5.) Generally, those prime products most difficult to make, such as flaking grits, command the highest price while smaller particle products, such as meal or flour, bring the lowest prices. (PX 1 at para. 12.)

III. *Relevant Product Market*

12. With few exceptions, industrial dry corn mills can reconfigure their processing equipment to produce all prime products used by food processors. (PX 1 at paras. 11, 15; PX 4 at **[**9]** paras. 7, 12; PX 8 at 1; Tr. at 71-75, 86.)

13. Six industrial dry corn milling concerns produce over 90 percent of all relevant prime products sold in the United States: (1) Bunge Corporation ("Bunge"), with facilities in Danville, Illinois and Crete, Nebraska; (2) J.R. Short Milling Company in Kankakee, Illinois ("J.R. Short"); (3) Archer Daniels Midland Company in Shawnee Mission, Kansas and Milwaukee, Wisconsin ("ADM"); (4) Quaker Oats Company in Cedar Rapids, Iowa ("Quaker Oats"); (5) Elders' Lincoln Grain Company in Atchison, Kansas; and (6) ICM in Paris, Illinois, and Indianapolis, Indiana. (PX 1 at para. 16; PX 4 at para. 9, PX 31; Tr. at 12-14, 29, 71, 82.)

14. The industrial dry corn milling industry is presently operating in a state of substantial excess capacity. (PX 1 at para. 15; PX 4 at para. 15.)

15. Consumer dry corn mills relative to industrial mills are small in size and produce corn meal and corn flour products which are not degermed. The germed products produced by consumer mills are typically packaged in five- to ten-pound bags and sold in grocery stores. Purchasers of industrial milled prime products cannot use germed corn products because an adverse effect **[**10]** on the quality of the final product produced would result. Industrial **[*1136]** dry corn millers and customers do not consider the products produced by consumer mills as adequate substitutes for industrial milled prime products. (PX 1 at para. 4; PX 4 at para. 10; Tr. 19-20, 27, 76.)

16. Consumers using prime products produced by industrial dry corn mills generally cannot shift to other products in response to a small but significant nontransitory price increase. A sustained ten-percent price increase of prime

products would not induce product substitution to any appreciable degree. (PX 1 at para. 10; PX 22 at para. 18; PX 24 at para. 6; Tr. at 10, 28-29, 45, 73-75.) The unique texture, taste, "mouth feel," and other qualities of dry milled prime products simply cannot be duplicated by another grain or food product. (PX 1 at para. 10.)

IV. *Relevant Geographic Market*

17. Major industrial dry corn mills are located in or near the corn belt states of Indiana, Illinois, Iowa, Kansas, and Nebraska. Most large industrial mills operate a series of country grain elevators where corn is purchased directly from farmers and stored for use by the mills. Location of the industrial mills and the elevators **[**11]** in corn producing areas allows dry millers to avoid purchasing corn from commercial terminal elevators where the particular quality of corn needed for dry milling is difficult to guarantee. (PX 1 at para. 4.) To ensure only top quality corn is used, industrial mills attempt to control the corn from its acquisition from the farmer to arrival at the mill. (*Id*.)

18. Access to railroad lines is also an important factor in the success of an industrial mill. (PX 1 at paras. 17, 18.) Although major industrial mills ship some of their product by truck, the majority of industrial dry corn products are shipped by rail. (PX 1 at para. 18.) Rail shipments can take any one of three forms. Depending on the needs and location of the particular customer, products may be packaged in bags of 100 pounds or more and shipped by box car or piggyback. In other cases the products are shipped bulk in hopper cars. (PX 26; PX 28; PX 30.)

19. Shippers incur a penalty or surcharge each time a "break" in the railroad system occurs, or each time a rail car must be transferred from one rail carrier to another. (Tr. at 128-29.) Although breaks result any time a shipper is unable to reach a desired destination **[**12]** on one rail line, the Mississippi River, by virtue of geographic divisions in the rail industry, is commonly where a break occurs. (Tr. at 131.) Thus, with few exceptions, shippers generally incur a freight penalty each time the Mississippi River is crossed. (*Id*.)

20. The average cost of a break in a rail shipment is equal to about two to four percent of the delivered price of the product shipped. (PX 41; Tr. at 131-32.)

21. Shipment patterns of industrial mills reveal that substantial quantities of dry milled corn products travel across the Mississippi River. Elders' Lincoln mill ships over nine percent of its production of prime products east of the Mississippi River; Bunge's Danville, Illinois mill ships 61 percent of its flaking grit production west of the Mississippi River; Bunge's Crete, Nebraska dry corn mill ships 61 percent of "other grits and meal" east of the Mississippi River; ADM Milling, in Milwaukee, Wisconsin ships 17 percent of all of its dry milled corn products west of the Mississippi River; and J.R. Short, in Kankakee, Illinois ships over 36 percent of its brewer's grits production west of the Mississippi River. (PX 1 at para. 20; PX 31; Tr. 105-06, 114-15, **[**13]** 164.) In contrast, ICM ships only 1 percent of its production west of the Mississippi River. (*See* PX 1 at para. 8; PX 31; Tr. at 164-65.)

22. Buyers and sellers in the industrial dry corn industry perceive that all large industrial mills are significant competitors in a market that spans both east and west of the Mississippi River. (PX 2 Spec. 2 at 5, 9, 14, 18, Spec. 3 at 1; PX 4 at para. 9; PX 6 at 49-51, 69; PX 26 at 4; PX 28 at Schedule H; PX 39; Tr. 32-37, 48-49, 77-81, 113-15.)

23. Elders and ICM have identified each other as "principal competitors," and each ships products into several states served by the other. (*See* PX 1 at para. 16; PX 2; PX 3; **[*1137]** PX 6 at 51; PX 26 at 4; *but cf*. PX 1 para. 8.) ICM and Elders bid to supply corn meal for USDA programs to the same locations east of the Mississippi River. In many cases, Elders' Lincoln mill bids lower than ICM in the east. (PX 3 at 84; Tr. at 184.)

24. Elders advertises that it markets its dry corn products on a nationwide basis. (PX 16; PX 39.) Presently, Elders ships its products to over 18 states east of the Mississippi River. (PX 2 Spec. 3 at 1.) In addition, Elders identifies over 19 ICM customers as prospective new **[**14]** customers. (PX 12; Tr. 105.)

25. The Sales Staff Supervisor for Elders' Lincoln mill testified at a Commission investigative hearing that he perceived ICM to be a "major competitor." (PX 6 at 48, 69.) Lincoln's Traffic Manager testified at a Commission investigative hearing that Lincoln served customers in the east and estimated that 30 to 40 percent of Lincoln's shipments went to locations east of the Mississippi River. (PX 5 at 35; *see also* PX 31.)

26. ***HN1***[] The *Staggers Rail Act of 1980*, *49 U.S.C. § 10101 et seq.*, deregulating the rail and trucking industries, has made negotiated transportation rates for long distance rail and truck shipments the norm in the dry corn milling industry. (*See* PX 5; PX 28; PX 41; Tr. at 78-81; 181-87.)

27. Buyers of industrial milled prime products located in the east indicate that a ten-percent increase in price by mills situated east of the Mississippi would induce them to increase purchases from western mills. (Tr. at 10, 32-33, 44-49.)

28. Likewise, a significant but nontransitory price increase by western mills to customers west of the Mississippi would result in increased shipments from eastern mills. (PX 41.)

29. Notwithstanding the **[**15]** foregoing, an internal memorandum prepared by an FTC lawyer in connection with Bunge's attempt to purchase Lincoln from Elders in May 1988, discusses tentative national and western markets for dry corn mill products. (Defendant ICM's Exhibit ("DX") 3.)

V. *Competitive Effects*

30. ICM is the second-largest industrial dry corn mill operator in the United States. (PX 19.) The acquisition of dry corn milling operations of Elders represents an acquisition of the fifth-largest industrial dry corn mill operator in the United States. (PX 19.) The transaction combines two of only six significant industrial dry corn millers in the United States. (PX 19.)

31. Two methods of measuring industry concentration exist for purposes of merger analysis. The first is the four-firm concentration ratio. The second, which is set forth in the Department of Justice *Merger Guidelines*, 2Trade Reg. Rep. (CCH) para. 4500 *et seq*. (1982) ("Merger Guidelines"), is the Herfindahl-Hirchman Index ("HHI"). (Tr. 66-67.)

32. The four-firm concentration ratio method adds the shares of the top four firms in a given product and geographic market. (Tr. at 67.) Assuming that the relevant product market is all industrial **[**16]** milled prime products and the relevant geographic market is the United States, the postacquisition four-firm concentration ratio increases from 79 percent to 88 percent. (PX 19.) Thus, the increase in concentration resulting from ICM's acquisition of Lincoln's milling assets is 9 percent. (*Id*.) Additionally, the acquisition elevates ICM's market share from 23 percent to 32 percent. (*Id*.)

33. The HHI is premised upon the economic principle that both the distribution of market shares among the leading firms and the composition of the market outside of the leading firms are significant in assessing the likelihood of tacit collusion or interdependent, noncompetitive conduct in a market. [1] The fewer the number of firms, **[*1138]** the easier a collusive arrangement can be achieved. *See Merger Guidelines, supra*, Para. 4493 at 6879-13. Markets with HHI below 1000 are generally characterized as "unconcentrated," while markets with HHI between 1000 and 1800 are "moderately concentrated " and markets with HHI in excess of 1800 are "highly concentrated." *Id*. (Tr. at 68-69.)

[17]** 34. Again assuming the relevant product and geographic markets are all industrial milled prime products sold in the United States, the postacquisition HHI is 2606. (PX 19.) This represents an increase of 480 over the preacquisition HHI of approximately 2100 (PX 19; Tr. at 82.)

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[1] The Herfindahl-Hirschman Index, or HHI, is a measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of three firms with shares of 50, 30, and 20 percent each, the HHI is 3800 (50<2>+30<2>+20<2>=3800). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is served by a large number of firms of relatively equal size, and reaches its maximum of 10,000 when a single supplier exists in the market. The HHI increases both as the number of firms in the market decreases and as the disparity in size among those firms increases. *See Merger Guidelines, supra*, at para. 4493.

35. Industrial dry corn mills are expensive to build and, if they fail, have little salvage value. (PX 1 at para. 18.) Entry into the industrial dry corn milling industry requires the construction of the large facility to economically compete with existing firms. (PX 1 at para. 17; PX at para. 17; PX 22 at para. 9; Tr. at 84, 134-35.) Recent experience has shown that a new entrant cannot successfully penetrate the market without first securing substantial contracts to minimize the risk. (PX 22.) Because a new manufacturer is not likely to find the necessary sales volume prior to constructing a mill facility, *de novo* entry into the industrial dry corn milling industry is unlikely. (Tr. at 134-35.) Even in the event of a small but significant increase in price for a nontransitory period of time, prospects for entry into the industrial dry milling industry are remote. (Tr. at 83, 134-35.)

36. Elders acquired **[**18]** Lincoln in August 1987. As part of the transaction, Elders acquired Lincoln's mill facility in Atchison, Kansas and numerous grain elevators located in the midwest. (Defendant Elders' Exhibit ("DEX") 1 at para. 2.) Elders considers the dry corn mill assets to represent only ten percent of the total cost of the Lincoln acquisition. (DEX 1 at para. 3.) At the time it purchased Lincoln, Elders possessed no experience in operating an industrial dry corn mill and did not intend to retain the milling facilities for any appreciable period of time. (*Id*.) Since acquiring Lincoln, several key management personnel of the mill have left the company. Elders has filled these vacancies with prior Lincoln employees possessing little experience in the management of a dry corn mill. (DEX 1 at para. 5.)

37. Lincoln presently ships over 90 percent of its prime products to customers located west of the Mississippi River (DX 9.)

38. ICM is generally regarded as an efficient technologically innovative producer of dry corn milled products. (DX 11 at para. 5.) ICM intends to implement certain modifications in the Lincoln mill which are expected to result in significant cost savings and allow the Lincoln **[**19]** facility to compete more effectively for business in the western United States. (DX 11 at para. 5.)

39. To the extent that any of the foregoing findings of fact are deemed to be conclusions of law, they are hereby adopted as conclusions of law.

CONCLUSIONS OF LAW

I. *Jurisdiction*

1. Jurisdiction is conferred on this court by § 13(b) of the FTC Act, *15 U.S.C. § 53(b)*. Venue is proper in this district under § 13(b) of the FTC Act and *28 U.S.C. § 1391(c)*. Elders and ICM are engaged "in commerce," as defined in § 4 of the FTC Act, *15 U.S.C. § 44*, and *§ 1* of the Clayton Act, *15 U.S.C. § 12*.

II. *Commission's Motion to Add a HSR Act Claim*

2. The Commission seeks to amend its complaint against defendants to include a claim under the HSR Act, *15 U.S.C. § 18a*. ***HN2***[] The HSR Act provides that before stock or asset acquisitions of a particular size can be consummated, both the prospective sellers and purchasers must comply with certain reporting and waiting requirements. *15 U.S.C. § 18a(a)-(b)*. The purpose of the HSR Act is to provide the **[*1139]** Commission and the Department of Justice with information and time necessary to determine whether a proposed transaction, if consummated, may violate antitrust **[**20]** laws.

3. ***HN3***[] The statutory coverage of the HSR Act turns on three tests, all of which must be satisfied before the Act applies. First, one of the parties must be engaged in commerce or in activities affecting commerce. *15 U.S.C. § 18a(a)(1)*. Second, the parties must meet the size-of-person test set forth in *15 U.S.C. § 18a(a)(2)*. Third, the size of the transaction must exceed one of two specified thresholds. *15 U.S.C. § 18a(a)(3)*. One such threshold is passed when the total amount of securities or assets acquired exceeds $ 15 million. *Id*.

4. The parties agree that applicability of the Act to the Lincoln acquisition turns on whether the third test set forth in *§ 18a(a)(3)(B)* is met. The Commission essentially contends that the purchase-lease-option agreement between Elders and ICM is a sham and that the actual value of the Lincoln asset acquisition exceeds the $ 15 million threshold. Elders and ICM argue, however, that legitimate business reasons existed for structuring the transaction

in the manner in which it was consummated. Moreover, Elders and ICM vigorously contest the Commission's position that procuring an option to purchase an asset should be viewed as acquiring the asset **[**21]** for purposes of HSR Act compliance.

5. As indicated earlier, the Commission's motion for leave to amend its complaint was denied on June 9, 1988. The basic rationale for this court's ruling stemmed from the fact that permitting the proposed amendment would have required postponement of the preliminary injunction hearing to allow defendants adequate time for discovery and preparation. Elders and ICM did not receive notice of the Commission's intent to add a HSR Act claim until the very eve of the scheduled preliminary injunction hearing. Thus, prejudice to ICM and Elders would have resulted if the HSR Act amendment was allowed and the preliminary hearings were not delayed. Considering the foregoing factors and both sides' interest in prompt determination of the Commission's motion for preliminary relief under § 13(b) of the FTC Act, this court determined that allowing the Commission to amend its complaint the morning of the scheduled preliminary injunction hearing was inappropriate.

6. Nothing contained in the Commission's motion for reconsideration persuades this court to the contrary. As earlier indicated, the Commission has succeeded in obtaining preliminary relief on its claim that **[**22]** the Lincoln asset sale is likely to lessen competition or tend to create a monopoly in the markets for industrial milled prime products in the United States. Thus, even if the Commission had obtained leave to file its amended complaint and had succeeded in proving a HSR violation, it would have been entitled to no relief greater than that awarded under its § 13(b) claim. As such, the Commission's motion for reconsideration of its motion to amend its complaint is denied. [2]

III. *Standards for Preliminary Relief Under § 13(b) of the FTC Act*

7. ***HN4***[] The Commission is empowered under § 13(b) of the FTC Act, *15 U.S.C. § 53(b)*, to seek preliminary relief pending the completion of administrative proceedings challenging a merger or acquisition. Because preliminary injunctive relief is an "extraordinary and drastic remedy," *FTC v. Great Lakes Chemical Corp., 528 F. Supp. 84, 86 (N.D. Ill. 1981)*, such relief is granted only upon a showing by the Commission that a substantial likelihood of success on the merits exists, that preliminary injunctive relief is the **[**23]** only available means of ensuring the availability of a final remedy, and that the public interest favors the issuance of preliminary relief. *See FTC v. Weyerhaeuser Co., 214 U.S. App. D.C. 254, 665 F.2d 1072, 1076 (D.C. Cir. 1981)*; *United States v. Coca-Cola Bottling Co. of Los Angeles, 575 F.2d 222, 226* (9th Cir.), *cert. denied sub nom., Aqua Media, Ltd. v. United States, 439 U.S. 959,* ***[*1140]*** *58 L. Ed. 2d 351, 99 S. Ct. 362 (1978)*; *FTC v. Great Lakes Chemical Corp., 528 F. Supp. at 87*.

8. To demonstrate a likelihood of success on the merits, the Commission must prove:

> not that the merger in question may possibly have an anti-competitive effect, but rather that it will probably have such an effect. And the Government must have demonstrated at this stage in the case a likelihood that it can meet this burden.

FTC v. Great Lakes Chemical Corp., 528 F. Supp. at 86.

9. ***HN5***[] Because a preliminary injunction blocking or rescinding an acquisition will often spell doom for the transaction, the Commission must establish that the preliminary injunction sought is necessary to ensure the availability of an effective final remedy and that divestiture after the completion of proceedings on the merits would not provide suitable relief. **[**24]** *FTC v. Great Lakes Chemical Corp., 528 F. Supp. at 99*.

10. In addition to the foregoing, the Commission must show that the equities favor issuing the relief sought. *15 U.S.C. § 53(b)*. Essentially, this requires the Commission to establish that the harm to the parties and to the public resulting from the preliminary injunction is outweighed by any harm to competition that would occur in the period between denial of a preliminary injunction and a final adjudication on the merits. *FTC v. Great Lakes Chemical Corp., 528 F. Supp. at 86*.

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[2] In reaching this conclusion, however, this court expresses no opinion on the merits of the Commission's proposed amendment.

IV. *Likelihood of Success Under § 7 of the Clayton Act and § 5 of the FTC Act*

11. The Commission attacks ICM's acquisition of Lincoln's dry corn milling assets from Elders under § 7 of the Clayton Act, *15 U.S.C. § 18*, and *§ 5* of the FTC Act, *15 U.S.C. § 45*. Section 7 of ***HN6***[] the Clayton Act prohibits a corporation engaged in commerce from acquiring the assets of another corporation engaged in commerce where such acquisition may substantially lessen competition or tend to create a monopoly in a particular line of commerce in any section of the United States. *15 U.S.C. § 18*. *Section 5* of ***HN7***[] the FTC Act makes all unfair methods of competition and unfair or **[**25]** deceptive acts or practices in commerce unlawful. *15 U.S.C. § 45*. Any act or practice which is prohibited by antitrust laws is viewed as an unfair method of competition under *§ 5* of the FTC Act. *See FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 2016, 90 L. Ed. 2d 445 (1986)*.

12. The Commission's complaint asserts that ICM's purchase of Lincoln's dry corn milling assets may substantially lessen competition or tend to create a monopoly in the market for industrial milled prime products in the United States. Thus, the Commission premises its *§ 5* claim on an alleged violation of § 7 of the Clayton Act. Accordingly, the requirements for demonstrating a § 7 violation must be addressed before assessing whether the Commission has shown a likelihood of success on the merits.

13. To ultimately succeed on its Section 7 claims, the Commission must first establish the relevant product and geographic markets and then prove that the effect of the acquisition may substantially lessen competition within those markets. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*.

A. Relevant Product Market

14. In *Brown Shoe Co*., ***HN8***[] the Supreme Court outlined a two-step process for product market analysis. First, the outermost boundaries of a product market are **[**26]** identified by determining reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it. *Id. at 325*. *See also United States v. Continental Can Co., 378 U.S. 441, 447-49, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964)*; *United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 394-95, 400-01, 404, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)* (cross-elasticity of demand measures how far buyers will go to substitute one commodity for another). After the outer boundaries of a product market are defined, further analysis is required to determine whether well-defined submarkets **[*1141]** exist which, by themselves, may constitute separate product markets for antitrust purposes. *Brown Shoe Co., 370 U.S. at 325*. The ***HN9***[] boundaries of such individual product markets may be determined by examining such practical indicia as "industry or public recognition of the submarket as a separate economic entity, the product's particular characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id*. The overriding principle in this two-step analysis is to identify meaningful competition where it actually exists. *United States v.* ***[**27]*** *Continental Can Co., 378 U.S. at 449*.

15. In *Brown Shoe Co*., the Supreme Court also noted that ***HN10***[] cross-elasticity of supply or production substitutability may also play a role in defining product markets for antitrust analyses. *Brown Shoe Co., 370 U.S. at 325 n.42*. The cross-elasticity of supply refers to the capability of other production facilities to be converted to produce a substitutable product. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210, 218 (D.C. Cir. 1986)*.

16. Evidence presented by the Commission shows that industrial dry corn mills possess the ability to configure their operations to produce all prime products used by food processors. *See* Findings of Fact ("FF") para. 12, *supra*. Thus, the simple fact that certain industrial mills do not currently produce each type of prime product presently marketed does not alter the analysis of which firms should be included in assessing the cross-elasticity of supply.

17. Six firms capable of manufacturing the relevant products produce over 90 percent of the prime products sold in the United States. *See* FF para. 13, *supra*. These firms are Bunge, ICM, ADM, Quaker, Elders (Lincoln), and **[**28]** J.R. Short. *Id*. A number of smaller dry corn mills with extremely limited output capacities supply the remaining prime products sold in the United States. *Id*.

18. Consumer dry corn mills compared to industrial dry corn mills are considerably smaller and typically do not possess facilities for manufacturing degermed corn products. *See* FF para. 15, *supra*. Thus, they are not viewed as potential suppliers of prime products.

19. Consumers using prime products produced by industrial mills cannot shift to other products in response to a small but significant nontransitory price increase. *See* FF para. 16, *supra*. Testimony of purchasers of prime products reveals that a sustained ten-percent increase in the price of prime products would not induce product substitution to any appreciable degree due to the particular qualities dry milled corn adds to their food products. *Id*. Because the use of germed corn products by food processors adversely affects the quality of the food products they produce, food processors do not consider the products manufactured by consumer mills as being viable substitutes for industrial milled prime products. *See* FF para. 15, *supra*

[29]** 20. Applying the principles of cross-elasticity of supply and demand to the facts in the present case, this court determines that the relevant product market consists of all prime products for food use produced by industrial dry corn mills. Although the Commission also believes that each type of prime product constitutes a separate product submarket, the Commission's evidence and arguments essentially embrace the theory that the broader market definition of all prime products is the proper "line of commerce" for purposes of § 7 analysis. Accordingly, this court's discussion will focus on the effect the challenged acquisition is likely to have on competition in the market for industrial milled prime products.

B. Relevant Geographic Market

21. ***HN11***[] In addition to defining a relevant product market, § 7 requires a determination of the effects the acquisition is likely to have on a section of the country or relevant geographic market.

22. In the present case, the parties are sharply divided on the proper definition of the relevant geographic market. The Commission takes the position that a national market for industrial milled prime products exists. Elders and ICM, however, assert **[*1142]** that the **[**30]** Mississippi River marks a sharp delineation between separate eastern and western markets for industrial milled prime products. They contend that producers in the east and west are unable to significantly compete with each other because of special transportation costs incurred when shipping goods by rail over the Mississippi River.

23. According to the Court's opinion in *Brown Shoe Co*., the geographic market selected must correspond to the "commercial realities of the industry and be economically significant." *Brown Shoe Co., 370 U.S. at 336-37*. The inquiry employed under this standard does not focus on where the parties to an impending merger or acquisition do business or where they presently compete, but rather it focuses on where, within the area of competitive overlap, the effect of the merger or acquisition on competition will be direct and immediate. *United States v. Philadelphia Nat'l. Bank, 374 U.S. 321, 357, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. Simply stated, the question centers on where sellers operate and where purchasers can practicably turn for supplies. *United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 357-58, 26 L. Ed. 2d 658, 90 S. Ct. 2035 (1970)*. The scope of the relevant geographic market includes **[**31]** the area in which sellers of the relevant product can increase price or cut output without triggering a flow of supply into the area from outside it. *See RSR Corp. v. FTC, 602 F.2d 1317, 1323 (9th Cir. 1979)*.

24. Applying the foregoing analysis to the facts in the present case compels the conclusion that a nationwide geographic market for prime products exists: All producers are located relatively close to one another, they ship their products nationally, customers look to each of them for supplies and producers consider each other to be competitors. *See* FF paras. 21-28, *supra*.

25. Elders and ICM's contention that separate eastern and western geographic markets exist rests on the assertion that freight penalties incurred when crossing the Mississippi River make such shipments cost prohibitive. Because shipments across the Mississippi River typically involve a break in rail service requiring the services of a second railroad at a special premium, Elders and ICM contend that mills located on opposite sides of the Mississippi are unable to effectively compete with each other. Defendants contend that ICM's own shipment patterns are indicative of this barrier to nationwide **[**32]** competition and that statements by other industrial mills support the existence of

separate eastern and western geographic markets. Additionally, Elders and ICM note that an internal memorandum prepared by a Commission attorney in connection with Bunge's unsuccessful attempt to acquire Lincoln in June 1988 recognizes a western geographic market for prime products.

26. Elders and ICM's arguments, however, fail to convince this court that separate geographic markets for industrial milled prime products exist on each side of the Mississippi. First, under Elders and ICM's theory, producers are limited to competing for customers that are located in areas where single-line rail shipments are possible. An examination of shipment records for several industrial mills reveals that even when shipping products to locations on the same side of the Mississippi, multiple rail services frequently are employed. *See e.g*., PX 26 at Ex. 3; PX 28 at Ex. F; PX 30 at Ex. IV. Although ICM's Paris, Illinois mill is only serviced by Conrail, eastern shipments from its Paris facility commonly involve two or more railroads. *See* PX 2 at Ex. 3. Thus, breaks in rail service are commonly encountered when shipping **[**33]** goods to all areas of the nation, not just those instances when the Mississippi River is crossed.

27. Elders and ICM's argument concerning freight barriers is also undercut by the current shipping practices of most industrial mills. Although ICM currently rail ships only one percent of its products to locations west of the Mississippi River, rail shipment patterns of other major industrial mills indicate that ICM is atypical. Most major industrial mills rail ship substantial amounts of their prime products **[*1143]** across the Mississippi River. *See* FF para. 21, *supra*.

28. Though mills west of the Mississippi tend to ship most of their products to western locations and mills east of the Mississippi tend to ship to eastern locations, the fact remains the nearly all major industrial mills compete for customers on a national basis. All major industrial mills consider each other principal competitors, and consumers view industrial mills on both sides of the Mississippi as viable suppliers of prime products. *See* FF 22-23, *supra*. Customers buying prime products from producers east of the Mississippi would, in the face of a sustained ten-percent price increase by eastern mills, turn **[**34]** to western producers for their purchases. *Id*. This type of response indicates that regional price increases are likely to fail and that the market which buyers are able to turn for prime products is national in scope. Thus, the fact that ICM presently ships only one percent of its prime products west of the Mississippi does not dictate that two geographic markets exist.

29. ICM and Elders attempt to support their assertion of separate eastern and western markets with citations to statements by various producers concerning their perceived competitors. First, testimony by ICM's chief executive officer and president is highlighted to underscore that freight penalties limit eastern producers, like ICM, from competing for business west of the Mississippi. Next, ICM and Elders note statements by the presidents of J.R. Short and Agricor, Inc., a small industrial dry corn mill in Marion, Indiana, which purportedly support the existence of two geographic markets.

30. Careful scrutiny reveals, however, that during the Commission's investigation of Bunge's proposed acquisition of Lincoln from Elders, ICM submitted statements to the Commission which listed Bunge's mill in Crete, Nebraska **[**35]** and Elder's mill in Atchison, Kansas as being among its "principle competitors." *See* PX 26 at 4. Similarly, the president of J.R. Short listed all major western mills as primary competitors in his report to the Commission. See PX 30 at § 9. The portion of the president's report highlighted by defendants simply states that J.R. Short's area of competition with competing producers is "principally east of the Mississippi River." *Id*. However, the fact that J.R. Short ships over a third of its brewer's grits production west of the Mississippi clearly indicates that J.R. Short competes with other producers outside its self-defined area of competition in the east. Statements by Agricor's president, although supportive of defendant's position, must be placed in proper context. Agricor, relative to the six major industrial mills, is extremely small and ships only a small percentage of its products by rail. *See* PX 22; PX 35. Agricor is further differentiated in that one customer located 90 miles from its mill, purchases over half of its production. Given these distinctions, Agricor's marketing practices can hardly be accepted as typical among major industrial mills. Thus, Agricor's assessment of geographic markets in which it is capable of competing does **[**36]** not compel the conclusion that separate eastern and western geographic markets exist.

31. Finally, Elders and ICM point to a Commission memorandum prepared in connection with its investigation of Bunge's unsuccessful attempt to purchase Lincoln earlier this year which discusses national and western markets for prime products. Although the memorandum appears to explore the possibility that the western United States

might constitute a separate geographic market for analyzing Bunge's proposed acquisition of Lincoln, the language contained in the memorandum makes clear that any such geographic definitions were purely tentative in nature. No conclusions regarding the relevant geographic market were ever made in the memorandum. In fact, the memorandum unequivocally indicates that United States might be the proper geographic market for purposes reviewing the Bunge proposal for antitrust concerns. Thus, the memorandum offers little actual support for defendants' market definitions.

32. Though Elders and ICM's assertion of eastern and western geographic markets cannot be summarily dismissed, the weight **[*1144]** of evidence presented in this case clearly supports this court's finding of a national geographic **[**37]** market for industrial milled prime products. As the relevant product and geographic markets are defined, the next step is to determine the likely effects of the transaction at issue.

C. Competitive Effects

33. ***HN12***[] Analysis of a merger's competitive significance begins with consideration of market shares of the combined firms and proceeds from there to a review of qualitative factors to determine whether the merger poses a "significant threat to competition." *Merger Guidelines*, 2 Trade Reg. Reg. Rep. (CCH) para. 4503; *Statement of the FTC Concerning Horizontal Mergers*, [Jan.-June 1982 Special Supplement] Antitrust & Trade Reg. Rep. (BNA) No. 1069 at 5-12 (June 12, 1982) ("*FTC Statement*"). *See also* *United States v. General Dynamics Corp., 415 U.S. 486, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974)*; *Kaiser Aluminum & Chemical Corp. v. F.T.C., 652 F.2d 1324 (7th Cir. 1981)*. Among ***HN13***[] the qualitative factors most important to consider in assessing the potential for a merger to cause competitive harm are the difficulty of entry into the market and other market characteristics that may be conducive to interdependent or noncompetitive behavior. *FTC Statement, supra; see also* Posner, ***Antitrust Law****: An Economic* ***[**38]*** *Perspective*, 55-61 (1976).

34. The Supreme Court has observed that ***HN14***[] as concentration in a particular product and geographic market increases, "greater is the likelihood that parallel policies of mutual advantage not competition, will emerge." *United States v. Aluminum Co. of America, 377 U.S. 271, 280, 12 L. Ed. 2d 314, 84 S. Ct. 1283 (1964)*. *See also* *United States v. Philadelphia National Bank, 374 U.S. 321, 363, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1964)*. "This conclusion rests upon the theory that where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *FTC v. PPG Industries, Inc., 255 U.S. App. D.C. 69, 798 F.2d 1500, 1503 (D.C. Cir. 1986)*.

35. ***HN15***[] Concentration is commonly measured by calculating both the four-firm concentration ratio and the more sensitive Herfindahl-Hirschman Index ("HHI"). *Id*. Under either method, the acquisition at issue raises concentration significantly in an already highly concentrated market. After acquiring Lincoln's milling assets, ICM will control slightly more than 32 percent of the relevant market. *See* FF para. 32, *supra*. The postacquisition four-firm concentration ratio jumps from **[**39]** 79 percent to 88 percent. *Id*. Similarly, the preacquisition HHI of 2114, which itself denotes a highly concentrated market, increases some 480 points to 2606 when the Lincoln asset sale is recognized. *See* FF paras. 33-34, *supra*.

36. The concentration levels here exceed levels found in other cases in which courts have found a violation of Section 7. In some cases, such concentration levels established a *prima facie* case of illegality. *See RSR Corp. v. FTC, 602 F.2d at 1324-25* (four-firm concentration 72.40 percent, combined share 19.18 percent); *Liggett & Meyers, Inc. v. FTC, 567 F.2d 1273, 1275-76 (4th Cir. 1977)* (four-firm concentration 54.44 percent, combined share 15.4 percent); *United States v. General Dynamics Corp., 415 U.S. 486, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974)* (four-firm concentration 43 percent, combined share 23.2 percent; *prima facie* showing of illegality rebutted by other factors).

37. ***HN16***[] Difficulty of entry is a factor which increases concern over competitive effects of an acquisition. *FTC v. Procter & Gamble Co., 386 U.S. 568, 579, 18 L. Ed. 2d 303, 87 S. Ct. 1224 (1967)*; *United States Steel Corp. v. FTC, 426 F.2d 592 (6th Cir. 1970)*; *Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 325* ***[**40]*** *(N.D. Ohio 1981)*, *aff'd* *669 F.2d 378 (6th Cir. 1980)*. As the Second Circuit observed in *Fruehauf Corp. v. FTC, 603 F.2d 345, 357 (2d Cir. 1979)*, "high entry barriers may be a signal that a particular merger carries a potential for impairing

competition, but barriers need not reach some predetermined level before an anticompetitive effect becomes possible."

[*1145] 38. Industrial dry corn mills are expensive to build and, if they fail, have little salvage value. *See* FF para. 35, *supra*. ***HN17***[] Major producers recognize that entry into the industrial corn milling industry requires the construction of a large and expensive facility. *Id*. Recent and past experience has shown that a new entrant cannot come into the market without first securing substantial contracts to minimize the risk. *Id*. The most recent example of *de novo* entry is Agricor's construction of a corn mill in Marion, Indiana in 1983. Agricor entered the market only after it had secured a long-term commitment from Miles Laboratories, and even then it took Agricor more than three years to negotiate with Miles, construct its plant, and produce marketable brewer's grits. *See* PX 1; PX 22. Similarly, ICM began **[**41]** construction of its Evans, Illinois dry corn mill in 1976. *See* PX 1 at para. 17. It did not complete construction until 1982, and did not conclude the shakedown and modifications of the mill until 1985 -- nearly nine years after the project was started. *Id*. In addition, the testimony of Mr. Wiggins, ICM's Chief Executive Officer, regarding the likelihood of *de novo* entry and entry through the conversion of wheat mills is highly probative. Mr. Wiggins testified that entry is difficult, time consuming, expensive and unlikely. *See* Tr. at 134-35.

39. In sum, the evidence presented shows the Commission possesses a significant likelihood of ultimate success on the merits. Facts adduced at the hearing indicate that ICM and Elders compete against each other for a significant number of the same customers. *See* FF para. 24, *supra*. ICM's acquisition of Lincoln's milling assets will thus eliminate existing and future competition between the two firms. Prior to ICM's purchase of Lincoln's milling assets, the industrial dry corn milling industry was highly concentrated. Sharp postacquisition increases in the four-firm concentration ratio and the HHI strongly support the Commission's **[**42]** assertion that the challenged acquisition is likely to result in anticompetitive conduct among remaining producers of industrial milled prime products. Moreover, given the noted cost and time barriers for *de novo* entry, little chance exists that new suppliers of prime products will appear in the event of a small but significant nontransitory price increase. Although ICM's expertise in industrial milling may result in significant cost savings at the Lincoln facility, it does not follow that competition in the relevant market will be enhanced. The weight of evidence presented in this case suggests, rather, that ICM's purchase of Lincoln's milling assets will allow remaining competitors to overtly or tacitly coordinate their behavior to restrict output and achieve profits above competitive levels.

V. *Public Interest*

40. ***HN18***[] Once a substantial likelihood of success on the merits is demonstrated, the court must consider whether the equities favor the issuance of preliminary relief and if so what type of relief is necessary and appropriate. *FTC v. Weyerhaeuser Co., 665 F.2d at 1076*; *United States v. Coca-Cola Bottling Co. of Los Angeles, 575 F.2d at 226*; *FTC v. Great Lakes **[**43]** Chemical Corp., 528 F. Supp. at 86-87, 99*. An examination of the facts in the present case indicates that the public interest will be benefited by a grant of preliminary relief. As discussed above, ICM's acquisition of Lincoln's milling assets creates a strong likelihood that producers will engage in anticompetitive conduct causing the price of industrial milled prime products to rise above competitive levels. The challenged transaction thus poses a direct and immediate threat to the public in the form of higher prices for prime products and the food products derived therefrom.

41. Elders and ICM resist the conclusion that the equities favor the issuance of preliminary relief with two basic arguments. First, defendants note that Elders acquired Lincoln in 1987 to obtain its grain elevators and desired to sell Lincoln's dry corn mill because it lacked any experience operating such a facility. Since ICM possesses considerable expertise in producing high quality prime products and Elders does not, defendants argue that the Lincoln facility will be a more efficient producer under ICM and that the public **[*1146]** will benefit by increased competition in the western United States. Elders and ICM's **[**44]** second argument underscores the financial and economic hardships both firms will face if the challenged transaction is rescinded or otherwise enjoined.

42. Elders and ICM's first argument fails to persuade this court because it rests heavily on the assumption that eastern and western geographic markets for prime products exist. As earlier defined, the relevant geographic market for measuring the effect of the challenged transaction is the United States. Even assuming Elders is unable to efficiently operate the Lincoln mill, it does not follow that competition in the relevant geographic market will be

enhanced by the challenged acquisition. Rather than lower prices for consumers, the likely result of the Lincoln acquisition will be greater mill profitability. Thus, Elders and ICM fail to demonstrate that public will be adversely affected if the transaction is rescinded or enjoined.

43. Defendants' second argument concerns only private interests which will be harmed if the Commission's motion for preliminary is granted. ***HN19***[] Although private interests may be considered when balancing the equities, they are subordinate to public interests and cannot alone support the denial of preliminary **[**45]** relief. *FTC v. Weyerhaeuser Co., 214 U.S. App. D.C. 254, 665 F.2d 1072, 1083 (D.C. Cir. 1981)*. As such, Elders and ICM are unable to defeat the Commission's motion on the grounds that their private financial and economic interests will be impaired if preliminary relief is granted.

44. As this court concludes that the Commission possesses a significant likelihood of success on the merits and public equities favor the issuance of preliminary injunction, the final issue to be addressed is what type of relief is necessary to preserve an adequate remedy should the Commission ultimately prevail on its claim that the acquisition violates § 7 of the Clayton Act.

VI. *Preliminary Relief*

45. One of the principal reasons for enjoining mergers is the historic difficulty of determining how to split an ongoing operation into two viable entities when attempting to enforce a divestiture order after the fact. This persistent problem has been long recognized by courts, and is the underlying reason for the Commission's authority to seek preliminary relief under Section 13(b) of the FTC Act. *FTC v. PPG Industries, Inc., 255 U.S. App. D.C. 69, 798 F.2d 1500, 1507-08 (D.C. Cir. 1986)*; *FTC v. Warner Communication, Inc., 742 F.2d 1156, 1165 **[**46]** (9th Cir. 1984)*. Because most acquisitions present the probability that owners will commingle and consolidate corporate assets and operations, reliance upon an ability to "unscramble the eggs" following a full administrative adjudication is generally misplaced. *Id.; see also* *FTC v. Rhinechem Corp., 459 F. Supp. 785, 790 (N.D. Ill. 1978)*.

46. In the present case, Elders and ICM argue that difficulty exists in applying the foregoing principles because the "eggs have already been cracked." ICM completed its acquisition on Lincoln's milling assets on June 5, 1988 and has assumed operation of the mill. As a result, Elders and ICM assert that confidential trade information has been exchanged and rescission will not return the parties to their original positions. These facts, however, do not restrict this court from granting preliminary relief pending administrative litigation. *See* *FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982)* (asset freeze entered pending completion of administrative proceedings to ensure availability of effective final remedy); *FTC v. Weyerhaeuser Co., 208 U.S. App. D.C. 366, 648 F.2d 739 (D.C. Cir. 1981)* (acquisition ordered rescinded pending appellate review **[**47]** where parties consummated challenged transaction prior to resolution of appeal); *SEC v. Keller Corp., 323 F.2d 397 (7th Cir. 1963)* (temporary receiver appointed on showing of likely success).

47. The facts in the instant case reveal that ICM and Elders were well aware that the Commission possessed serious reservations about the legality of the Lincoln sale before it was consummated. Letters from Commission attorneys requesting that Elders and ICM refrain from closing the Lincoln sale until the Commission's antitrust concerns were judicially resolved fell on deaf ears. *See* PX 27. In fact, the record **[*1147]** strongly suggests that the parties advanced the tentative closing date to a Sunday afternoon to thwart the Commission's attempt to block the sale. Elders and ICM chose to accept the risk that a court might later agree with the Commission's assessment of possible § 7 violations and order the transaction be set aside. The fact Elders and ICM decided to persevere in the face of such uncertainty is not a valid reason for denying preliminary relief.

48. If the Commission succeeds on the merits of its case, the only suitable relief appears to be divestiture. Given the nature of the assets **[**48]** acquired, any loss of competition resulting from the challenged transaction could only be remedied by transferring Lincoln's milling facilities to an independent party. Because of the small number of competitors presently existing in the industrial milling industry, serious difficulties could arise in finding a suitable buyer after a divestiture order. Moreover, ICM intends to consolidate operations at the Lincoln facility and eliminate personnel whose functions are mirrored by existing ICM employees. If ICM is allowed to maintain the Lincoln mill during the pendency of administrative litigation which often exceeds several years in duration, *see FTC v.*

Occidental Petroleum Corp., 1986-1 Trade Cas. (CCH) para. 67,071 at 62,516 (D.D.C. 1986), important personnel will be lost, and Lincoln's ability to function as an independent competitor after divestiture will be jeopardized. Thus, to preserve the viability of divestiture as an ultimate remedy, an order appointing a trustee to manage the acquired assets or rescinding the sale is required.

49. Evidence received during hearings on the Commission's motion made clear that appointing a trustee to manage milling operations pending administrative **[**49]** litigation would likely spell doom for the continued existence of Lincoln as a viable competitor. Many of Lincoln's key management personnel have left and locating a qualified trustee, due to the small size of the dry corn milling industry, would be difficult if not impossible. Thus, appointment of a trustee would not be prudent in the present case.

50. Rescission of the consummated transaction is the only preliminary remedy which will ensure the availability of adequate relief after a trial on the merits and preserve competition pending the resolution of administrative litigation. Continuation of the present hold separate order during years of administrative proceedings before the Commission will only multiply uncertainty about the future of the Lincoln mill and restrict ICM and Elders from pursuing other business opportunities. However, ordering immediate rescission of the challenged transaction before Elders and ICM exhaust their right to appeal would result in unnecessary transaction costs if this court's decision is later reversed. Given the nature of this case, the Circuit Court is likely to afford prompt attention to any appeal of this decision. Because the potential for harm **[**50]** to competition during appeal is minimal under the present hold separate order, rescission of the challenged transaction is stayed pending exhaustion of appeal to the Seventh Circuit. During the interim period, the terms of the agreed hold separate order dated June 14, 1988 will apply.

51. To the extent that any of the foregoing conclusions of law are deemed to be findings of fact, they are hereby adopted as findings of fact.

VII. *CONCLUSION*

For the foregoing reasons, Commission's motion for reconsideration of leave to file a claim under *§ 18a(g)(2)* of the Hart-Scott-Rodino Act is denied, but motion for preliminary relief in the form of an injunction ordering rescission of the consummated acquisition of Lincoln's milling assets by defendant ICM from defendant Elders is granted. Execution of the rescission order is stayed, however, pending exhaustion of appeal to the Seventh Circuit.

IT IS SO ORDERED.

[Corrosion Resistant Materials Co. v. Steelite, Inc.](#)

United States District Court for the District of New Jersey

July 19, 1988, Decided ; July 20, 1988, Filed

Civil Action No. 84-2337

Reporter

692 F. Supp. 407 *; 1988 U.S. Dist. LEXIS 7580 **; 1988-2 Trade Cas. (CCH) P68,359

CORROSION RESISTANT MATERIALS CO., Plaintiff, v. STEELITE, INC., OXHANDLER STRUCTURAL ENTERPRISES, INC., CHRIS ANDERSON ERECTING CORP. and JOHN DOE CORPORATION, Defendants

Subsequent History: **[**1]** As Amended August 17, 1988.

Core Terms

distributors, summary judgment, engineered, terminated, quotation, manufacturer, Sherman Act, vertical, prices, siding, Counts, partial summary judgment, Resistant, antitrust, products, dealer, metal, summary judgment motion, defense motion, unit price, lump sum, Corrosion, genuine, roofing, new construction, material fact, conspiracy, panels

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Supporting Materials**

Fed. R. Civ. P. 56(b) provides that a party against whom a claim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Summary Judgment, Supporting Materials**

See *Fed. R. Civ. P. 56(c)*.

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

HN3[] **Summary Judgment, Opposing Materials**

The party moving for summary judgment has the burden of establishing that there exists no genuine issue of material fact. Once that burden is met, the opposing party must do more than simply show that there is some metaphysical doubt as to the material facts. In particular, the non-moving party is required to set forth specific facts which show that a genuine issue exists; said party cannot rest upon the mere allegations or denials of its pleadings.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Summary Judgment, Entitlement as Matter of Law**

A dispute involving a material fact is "genuine" only if the evidence is such that a reasonable jury would return a verdict for the non-moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN5[] **Entitlement as Matter of Law, Appropriateness**

At the summary judgment stage, a judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. However, if the evidence is 'merely colorable' or is 'not significantly probative,' summary judgment may be granted.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6[] Remedies, Damages

Although the summary judgment hurdle is a difficult one to meet in an antitrust suit, it is by no means insurmountable. To survive a motion for summary judgment, a plaintiff seeking damages for a violation of the Sherman Act *§ 1*, *15 U.S.C.S. § 1*, must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Respondents, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Price Fixing & Restraints of Trade, Vertical Restraints

A vertical restraint is not illegal per se unless it includes some agreement on price or price levels.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN8[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Vertical agreements on resale prices are per se illegal. Within the context of vertical non-price restraints, however, the scope of per se illegality is much narrower. This distinction is based on the conclusion that vertical nonporous restraints have not been shown to have "such a pernicious effect on competition" and to be so "lacking in redeeming value" as to justify per se illegality.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] Regulated Practices, Trade Practices & Unfair Competition

See *N.J. Stat. Ann. § 56:9-3*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10[] Regulated Practices, Trade Practices & Unfair Competition

See *N.J. Stat. Ann. § 56:9-18*.

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Gary J. Langer, Esq., New York, New York, Attorney for Defendant, Oxhandler Structural Enterprises, Inc.

Judges: Wolin, United States District Judge.

Opinion by: WOLIN

Opinion

[*408] WOLIN, United States District Judge.

In this antitrust action defendant Steelite, Inc. renews its motion for partial summary judgment on Counts One and Four of the Complaint based on the recent decision of the United States Supreme Court in *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. For the following reasons defendant's motion is granted.

I. FACTUAL BACKGROUND

A. The Parties

Defendant Steelite, Inc. ("Steelite") is a Pennsylvania corporation engaged in the manufacture and sale of materials for the construction industry. Specifically, Steelite manufactures roll-formed metal roofing and siding panels which are generally used in the construction of warehouses, manufacturing plants and other commercial or industrial facilities. Steelite also manufactures ventilation **[**2]** equipment for such facilities and resells the fasteners and other equipment needed to install its roofing and siding panels.

Defendant Oxhandler Structural Enterprises, Inc. ("Oxhandler") is a construction contractor engaged primarily in the business of packaging and providing the labor, material and engineering services necessary to erect both the structural components of buildings and the exterior finishes for such structures. Oxhandler has been an authorized dealer-erector of Steelite's building materials since the mid-1970's.

Plaintiff Corrosion Resistant Materials Co. ("CRMC") is a dealer engaged in the business of buying, selling and distributing corrosion resistant building materials. Between 1977 and September 20, 1983 (at which point Steelite terminated its relationship with CRMC), CRMC was an authorized distributor of Steelite's roll-formed metal roofing and siding panels.

B. The Steelite Distribution and Marketing System

Steelite sells its building materials through authorized distributors who fall into two categories: materials-only distributors, like CRMC, and dealer-erectors, like Oxhandler. The materials-only distributors, as their name suggests, provide material **[**3]** (*i.e.*, metal roofing and siding panels and fasteners) to their customers who, in turn, make other arrangements to install (*i.e.*, "erect") the materials. On the other hand, dealer-erectors provide materials, labor, engineering services and/or installation expertise to their customers.

[*409] The ultimate consumers of Steelite products likewise fall roughly into two classes: those who are maintaining and/or repairing existing structures (the "maintenance" market) and those who are building new facilities (the "new construction" market). Although Steelite sells the same materials through its distributors in both the maintenance and the new construction markets, these materials are usually sold differently in each market.

In the maintenance market, Steelite materials are usually sold to the maintenance department of the owner of a commercial or industrial facility or to a contractor who has been awarded a maintenance or repair contract. In the new construction market, however, roofing and siding are usually sold on a competitive bid basis through architects and engineers to contractors. [1] In both the maintenance and the new construction markets, Steelite's sales representatives and its **[**4]** distributors make every effort to identify pending or planned projects on which Steelite materials can be used and to persuade those responsible for the purchasing decision to choose Steelite products rather than products manufactured by one of Steelite's competitors.

C. Steelite's Pricing and Quotation Systems

Steelite periodically provides its distributors with price lists which set forth the price for standard Steelite products (*i.e*., standard base metals and gauges, profiles, colors and coatings) and it also directs distributors to consult Steelite's headquarters in Pittsburgh for pricing on engineered sales or for the price of "non-standard, non-stocked" items (*i.e*., items for which **[**5]** Steelite does not ordinarily stock the raw materials or for which Steelite must schedule a special run at its mill).

As a general rule, when a project will require standard Steelite products only, Steelite distributors can prepare and submit bids to supply these materials without consulting Steelite. If the Steelite distributor is awarded a contract on such a project, said distributor need only place an order with Steelite for the necessary materials. However, those projects which require non-standard materials, engineering services or more than 100 squares of roofing or siding (one "square" is equal to 100 square feet) are treated differently. If the order is for more than 100 squares Steelite encourages, and for those orders involving engineered or non-standard materials it requires, the distributor to consult Steelite's Inside Sales Department or its Engineered Sales Department to obtain a price quotation.

The Steelite Inside Sales Department provides "unit price quotations" to Steelite distributors. A unit price quotation is the price quotation for a specified quantity of a particular material (that specification requires reference to the type and gauge of base metal, the profile **[**6]** of the panel, the color, the coating, if any, and the finished lengths of the panels). The Engineered Sales Department, on the other hand, provides "engineered lump sum" price quotations to Steelite distributors. To obtain an engineered lump sum quotation from Steelite, the distributor must provide Steelite with the job construction and siding plans. These plans are reviewed by Steelite engineers who then prepare a price quotation based on determinations of the necessary materials required to complete a given job. [2]

Steelite will provide unit prices or engineered lump sum prices for any job. However, once a distributor requests an engineered price on a particular job, Steelite will not quote (or sell) at a price calculated purely on a unit price basis because, as already noted, the preparation of the engineered price in and of itself increases costs to Steelite.

[*410] D. The Termination of CRMC

CRMC began as a materials-only distributor of Steelite products in 1977. Sometime thereafter Steelite and CRMC entered into an oral distribution arrangement. Purportedly, this contract was terminable at will **[**7]** by either party. Subsequently, the relationship between Steelite and CRMC began to deteriorate. [3]

The situation between Steelite and CRMC worsened when, in April 1983, three Steelite distributors (including CRMC and Oxhandler) submitted construction plans and specifications for an airplane hangar construction job (the "IBM Job") and asked Steelite to prepare an engineered lump sum price quotation for the siding required. On or about May 10, 1983, Steelite forwarded the price quotation to the appropriate distributors.

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[1] As a result of this market structure, Steelite distributors must sometimes sell" Steelite products twice. First they must persuade the architect or engineer (who will specify which materials must be used on the job) to specify a Steelite product or an "approved equal" for the roofing or siding. Then, when the job is let for bids, the distributor must persuade the general contractor or its subcontractor that he should use a Steelite product and not an "approved equal" on the project.

[2] This quotation also reflects cost of engineering services provided by Steelite.

[3] According to Steelite, CRMC paid its bills late, placed unrealistic production demands on Steelite and generally abused Steelite personnel.

Lecesse Bros., the general contractor on the IBM Job, did not award the siding sub-contract to any of the Steelite distributors. Instead, Lecesse apparently awarded the siding contract to Independent Metal Systems, Inc. ("IMS"), which was not a Steelite distributor.

Subsequently, on or about July 28, 1983, Oxhandler called Steelite's Engineered Sales Department and told them that IMS had asked Oxhandler to provide Steelite materials for the IBM Job. Oxhandler requested that Steelite reprice its engineered lump sum quotation **[**8]** by deducting certain auxiliary items. [4] It appears that on the same day, CRMC called Steelite's Inside Sales Department and requested a unit price quotation (as opposed to an engineered price quotation) on certain material for the "Independent Metals Job." [5]

Steelite soon discovered that CRMC had obtained both an engineered lump sum and a unit price on the same job. Basically, this was "the straw that broke the camel's back," and during the month of August 1983, Steelite made the decision to terminate CRMC's distributorship. Thus, on or about September 30, 1983, Steelite notified CRMC of its termination.

II. PROCEDURAL HISTORY

On June 14, 1984, CRMC filed **[**9]** a five count complaint against defendants Steelite, Oxhandler, Chris Anderson Erecting Co. [6] and John Doe Corp. The first count alleged violations by all defendants of the Sherman Act, *15 U.S.C. § 1*, and the Clayton Act, *15 U.S.C. § 15*. The second count claimed defendant Steelite violated the Robinson-Patman Act, *15 U.S.C. § 13*. The third count contends that the remaining defendants violated the Robinson-Patman Act. The fourth count alleges that all defendants violated the New Jersey ***Antitrust Law***, *N.J. Stat. Ann. 56:9-3*. The fifth count avers that all defendants committed the common law tort of unlawful interference with plaintiff's business relationship.

On October 31, 1984, Steelite moved for summary judgment on count two of the complaint, which motion was subsequently withdrawn. Thereafter, CRMC moved for partial summary judgment as to liability but not damages on the first count only insofar as that count alleged a Sherman Act violation. Steelite also cross-moved for partial summary judgment as to the first, second and fourth counts. Oxhandler joined **[**10]** with Steelite in defense against CRMC's partial summary judgment motion, but it did not join in Steelite's own motions for partial summary judgment. In an Opinion and Order dated May 1, 1986 (and filed as of May 2nd), Judge Barry denied both CRMC's motion for partial summary **[*411]** judgment and also Steelite's cross-motion for partial summary judgment as to the fourth count and the Sherman Act claims of the first count.

Presently, and in light of the Supreme Court's May 2, 1988 opinion in *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*, Steelite now renews its motion for summary judgment as to counts one and four of the complaint.

III. DISCUSSION

A. Summary Judgment Standard -- *Matsushita*

HN1[] *Rule 56(b) of the Federal Rules of Civil Procedure* provides, in pertinent part that "[a] party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." And upon receipt of such motion by the court, ***HN2***[] *Fed.R.Civ.P. 56(c)* provides that:

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[4] In light of Steelite's policy not to provide unit prices once it had quoted engineered prices, Oxhandler represents that it did not ask for unit prices on the IBM Job.

[5] The IBM Job was also known as the Independent Metals Job, and it appears that the Steelite employee who received the CRMC request had not worked on the Oxhandler engineered lump sum price quotation for the IBM Job, and thus did not recognize the material requested as material for a job in which Steelite had already quoted an engineered lump sum.

[6] Defendant Chris Anderson Erecting Co. was voluntarily dismissed by CRMC per Stipulation and Order dated August 8, 1985.

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, **[**11]** and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . . .

HN3[] The moving party has the burden of establishing that there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Once that burden is met, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)* (citations omitted) In particular, the non-moving party is required to set forth specific facts which show that a genuine issue exists; said party cannot rest upon the mere allegations or denials of its pleadings. *Liberty Lobby, 477 U.S. at 248, 106 S. Ct. at 2510*. The *Liberty Lobby* Court also observed that ***HN4***[] a dispute involving a material fact is "genuine" only "if the evidence is such that a reasonable jury would return a verdict for the non-moving party." *Id.* [7]

[12]** Furthermore, in considering a summary judgment motion, all evidence submitted must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., 475 U.S. at 586, 106 S. Ct. at 1356-57*. ***HN6***[] Although the summary judgment hurdle is a difficult one to meet, in an antitrust suit it is by no means insurmountable:

> To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of *§ 1* [of the Sherman Act] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently. [*Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775 (1984)]*. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See [*First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 280, 88 S. Ct. 1575, 1588, 20 L. Ed. 2d 569 (1968)]*.

Matsushita Elec. Indus. Co., 475 U.S. at 586, 106 S. Ct. at 1357. *But see* Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962) (summary judgment should **[**13]** be used sparingly in complex antitrust litigation).

B. The Initial Denial of Summary Judgment -- *Cernuto*

As already noted, defendant's motion for summary judgment as to Count 1 has previously **[*412]** been considered and denied by Judge Barry. *See Corrosion Resistant Materials Company v. Steelite, Inc*., Civil No. 84-2337, slip op. at 6-11 (D.N.J. 1986). [8] **[**15]** Judge Barry, in denying defendant's motion, found that although there was no direct evidence of improper motives on the part of the defendant, there existed genuine issues of material fact whether a jury could infer a *per se* violation of *section 1* of the Sherman Act. *Corrision Resistant Materials*, slip op. at 9. [9] In

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[7] Accordingly, in *Equimark Commercial Finance Co. v. C.I.T.* *Financial Services Corp., 812 F.2d 141 (3d Cir. 1987)*, the Third Circuit noted:

> ***HN5***[] At the summary judgment stage, a 'judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' . . . However, if the evidence is 'merely colorable' or is 'not significantly probative,' summary judgment may be granted . . . .

812 F.2d at 144 (quoting *Liberty Lobby, 477 U.S. at 248, 106 S. Ct. at 2511*).

[8] Judge Barry also denied plaintiff's cross-motion for summary judgment on Count 1. She held that even if an inference of impermissible discrimination had occurred, plaintiff produced no evidence definitively establishing a *per se* conspiracy between defendants Steelite and Oxhandler. *Corrosion Resistant Materials*, slip op. at 5-6.

determining the standards for establishing a *per se* violation, Judge Barry relied on the Third Circuit's opinion in [Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979)](#):

> Given the alleged anti-competitive and arguably horizontal impact of United's [*i.e.*, the manufacturer's] decision, and given the price orientation of the alleged conspiracy, we cannot say that a *per se* violation of the [Sherman Act] may not be shown. If Cernuto [*i.e.*, the terminated distributor] can prove at trial **[**14]** that United, Lappin and Famous conspired to protect Famous [*i.e.*, a non-terminated distributor] 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 [in the relevant product market].

Corrosion Resistant Materials, slip op. at 11 (quoting *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d at 170*). The *Cernuto* court, although noting that proof of either defendant's unilateral marketing decision or that price was not the defendant's sole motivation would probably render the *per se* rule inappropriate, overturned the district court's grant of summary judgment because "in reviewing a grant of summary judgment - we must assume that the facts are otherwise." *595 F.2d at 170*.

It is clear, therefore, that under the *Cernuto* formulation a plaintiff need not prove the existence of an agreement in order to avoid a defendant's motion for summary judgment. Even though a "mere coincidence of factors" or "mere evidence of an opportunity to conspire" would not withstand the scrutiny of a summary judgment motion under *Cernuto*, Judge Barry concluded that "some evidence of concerted action" would defeat such a motion. *Corrosion Resistant Materials*, slip op. at 10 (citing *Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482 (3d Cir. 1985)*; *Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469 (3d Cir. 1985)*; *Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367 (3d Cir. 1985))*. Accordingly, Judge Barry held that a plaintiff could establish *per se* violation of *§ 1* of the Sherman Act simply by showing that the object of a conspiracy was the price-related **[**16]** end of the elimination of a price-cutting competitor of a non-terminated distributor.

C. Defendant's Renewed Motion for Summary Judgment -- *Business Electronics*

In *Business Electronics Corp. v. Sharp Electronics Corp*., the Supreme Court acknowledged that there existed:

> [A] conflict in the Courts of Appeals regarding the proper dividing line between the rule that vertical price restraints are illegal *per se* and the rule that vertical nonprice restraints are to be judged under the rule of reason.

U.S. at , 108 S. Ct. at 1517 (footnote omitted). On the one hand, the Fifth, Seventh, Eighth and Tenth Circuits applied the rule that in order to avail himself of the *per se* rule, a plaintiff must establish that between the manufacturer and dealer defendants there existed an "express or implied **[*413]** agree[ment] to set . . . prices at some level, though not a specific one." *Id. at 1518* (citing *Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212, 1218 (5th Cir. 1986))*. On the other hand, the Third and Ninth Circuits have disagreed; these circuits followed the rule that a plaintiff can prevail on a price-fixing theory on the lesser showing that defendants **[**17]** acted in pursuit of a price-related end. *See Business Electronics*, U.S. at , 108 S. Ct. at 1517. The Supreme Court, in affirming the Fifth Circuit (and thereby effectively overruling the Third and Ninth Circuits), held that ***HN7***[] "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." *Id*. at , 108 S. Ct. at 1524.

In light of the Supreme Court's holding in *Business Electronics*, defendant Steelite has renewed its motion for summary judgment for the reason that *Cernuto*, upon which Judge Barry relied, has been reversed. *Business Electronics*, U.S. at , 108 S. Ct. at 1517, n. 1. Steelite maintains that plaintiff cannot, as a matter of law, show that the contract or conspiracy between Steelite and Oxhandler included an express or implied agreement to

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[9] In arriving at this conclusion, Judge Barry placed strong emphasis on a series of letters in which defendant Steelite expressed concern as to competition between its distributors in the New York metropolitan area. *See infra* notes 10 and 11 (setting forth relevant portions of said letters).

maintain resale prices. In response, plaintiff contends that the reversal of *Cernuto* aside, the *Business Electronics* case did not impose a burden on the plaintiff to prove that an express agreement on price existed, but rather, that a plaintiff need only prove "an express or implied agreement to set resale prices at some level." U.S. **[**18]** at , 108 S. Ct. at 1517.

D. Vertical Restraints of Trade -- *GTE Sylvania, Monsanto* and *Business Electronics*

HN8[] Vertical agreements on resale prices are *per se* illegal. *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*. Within the context of vertical nonprice restraints, however, the scope of *per se* illegality is much narrower *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. This distinction is based on the Supreme Court's conclusion "that vertical nonprice restraints ha[ve] not been shown to have such a 'pernicious effect on competition' and to be so 'lack[ing] [in] . . . redeeming value' as to justify *per se* illegality." *Business Electronics*, U.S. at , 108 S. Ct. at 1519 (quoting *GTE Sylvania, 433 U.S. at 58, 97 S. Ct. at 2561* (quoting *Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958))*). Moreover, the *Business Electronics* court noted that:

> We have been solicitous to assure that the market-freeing effect of our decision in *GTE Sylvania* is not frustrated by related legal rules. In *Monsanto Co. v. Spray-Rite Service Corp.,* ***[**19]*** *465 U.S. 752, 763, 104 S. Ct. 1464, 1470, [79 L. Ed. 2d 775]* (1984), which addressed the evidentiary showing necessary to establish vertical concerted action, we expressed concern that' i f an inference of such an agreement may be drawn from highly ambiguous evidence, there is considerable danger that the doctrin[e] enunciated in *Sylvania* . . . will be seriously eroded.' See also *id., at 761, n. 6, 104 S. Ct. at 1469, n. 6*. We eschewed adoption of an evidentiary standard that 'could deter or penalize perfectly legitimate conduct' or 'would create an irrational dislocation in the market' by preventing legitimate communication between a manufacturer and its distributors. *Id. at 763, 764, 104 S. Ct. at 1470*.

U.S. at , 108 S. Ct. at 1520.

Thus, in light of *GTE, Sylvania, Monsanto*, and most recently, *Business Electronics*, it is clear that in the instant case plaintiff must be able to point to *some* evidence that defendants Steelite and Oxhandler conspired to fix prices. In support of this assertion, plaintiff sets forth the following facts: (1) Oxhandler complained to Steelite that there were too many distributors in the New York metropolitan area and that materials-only distributors **[**20]** were getting a "free ride" on Oxhandler's promotional efforts on Steelite's behalf in the new construction market; (2) Oxhandler's subsequent request for an exclusive distributorship of Steelite products in the metropolitan New York area; (3) a meeting, in May 1983, between Steelite and Oxhandler **[*414]** where representatives of each company met at Newark Airport to discuss Oxhandler's complaints; (4) a letter to Oxhandler memoralizing Steelite's policy of providing job names on certain price inquiries; [10] and (5) Steelite's termination of CRMC as a distributor. [11]

[21]** It was essentially these facts, as applied under the *Cernuto* rule, that caused Judge Barry to determine that plaintiff may have been unlawfully terminated. However, even considering all of the above-noted facts, this Court notes that plaintiff has failed to allege, as required under *Business Electronics*, that Steelite in any way forced its

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[10] In pertinent part, this letter provides

> In an effort to minimize competition with other Steelite distributors in your area, the following steps have been taken. Both [CRMC] and Long Island Tinsmith Corp. will be required to give Steelite's Inside Sales a job name on all inquiries over 100 squares.

Letter from Steelite to Oxhandler dated June 14, 1983 (Exhibit F to Plaintiff's Motion for Summary Judgment before Judge Barry).

[11] CRMC was terminated as of a letter dated September 20, 1983, which provides in pertinent part:

> Steelite has found that certain of its distributors are competing against each other with increasing frequency on the same jobs. This has resulted in confusion in the market place [sic] and a loss of business for Steelite and its distributors.

Letter from Steelite to CRMC (Exhibit B to plaintiff's Brief in Opposition to defendant's current Motion for Summary Judgment).

distributors to sell at a certain price level. Further, there is no allegation, or subsequent proof, of any Steelite/Oxhandler price agreement following the termination of CRMC, at which point Oxhandler became an exclusive dealer of Steelite products in the New York metropolitan area. [12] Thus, merely because Steelite terminated CRMC, even if due to an agreement with Oxhandler, CRMC has failed to establish the existence of any genuine issue of fact such that summary judgment may now be avoided. To hold otherwise in the instant case, in light of *Business Electronics*, "would threaten to dismantle the doctrine of *GTE Sylvania*." U.S. at , 108 S. Ct. at 1521.

[22]** Finally, this Court notes that plaintiff's argument that plaintiff intends to establish a violation of the Sherman Act by introducing at trial circumstantial evidence as to an implied agreement between Steelite and Oxhandler clearly runs counter to the logic, and indeed the law, of *Business Electronics*. The Supreme Court acknowledged that:

> Any agreement between a manufacturer and a dealer to terminate another dealer who happens to have charged lower prices can be alleged to have been directed against the terminated dealer's "price cutting." In the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate services, since price cutting and some measure of service cutting go hand in hand.

U.S. at , 108 S. Ct. at 1521. Further, the Court recognized that:

> [A] manufacturer that agrees with one dealer to terminate another for failure to provide contractually-obligated services, exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter.

Id.

Despite these inherent "risks," however, the *Business Electronics* Court *did not* agree with **[**23]** "the proposition that vertical price agreements generally underlie agreements to terminate a price cutter [because] that proposition is simply incompatible with the conclusions of *GTE Sylvania* and *Monsanto." Id*. at , 108 S. Ct. at 1523. Moreover, the Court noted that the concept of eliminating a "free-rider," as noted in *GTE Sylvania* and *Monsanto*, actually accomplishes a beneficial economic result. U.S. at , 108 S. Ct. at 1522-23. Accordingly, in light of the fact that plaintiff **[*415]** does not make the factual showing necessary to support the inference of an agreement to set prices, either express or implied, defendant's motion for summary judgment as to Count 1 of the Complaint must be granted. [13]

E. State Law Claims

HN9[🡅] The New Jersey Antitrust Act, *N.J.Stat.Ann. § 56:9-3*, provides that "every contract, combination in the form of trust or otherwise, **[**24]** or conspiracy in restraint of trade or commerce, in this State, shall be unlawful." ***HN10***[🡅] Moreover, *Section 56:9-18* of the Act provides that it "shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, uniformity in the laws of those states which enact it." *See also* *Pomanowski v. Monmouth County Board, 89 N.J. 306, 312-13, 446 A.2d 83 (1982)* (federal caselaw under Sherman Act useful for developing analytical framework for restraint-of-trade question under New Jersey Antitrust Act).

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[12] In an attempt to address this deficiency, plaintiff moved to amend the Final Pre-Trial Order by including the following paragraph:

> (W) This agreement between Steelite and Oxhandler to terminate plaintiff included an implied understanding that Oxhandler would set its prices at a level satisfactory to Steelite.

This motion was denied at oral argument, however, in light of plaintiff's failure to show "manifest unjustice". *Ely v. Reading Co., 424 F.2d 758, 764 (3d Cir. 1970)*.

[13] In passing, this Court also notes that John Grochowski, CRMC's president, acknowledged that Steelite had never placed any price restrictions on CRMC and also that he had no knowledge as to any possible agreement between Steelite and Oxhandler. *See* Exhibit A to McSorley Affidavit dated June 2, 1988.

Thus, in light of the fact that plaintiff does not challenge the articulated policy that the New Jersey Antitrust Act should be interpreted "in harmony" with the interpretations of the Sherman Act, this Court is similarly constrained to grant summary judgment in favor of defendant as to Count 4 of the Complaint. *See* *Glasofer Motors v. Osterlund, Inc., 180 N.J. Super. 6, 23, 433 A.2d 780 (App. Div. 1981)* (no *per se* rule applied to vertical nonprice restrictions).

IV. CONCLUSION

In light of the fact that *Business Electronics Corp. v. Sharp Electronics Corp*. appears to overturn *Cernuto, Inc. v. United Cabinet Corp*., and for all **[**25]** of the reasons above-noted, defendant Steelite, Inc.'s motion for summary judgment as to Counts 1 and 4 of the Complaint is hereby GRANTED. As noted by plaintiff, Count 5 (unlawful interference with a business relationship) still remains at issue and the parties shall proceed to trial thereon as of August 22, 1988.

An appropriate order shall issue.

Dated: July 19, 1988

ORDER DISMISSING COUNTS I AND IV OF THE COMPLAINT

This matter having been opened to the Court by Smith, Stratton, Wise, Heher & Brennan, attorneys for defendant, Steelite, Inc. ("Steelite") (William J. Brennan, III, Esq., appearing), upon notice to Kuttner, Toner & DiBenedetto, attorneys for plaintiff, Corrosion Resistant Materials Co. (John F. Crane, Esq., appearing), on motion for an Order pursuant to *Rule 56(b) of the Federal Rules of Civil Procedure* entering summary judgment in favor of Steelite on Counts I and IV of the Complaint, and the Court having heard the argument of counsel, and having considered the papers presented to the Court, and good cause having been shown,

IT IS, on this 19th day of July, 1988:

ORDERED, that the motion of defendant Steelite, Inc. for summary judgment on Counts I and IV of the Complaint **[**26]** be and hereby is granted; and it is further

ORDERED, that Counts I and IV of the Complaint be and hereby are dismissed with prejudice.

LexisNexis®

Winter Hill Frozen Foods & Services, Inc. v. Haagen-Dazs Co.

United States District Court for the District of Massachusetts

July 19, 1988, Decided

Civil Action No. 88-0009-XX

Reporter
691 F. Supp. 539 *; 1988 U.S. Dist. LEXIS 8019 **; 1988-2 Trade Cas. (CCH) P68,182

WINTER HILL FROZEN FOODS AND SERVICES, INC., Plaintiff, v. THE HAAGEN-DAZS COMPANY, INC., THE PILLSBURY CO., INC., PAUL'S DISTRIBUTORS, INC., DAIRI FARMS, INC., INTERNATIONAL ICE CREAM CORP., and B & K DISTRIBUTORS, INC., Defendants

Core Terms

manufacturer, ice cream, distributors, products, market power, sales, Sherman Act, frozen food, termination, vertical, effects, unreasonable restraint, summary judgment, rule of reason, market share, defendants', competitor, retailers, asserts, genuine, prices, summary judgment motion, anti trust law, anticompetitive, nonprice, unfair

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Discovery, Methods of Discovery**

Pursuant to *Fed. R. Civ. P. 56*, the party seeking summary judgment must inform the court of the basis of its motion and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Methods of Discovery > Interrogatories > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] **Summary Judgment, Supporting Materials**

Where the nonmoving party will bear the burden of proof on an issue at trial, *Fed. R. Civ. P. 56(e)* requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN3[] **Discovery, Methods of Discovery**

See *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN4[] **Supporting Materials, Affidavits**

See *Fed. R. Civ. P. 56(e)*.

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

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Mass. Gen. Laws ch. 93, § 4* (1984).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN7[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A manufacturer generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A mere unilateral refusal to deal, without more, is not cognizable under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

When the manufacturer's actions 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, the countervailing consideration, the right of the manufacturer to decide with whom to deal, is not present and therefore he has put together a combination in violation of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN10[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The boundary separating the Colgate doctrine - the simple unilateral refusal to deal - from the non-simple unilateral refusal to deal is the presence of a contract, combination, or conspiracy, that is, either an express, implied or tacit agreement among two or more parties, or an involuntary acquiescence to one party's trade restraining policy.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN11[] Public Enforcement, US Federal Trade Commission Actions

Where a manufacturer's refusal to deal either promotes or enforces a trade policy which is unreasonable per se, the manufacturer's refusal is a per se violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Sherman Act, Claims**

Even where such a combination contract or conspiracy exists, there is not necessarily a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. The complainant must still prove that the manufacturer's policy constitutes an unlawful restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN13[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

There is a distinction between a non-simple unilateral refusal to deal and a concerted refusal to deal, which is also known as a "group boycott." A concerted refusal to deal is defined as an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms. Direct evidence of an explicit agreement that restricts dealing with a third party is not necessary for finding "concerted action."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Evidence of a contract, combination or conspiracy does not, without more, violate *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. Rather, there must be compelling proof that the refusal to deal was motivated by anticompetitive purposes, or will produce an anticompetitive effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Vertical Restraints, Nonprice Restraints**

Regardless whether a combination or conspiracy between a manufacturer and its dealer exists, the court must analyze whether a particular trade policy or practice imposes an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN16[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Where the plaintiff does not allege any 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 per se rules do not apply.

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**

Under the rule of reason, the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; and the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN18[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Business & Corporate Law > Distributorships & Franchises > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN19[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In the context of distributorship/dealership terminations, manufacturers are generally permitted a wide latitude to discontinue relationships with distributors, to determine the profile of its distributorship, and to otherwise establish vertical nonprice restraints.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN20[] **Sherman Act, Claims**

A plaintiff asserting that a distributorship termination violates *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, must present facts proving that competition has been injured rather than merely a competitor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN21[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Where there are vertical nonprice restraints, a threshold inquiry in rule of reason analysis is whether the defendant has market power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN22[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Market power is often defined as the power to raise prices significantly above the competitive level without losing all of one's business, and market power is often inferred from the control of a substantial percentage of the sales in a market carefully defined in terms of both product and geography.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN23[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In the context of evaluating whether a particular competitor has market power, the competitor's declining market share is evidence that such competitor lacks such power, although it is not dispositive.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN24[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the rule of reason inquiry, the court must compare the negative effects of the restraint on intrabrand and interbrand competition, if any, with any alleged positive effects on interbrand competition stemming from the restraints.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN25[] **Commercial Interference, Prospective Advantage**

To establish a claim for interference with advantageous business relations, the plaintiff must show: (1) a business relationship or contemplated contract of economic benefit; (2) the defendant's knowledge of such relationship; (3) the defendant's intentional and malicious interference with it; (4) the plaintiff's loss of advantage directly resulting from the defendant's conduct. Such conduct must have been done without justification. Justification is established when (a) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other, (b) the desired policy does not unlawfully restrain trade, and (c) the means employed are not wrongful.

Torts > Business Torts > Unfair Business Practices > General Overview

HN26[] **Business Torts, Unfair Business Practices**

In considering whether a plaintiff has established a claim for unfair practice under Mass. Gen. Laws ch. 93A, the court must consider: (1) whether the practice is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors, or other businessmen.

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Stanley Rudman, Dana Rodin, Rubin & Rudman, Boston, Massachusetts

Judges: William G. Young, United States District Judge.

Opinion by: YOUNG

Opinion

[*541] MEMORANDUM AND ORDER

WILLIAM G. YOUNG, UNITED STATES DISTRICT JUDGE.

Winter Hill Frozen Foods and Services, Inc. ("Winter Hill"), a frozen food distributor, brought this action against The Haagen-Dazs Company, Inc. ("Haagen-Dazs"), an ice cream manufacturer, The Pillsbury Co., Inc. ("Pillsbury"), the corporate parent of Haagen-Dazs, and the New England distributors of Haagen-Dazs products, [1] alleging that the defendants' refusal to sell Haagen-Dazs products to Winter Hill is an unlawful restraint of competition in violation of *Section 1* of the Sherman Act, *15 U.S.C. sec. 1*, and various state laws. This matter is presently before the Court on the motions by defendants Haagen-Dazs, Pillsbury, and International for summary judgment **[**2]** pursuant to *Fed. R. Civ. P. 56*.

I. BACKGROUND

The plaintiff Winter Hill, a Massachusetts corporation with a usual place of business in Westborough, Massachusetts, is engaged in the distribution of a full line of frozen food products to retailers in New England, New York and New Jersey ("the New England area"). Winter Hill carries approximately 1,900 frozen food items, 400 of which are ice cream products and frozen desserts. In the New England area, there are at least 189 other distributors of frozen foods.

The defendant Haagen-Dazs, a New Jersey corporation with a usual place of business in Woodbright, New Jersey, manufactures ice cream and frozen desserts products including Haagen-Dazs brand ice cream, which are distributed nationally via company-owned and selected independent distributors. Haagen-Dazs is a wholly owned subsidiary of the defendant Pillsbury, a Delaware corporation with a principal place of business in Minneapolis, **[**3]** Minnesota.

The defendants Paul's, Dairi Farms, International and B & K are independent authorized distributors of Haagen-Dazs products in the New England area. Although Dairi Farms and International also carry some non-dessert frozen foods, these four defendants are primarily ice cream distributors. In addition to these four distributors, Haagen-Dazs also sells its ice cream to approximately 50 independent distributors in the New England area.

Beginning in 1983, Winter Hill purchased Haagen-Dazs ice cream products from the distributor B & K and then resold the ice cream to its customers; at that time, Winter Hill was not an authorized Haagen-Dazs distributor. In 1985, Haagen-Dazs undertook to identify and correct various weaknesses in its distribution system, including those instances where its product was being sold to frozen food or warehouse distributors. [2] At this time, Haagen-Dazs

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[1] These distributors and co-defendants are Paul's Distributors, Inc. ("Paul's"), Dairi Farms, Inc. ("Dairi Farms"), International Ice Cream, Inc. ("International"), and B & K Distributors, Inc. ("B & K")(collectively, the "New England distributors.").

[2] Haagen-Dazs states that it does not want its product distributed by frozen food or warehouse distributors whose primary stake is in products other than ice cream. Affidavit of James E. Richards at 2. It thereby seeks to maintain the focus of the independent distributor on the Haagen-Dazs product and thus to secure the greatest amount of freezer space for the product. *Id*.

learned that B & K was selling the Haagen-Dazs product to Winter Hill, but it believed that Winter Hill's sales of ice cream were minor and only to military purchasers. Affidavit of Michael L. Baily at 10.

[4]** **[*542]** After learning the extent of Winter Hill's sales to the military, Haagen-Dazs decided that B & K should not continue to supply ice cream to Winter Hill, and on August 1, 1987, Haagen-Dazs wrote B & K requesting that it discontinue sales to Winter Hill effective October 1, 1987. B & K's sales of Haagen-Dazs to Winter Hill ended on November 30, 1987.

Paul's, Dairi Farms and International have never sold -- and have refused to sell -- Haagen-Dazs ice cream to Winter Hill.

On January 20, 1988, Winter Hill brought this action against the named defendants to preliminarily enjoin these defendants' refusal to deal with, and to sell Haagen-Dazs products to, Winter Hill. In the complaint, Winter Hill alleges:

1) the agreement between Haagen-Dazs and its distributors to refuse sales of Haagen-Dazs products to Winter Hill is an unreasonable restraint of trade in violation of *Section 1* of the Sherman Act, *15 U.S.C. sec. 1* ("Count I");

2) the agreement between Haagen-Dazs and its New England distributors to refuse sales of Haagen-Dazs products to Winter Hill is an unreasonable restraint of trade in violation of *Mass. Gen. Laws ch. 93, sec. 4* ("Count II");

3) Haagen-Dazs' conduct constitutes a tortious **[**5]** interference with Winter Hill's contractual relations and advantageous business relationships with its existing customers ("Count III"); and

4) Haagen-Dazs' conduct constitutes unfair acts or business practices in violation of *Mass. Gen. Laws ch. 93A, secs. 2* and *11* ("Count IV").

On February 16, 1988, the Court denied Winter Hill's motion for preliminary injunction without prejudice, and denied Haagen-Dazs' and Pillsbury's motion to dismiss the complaint on February 22, 1988. Defendants Haagen-Dazs, Pillsbury, and International now move the Court, pursuant to *Fed. R. Civ. P. 56(c)*, for summary judgment on the grounds that there is no genuine issue as to any material fact and that they are entitled to judgment as matter of law.

II. DISCUSSION

HN1[] Pursuant to *Rule 56 of the Federal Rules of Civil Procedure*, [3] the party seeking summary judgment must inform the court of the basis of its motion and identify those portions of "the pleadings, depositions, answers to

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Apparently, this battle for the limited amount of freezer space is an important element of distributing ice cream in the highly competitive frozen food and frozen desserts business. *See* Affidavit of Michael L. Baily at 4. Mr. Baily, vice president, sales, of Haagen-Dazs, explained:

> All products that occupy freezer space compete for that space. Ice creams compete against frozen pizza and vegetables. Only the winners -- in terms of consumer takeaway -- are awarded adequate shelf space. . .
>
> . . . Haagen-Dazs believes the frozen foods distributor has a substantially greater conflict of interest -- if he fights for additional space for ice cream, he has to give up space that is occupied by the other frozen foods he sells.

Id. at 5-6.

Moreover, Haagen-Dazs asserts that it prefers to have its distributors sell only to retail accounts, not to subdistributors, because Haagen-Dazs has no contractual or other control over subdistributors. *Id*. at 9.

[3] *Fed. R. Civ. P. 56* provides, in relevant part:

> . . .

interrogatories, and admissions on file, together with the affidavits, if any," which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN2***[] Where, **[**6]** however, the nonmoving party will bear the burden of proof on an issue at trial, "*Rule 56(e)* . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id. at 324*; *see* *Moody v. Maine Central R.R. Co., 823 F.2d 693, 694 (1st Cir. 1987)*; *Jako v. Pilling Co., 670 F. Supp. 1074, 1076 (D. Mass.1987)*, *vacated and rev'd in part*, *848 F.2d 318* (1st Cir. June 8, 1988). **[*543]** *Cf.* *Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975)*, *cert. denied*, *425 U.S. 904, 47 L. Ed. 2d 754, 96 S. Ct. 1495 (1976)*(nonmovant must establish by substantial evidence the existence of an issue of fact that is both genuine and material).

[7]** A. Counts I and II -- The Alleged Antitrust Violations.

Winter Hill asserts that the agreement between Haagen-Dazs and its distributors to refuse to sell Haagen-Dazs products to Winter Hill is an unreasonable restraint of trade in violation of both *Section 1* of the Sherman Act, [4] *15 U.S.C. sec. 1*, and *Mass. Gen. Laws ch. 93, sec. 4*. [5] In order to survive this motion for summary judgment, Winter Hill must establish that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused Winter Hill to suffer a cognizable injury. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Winter Hill asserts that the material issues of disputed fact are the following: 1) whether Haagen-Dazs has gone beyond the "mere announcement of a policy" and "simple refusal to deal;" 2) whether Haagen-Dazs has achieved "market power," i.e., the ability to set prices which are higher than the competition without losing the ability to sell its products; 3) whether the vertical restriction against sales to Winter Hill is harmful to competition either at the interbrand or intrabrand level, and 4) whether

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> ***HN3***[] (c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
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> . . .
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> ***HN4***[] (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[4] *Section 1* provides, in relevant part:

> ***HN5***[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. sec. 1 (1982).

[5] *Section 4* of the Massachusetts Antitrust Act provides:

> ***HN6***[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the commonwealth shall be unlawful.

Mass. Gen. Laws Ann. ch. 93, sec. 4 (West 1984). This statute is construed in harmony with *Section 1* of the Sherman Act, and the same principles and analysis under the federal claim apply to this particular state law claim. *See* *Mass. Gen. Laws Ann. ch. 93, sec. 1* (West 1984). Therefore, Winter Hill's state antitrust claims are subsumed by this discussion of federal ***antitrust law***.

[8]** such harm to competition outweighs any benefit resulting from the restriction. Winter Hill's Memorandum in Opposition to Defendants' Motions for Summary Judgment at 2-3 (hereinafter "Winter Hill's Memorandum in Opposition to Summary Judgment"). On Counts I and I, Winter Hill does not succeed.

1. The Refusal to Deal.

It is a well established **[**9]** principle of ***antitrust law*** that ***HN7***[] "[a] manufacturer . . . generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*(citing *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992* [1919]) and *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505* [1960]). The *Colgate* Court explained:

> 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.

250 U.S. at 307. Therefore, ***HN8***[] a mere unilateral refusal to deal, without more, is not **[**10]** cognizable under *Section 1* of the Sherman Act. *See, e.g., Parke, Davis, 362 U.S. at 37*; *Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1033* (2d Cir.), *cert. denied*, *444 U.S. 917, 62 L. Ed. 2d 172, 100 S. Ct. 232* ***[*544]*** *(1979)*; *Butera v. Sun Oil Co., 496 F.2d 434, 437 n.7 (1st Cir. 1974)*.

All refusals to deal, however, are not beyond the reach of the antitrust laws. The Supreme Court has explicitly ruled that

> ***HN9***[] 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 [the right of the manufacturer to decide with whom to deal] is not present and therefore he has put together a combination in violation of the Sherman Act.

Parke, Davis, 362 U.S. at 44. ***HN10***[] The boundry separating the *Colgate* doctrine -- the simple unilateral refusal to deal -- from the non-simple unilateral refusal to deal is the presence of a "contract, combination, or conspiracy:" that is, either an express, implied or tacit agreement among two or more parties, or an involuntary acquiescence to one party's trade restraining policy. *See generally* **[**11]** 2 Kinter *Federal* ***Antitrust Law*** sec. 10.22 at 137 (1980). [6] **[**12]** In this context, the Supreme Court has ruled repeatedly that ***HN11***[] where a manufacturer's refusal to deal either promotes or enforces a trade policy which is unreasonable *per se*, the manufacturer's refusal is a *per se* violation of *Section 1*. *E.g., Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307 (1922)*(holding that a company's refusal to deal with those dealers who did not observe resale prices violated Section 5 of the Federal Trade Commission Act); *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723, 64 S. Ct. 805, 88 L. Ed. 1024 (1944)*(holding that "more . . . than mere acquiescence of wholesalers" to a resale price maintenance scheme constituted a violation of *Section 1*); *Parke, Davis, 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503* (ruling that when a manufacturer goes beyond the mere announcement of a pricing policy [i.e., having the wholesalers terminate the sales to those retailers who do not abide by the policy], an unlawful combination in violation of *Section 1* exists). [7]

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[6] Yet, ***HN12***[] even where such a "combination contract or conspiracy" exists, there is not necessarily a violation of *Section 1* of the Sherman Act; the complainant must still prove that the manufacturer's policy constitutes an unlawful restraint of trade. *See* 2 Kinter *Federal* ***Antitrust Law*** sec. 10.20 at 133.

[7] The Court notes that ***HN13***[] there is a distinction between a non-simple unilateral refusal to deal and a concerted refusal to deal, which is also known as a "group boycott." *See* Horsley, *Per Se Illegality and Concerted Refusals to Deal*, 13 B.C. Indus. & Com. L. Rev. 484 (1972). A concerted refusal to deal is defined as "an agreement by two or more persons not to do business

HN14[] Evidence of "a contract, combination or conspiracy," however, does not, without more, violate Section 1 of the Sherman Act. *See, e.g.,* A. H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302, 1305-06 (9th Cir. 1981) (Kennedy, J.); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 298 (5th Cir. Unit A, July, 1981); Fuchs Sugar, 602 F.2d at 1030. Rather, there must be compelling proof **[**13]** that the refusal to deal was motivated by anticompetitive purposes, or will produce an anticompetitive effect. *See, e.g.,* 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)* ("Something more than an agreement between [a manufacturer and a distributor] must be shown. The agreement becomes violative of Section 1 of the Sherman Act only if it is *anticompetitive in purpose and effect* -- in sum, it must be tested by the rule of reason.") (emphasis in original); Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1223 (10th Cir. 1986), *cert. denied*, *486 U.S. 1005, 108 S. Ct. 1728, 100 L. Ed. 2d 192 (1988)*; *cf.* Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197, 1200 (7th Cir. 1986)(holding that otherwise lawful non-price mechanism agreements between a manufacturer and a distributor may be rendered *per se* unlawful **[*545]** if imposed as part of an illegal scheme to fix prices). Therefore, HN15[] regardless whether a combination or conspiracy between a manufacturer and its dealer exists, this Court's analysis is based upon the fundamental premise of ***antitrust law***: whether a particular trade policy or practice **[**14]** imposes an unreasonable restraint on competition. [8] **[**15]** More precisely, the central issue in this case is whether a manufacturer's termination of an unauthorized distributor constitutes an unreasonable restraint on competition. [9] The Court rules that it does not.

2. Distributorship/Dealership Terminations.

HN17[] Under the Rule of Reason, the standard for lawful trade practices has been described as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine **[**16]** that question the court must ordinarily consider the facts peculiar to the business to which the restraint is

with other individuals, or to do business with them only on specified terms." Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531 (1958). Although direct evidence of an explicit agreement that restricts dealing with a third party is not necessary for finding "concerted action," this Court cannot find sufficient evidence of a "boycott" in this particular case.

[8] This Court, therefore, need not address the issue of whether there exists a "contract, combination or conspiracy" between Haagen-Dazs and the New England distributors in the present case.

If, however, this Court were to decide this issue, there must be "something more than evidence of complaints [from the nonterminated distributors] . . . there must be evidence that tends to exclude the possibility that the manufacturers and nonterminated distributors were acting independently." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984); *see* Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853, 856-57 (1st Cir. 1982). "The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" 465 U.S. at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 [3d Cir. 1980], *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981* [1981]). Moreover, the plaintiff must present evidence "both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." Id. at 764 n.9. Furthermore, the finding that an unlawful conspiracy exists cannot be supported by the mere fact that the court determines that the business reasons for certain trade practices are pretextual. *See* Bruce Drug, 688 F.2d at 857. Applying these evidentiary standards to the case at bar, it does not appear that Winter Hill has presented sufficient evidence to support the finding of a conspiracy; the Court, however, does not rule on this particular issue.

[9] Winter Hill concedes that this case is governed by the "Rule of Reason," not the *per se* rules of antitrust illegality. *See* Winter Hill's Memorandum in Opposition to Defendants' Motions for Summary Judgment at 14 (hereinafter, "Winter Hill's Memorandum in Opposition to Summary Judgment"). HN16[] Since Winter Hill does not allege any "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958), the *per se* rules do not apply. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

> applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 n.15, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)(quoting *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683* [1918] [Brandeis, J.]). Simply, ***HN18***[] "the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., 433 U.S. at 49* (footnote omitted).

HN19[] In the context of distributorship/dealership terminations, manufacturers are generally permitted a wide latitude to discontinue relationships with distributors, to determine the profile of its distributorship, and to otherwise establish vertical nonprice restraints. *See, e.g., Chandler Supply Co. v. GAF Corp., 650 F.2d 983, 989 (9th **[**17]** Cir. 1980)* (manufacturer **[*546]** was dissatisfied with the franchisee's service); *Edward J. Sweeny & Sons, 637 F.2d at 110* (franchisee's service stations had produced a number of customer complaints); *White v. Hearst Corp., 669 F.2d 14, 18-19 (1st Cir. 1982)*(manufacturer had decided to establish an in-house method of distribution). The policy for allowing manufacturers to establish certain vertical nonprice restraints is basic: such restrictions may have pro-competitive effects. Addressing the manufacturer's decision to impose vertical nonprice restraints, the Supreme Court stated:

> New manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products. . . . The availability and quality of such services affect a manufacturer's goodwill and the competitiveness **[**18]** of his product. Because of market imperfections such as the so-called 'free-rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 1519-20, 99 L. Ed. 2d 808 (1988)(quoting *Continental T.V., 433 U.S. at 55*). The Supreme Court, in *Continental T.V*., explained that, although vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product, "vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." [10] *433 U.S. at 54*. Therefore, ***HN20***[] a plaintiff asserting that a distributorship termination violates *Section 1* of the Sherman Act must present facts *proving that competition has been injured rather than merely a competitor. Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734 (9th Cir. 1987)*. In this regard, it must be stressed that the antitrust laws were not established for the protection of a **[**19]** particular competitor, rather the protection of competition. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Under the rule of reason analysis, Winter Hill's antitrust claims cannot survive the defendants' motions for summary judgment on the ground that, as matter of law, there is not sufficient evidence establishing the existence of antitrust injury.

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[10] The *Continental T.V*. Court further noted that market efficiency is not the only permissible reason for a manufacturer to exercise control over the sales and servicing of a product. *433 U.S. at 55 n.23*. "As a result of statutory and common-law developments, society increasingly demands that manufacturers assume direct responsibility for the safety and quality of their products. . . . The legitimacy of these concerns has been recognized in cases involving vertical restrictions." *Id*. In the present case, Haagen-Dazs asserts that "ice cream requires more careful handling than other frozen foods. Because ice cream is perishable and sensitive to changes in temperatures, distribution involves a risk that the product may be mistreated." Affidavit of Michael L. Baily at 7. The Court thus acknowledges that the quality and safety of the product constitute a basis for vertical non-price restrictions.

[20]** First, Winter Hill asserts that Haagen-Dazs has market power in the super premium ice cream market, [11] and that such market **[*547]** power allows Haagen-Dazs to raise its prices above those of the competition. [12] Affidavit of Harold R. Rudnick at 2 (hereinafter, "Rudnick Aff. I"); Rudnick Aff. II at 5-9. ***HN21***[] Where there are vertical nonprice restraints, some circuits have ruled that a threshold inquiry in rule of reason analysis is whether the defendant has market power. *See, e.g., Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 315-16 (8th Cir. 1986)*; *Hennessy Indus. Inc. v. FMC Corp., 779 F.2d 402, 404-05 (7th Cir. 1985)*. ***HN22***[] Market power is often defined as the "'power to raise prices significantly above the competitive level without losing all of one's business,'" *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987)*(quoting *Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745* [7th Cir. 1982] [*Valley I*], *cert, denied*, *484 U.S. 977, 108 S. Ct. 488, 98 L. Ed. 2d 486* [1987]), and market power is often inferred from the control of a "'substantial percentage of the sales in a market carefully defined in terms of both product and geography.'" **[**21]** *Id*. (quoting *Valley I, 678 F.2d at 745*). Based upon those facts that Winter Hill presented to this Court, there is insufficient evidence to raise a genuine issue of material fact regarding Haagen-Dazs' market power.

[22]** Winter Hill asserts that Haagen-Dazs has a 43% market share of the super premium ice cream market in New England. [13] A 43% market share, however, does not alone establish that Haagen-Dazs has market power. *See Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 841 (2d Cir. 1980)*(market share declining from 54.5% to 33% over five years insufficient to establish market power); *Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122, 129* (2d Cir.), *cert. denied*, *454 U.S. 968, 102 S. Ct. 512, 70 L. Ed. 2d 384 (1981)*(market share below 50% is rarely evidence of monopoly power). *Cf. Graphic Prod. Distrib., Inc. v. Itek Corp., 717 F.2d 1560, 1570 (11th Cir. 1983)*(70-75 per-cent market share constitutes sufficient evidence of market power). Moreover, ***HN23***[] in the context of evaluating whether a particular competitor has market power, the competitor's declining market share is evidence that such competitor lacks such power, although it is not dispositive. *See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 n. 11 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)*. From the A. C. Nielson data regarding the **[**23]** sales

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[11] For the purposes of this opinion, super premium ice cream is defined as that ice cream containing all natural ingredients, with a higher butterfat and a lower air content than other ice creams. *See* Declaration of Jerry A. Hausman at 4; Affidavit of Harold R. Rudnick in Opposition to the Motion by the Pillsbury Company and the Haagen-Dazs Company, Inc. for Summary Judgment at 3 (hereinafter, "Rudnick Aff. II"). Furthermore, the super premium ice cream is sold only in pints and for prices which are higher than other ice creams. *See* Rudnick Aff. II at 3. In the New England area, the super premium ice cream market includes the following brands of ice cream: Haagen-Dazs, Frusen Gladje, Ben & Jerry's, and Steve's.

[12] As a preliminary matter, the Court does not decide the issue whether there in fact exists a separate market for super premium ice cream; rather, it assumes *arguendo* that such a market does exist.

If the Court were to decide this issue, the evidentiary burden falls on the plaintiff Winter Hill to establish a well-defined relevant market upon which anticompetitive actions had a substantial impact. *See Kartell v. Blue Shield of Massachusetts, Inc., 582 F. Supp. 734, 742 (D. Mass. 1984)*, *reversed and vacated in part on other grounds*, *749 F.2d 922 (1st Cir. 1984)*, *cert. denied*, ***471 U.S. 1029, 85 L. Ed. 2d 322, 105 S. Ct. 2040 (1985)***. To demonstrate the separate existence of a super premium ice cream submarket, Winter Hill must prove those submarket elements such 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, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (footnote omitted). Given these requisite factors for determining the existence of a submarket, this Court concludes that the two affidavits of Harold Rudnick would be insufficient to establish a distinct market for super premium ice cream. Moreover, in similar litigation filed in the United States District Court for the Northern District of California, Judge Legge ruled that "all grades of ice cream compete for both retail shelf space and for consumers' attention," and there is not, therefore, a separate market for super premium ice cream. *In re Super Premium Ice Cream Distribution Antitrust Litigation, 691 F. Supp. 1262, 1268* (N.D. Cal. June 23, 1988). The Court, however, does not decide this issue.

[13] Harold Rudnick, president of Winter Hill, asserts that the market shares of the super premium ice creams in New England from December, 1986 through November, 1987 are the following: Haagen-Dazs - 43%, Ben & Jerry's - 41%, Frusen Gladje - 8%, and Steve's - 8%. Rudnick Aff. II at 10. Haagen-Dazs, however, notes that in the October - November, 1987 reporting period, Haagen-Dazs' market share was only 39%, while Ben & Jerry's was 45%. Declaration of Jerry A. Hausman at 10.

of ice cream in New England, the Court notes that Haagen-Dazs' market share in **[*548]** the super premium ice cream market declined from 61% in 1985 to 50% in 1986 to 43% in 1987. *See* Exhibit E, Declaration of Jerry A. Hausman. Therefore, the data concerning both Haagen-Dazs' historical and current market shares demonstrates that Haagen-Dazs indeed lacks market power in the super premium ice cream market, [14] and thus would preclude the need to further balance the competitive effects of Haagen-Dazs' restraint under rule of reason analysis. *See* *Assam Drug, 798 F.2d at 316*.

[24]** Regardless, however, of this Court's conclusion that Haagen-Dazs lacks market power, the Court further rules that Winter Hill has failed to prove that there are anti-competitive effects resulting from terminating sales of Haagen-Dazs products to Winter Hill. ***HN24***[] Under the rule of reason inquiry, the Court must compare the negative effects of the restraint on intrabrand and interbrand competition, if any, with any alleged positive effects on interbrand competition stemming from the restraints. *See Graphic Prods.* *Distrib., 717 F.2d at 1571*. Winter Hill asserts that the price of a pint of Haagen-Dazs ice cream at Pease Air Force Base near Portsmouth, New Hampshire, has increased from $ 1.49 to $ 1.60, and at Griffiss Air Force Base near Syracuse, New York, the price has risen from $ 1.49 to $ 1.70. Winter Hill's Memorandum in Opposition to Defendants' Motions for Summary Judgment at 26. Winter Hill also alleges that B & K approached Trucchi's Supermarket, a Winter Hill customer in Raynham, Massachusetts, and proposed to charge $ 12.50 per case of Haagen-Dazs ice cream, a 21% increase over Winter Hill's price of $ 10.29 per case. *Id*. In short, these isolated examples of price increases **[**25]** in Haagen-Dazs ice cream products are insufficient to establish that there are anti-competitive effects resulting from Winter Hill's termination. Accordingly, this Court grants the motions for summary judgment of Haagen-Dazs, Pillsbury and International on the antitrust claims, Counts I and II.

B. Count III -- Interference with Advantageous Business Relations.

HN25[] As for this claim, Winter Hill must show "'(1) a business relationship or contemplated contract of economic benefit; (2) the defendant's knowledge of such relationship; (3) the defendant's intentional and malicious interference with it; (4) the plaintiff's loss of advantage directly resulting from the defendant's conduct.'" *Comey v. Hill, 387 Mass. 11, 19, 438 N.E.2d 811 (1982)*(quoting J. Nolan, *Tort Law* sec. 72, at 87 [1979]). Such conduct, however, must have been done without justification. Justification is established when "'(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 unlawfuly restrain trade . . . and (c) the means employed are not wrongful.'" *Moffat v. Lane Co., 595 F. Supp. 43, 49 (D. Mass. 1984)*(quoting **[**26]** *Restatement (Second) of Torts sec. 771* [1977]). Haagen-Dazs, Pillsbury and International have proved that 1) they have an economic interest in the matter, *see* Affidavit of Michael L. Baily (Haagen-Dazs **[*549]** and Pillsbury), Affidavit of Bruce C. Ginsberg (International), 2) the conduct does not unlawfully restrain trade, *see* Section II (A), *supra*, and 3) the conduct was not wrongful pursuant to *Moffat, 595 F. Supp. at 49*. Accordingly, the actions of the defendants Haagen-Dazs, Pillsbury and International were justifiable and, therefore, the Court grants their motions for summary judgment on Count III.

C. Count IV -- Unfair Competition.

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[14] Winter Hill further contends that Haagen-Dazs' market power stems from its ability to raise prices above competitive levels without losing customers, and states, "Haagen-Dazs is the price leader and is usually sold in supermarkets at prices which are more than 10 cents per pint above the price of any other super premium ice cream. Special flavors are priced 10 to 15 cents higher than that." Rudnick Aff. II at 9. First, the Court questions Mr. Rudnick's conclusion that Haagen-Dazs is the price leader where Winter Hill's October 14, 1987 order guide contains the following suggested retail prices for 16-ounce packages of frozen desserts: Howard Johnson -- $ 1.79, Dole -- $ 1.98, Tofutti -- $ 2.79, Haagen-Dazs - $ 1.89, Frusen Gladje - $ 2.08, Mousse d'Jour - $ 1.99, and Steve's - $ 2.19. Affidavit of Michael L. Baily, Exhibit B. Second, and more importantly, this conclusory statement of the pricing differentials in the super premium ice cream market, which is not supported by specific factual data, is insufficient evidence that Haagen-Dazs is in fact the price leader in the market. *Cf.* *United States v. Hall, 424 F. Supp. 508, 533-34 (W. D. Okla. 1975)*(holding that a motion requesting a trial judge to disqualify himself and the affidavit in support thereof were insufficient in part due to their conclusory nature), *aff'd*, *536 F.2d 313* (10th Cir.) cert. denied, ***429 U.S. 919 97 S. Ct. 313***, 50 L. 2d 285 (1976).

HN26[] In considering whether Winter Hill has established an unfair practice under Mass. Gen. Laws ch. 93A, the Court must consider "'1) whether the practice . . . is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; 2) whether it is immoral, unethical, oppressive, or unscrupulous; 3) whether it causes substantial injury to consumers (or competitors or other businessmen).'" *PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 596, 321 N.E.2d 915 (1975)*(quoting *29 Fed. Reg. 8325, 8355* [1964]); **[**27]** *see also* *Moffat, 595 F. Supp. at 49*. The case law is clear that the defendants' conduct does not fall within the scope of unfairness prohibited by Section 93A.

Accordingly, the Court grants the motions for summary judgment of Haagen-Dazs, Pillsbury and International on all counts of the complaint.

Allen-Myland, Inc. v. International Business Machines Corp.

United States District Court for the Eastern District of Pennsylvania

July 21, 1988, Decided ; July 22, 1988, Filed

Civil Action No. 85-6166

Reporter

693 F. Supp. 262 *; 1988 U.S. Dist. LEXIS 7582 **; 1988-2 Trade Cas. (CCH) P68,193

ALLEN-MYLAND, INC. v. INTERNATIONAL BUSINESS MACHINES CORPORATION

Core Terms

upgrades, prices, installation, large scale, mainframes, leasing company, relevant market, warranty, machines, percent, conversion, customers, products, economic power, technology, cycle, fabrication, memory, buyers, market power, tying product, estimates, compete, seller, costs, third party, manufacturing, calculation, contends, export

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN1[] **Tying Arrangements, Clayton Act**

A tie exists when a seller refuses to sell a product, the tying product, alone and insists that any buyer who wants it must also purchase another product, the tied product. The Sherman Act, 15 U.S.C.S. § 1 et seq., does not prohibit tying; it prohibits contracts in restraint of trade. Only a tying arrangement that imposes an unreasonable restraint of trade is unlawful.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN2[] **Tying Arrangements, Clayton Act**

Certain tying arrangements are per se unlawful under the antitrust laws; that is, they are deemed unreasonable as a matter of law and "no specific showing of unreasonable competitive effect is required. A tying arrangement that does not warrant per se condemnation may be found to violate the Sherman Act, *15 U.S.C.S. § 1 et seq.*, under a rule of reason analysis. Per se rules and the rule of reason are mechanisms employed to form a judgment about the competitive significance of the restraint.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] **Tying Arrangements, Per Se Rule**

To establish a per se tying violation, plaintiff must show: (1) the existence of two separate and distinct products or services and an agreement conditioning the sale of the tying product to the purchase of the tied product, (2) that the seller possesses sufficient economic power with respect to the tying product to restrain free competition appreciably in the market for the tied product; and (3) that the seller has thereby foreclosed a not insubstantial amount of interstate commerce in the tied product. An inquiry into the legality of a tying arrangement under the per se rule requires an elaborate economic analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN4[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price. However, even when the products are sold separately, the per se rule may apply if the option is not viable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Application of the per se rule against tying requires proof that the seller possesses economic power in the market for the tying product. The degree or form of economic power that must be established has been described in various ways. Proof of the existence of monopoly power is not required. In short, the issue is whether the seller has some advantage not shared by his competitors in the market for the tying product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. Proof of a seller's power to force involves proof that the seller enjoys significant market power or a dominant market position.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN7[] **Regulated Practices, Market Definition**

Market share is calculated by reference to a relevant product and geographic market. Briefly stated, 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. The purpose of market definition is to determine whether market power exists; therefore, market definitions must account for all factors affecting the ability of the defendant to raise prices or restrict competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN8[] **Regulated Practices, Market Definition**

Substitutes exist for every product and a relevant market definition cannot meaningfully encompass that infinite range; therefore, the circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn. However, it is also improper to require that products be fungible to be considered in the relevant market. The relevant market definition must include all commodities reasonably interchangeable by consumers for the same purposes. It must include all producers which have the ability - actual or potential - to take significant amounts of business away from each other.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9[] **Regulated Practices, Market Definition**

It is not the perceptions of manufacturers but those of consumers which are most salient in the determination of market boundaries.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] **Regulated Practices, Market Definition**

The absence of significant entry barriers in a given market or industry suggests that firms operating in the market or industry lack market power, even when they enjoy appreciable market shares. Conversely, 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.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN11[] **Regulated Practices, Market Definition**

Technological progress or innovation in an industry generally reflects the presence of economic competition in the market, and is generally inconsistent with the wielding of undue economic power by a firm or group of firms in the industry.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN12[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Even absent a showing of market dominance, the requisite economic power may, under special circumstances, be inferred from the desirability or uniqueness of the tying product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Proof of acceptance of a burdensome or uneconomic offer of a "tied" product is some evidence of coercion, but such proof alone does not establish, prima facie, the coercion element of a tying claim.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN14[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Neither the uniqueness of a product nor the fact that it is patented alone establishes the requisite economic power. A patent holder has no market power in any relevant sense if there are close substitutes for the patented product. Similarly, factual uniqueness is insufficient as a matter of law to establish market power. If competitors can design and offer a package similar to defendant's product for a similar cost, there is no barrier and no market power, and hence no special advantage for purposes of establishing uniqueness.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN15[] **Relevant Market, Product Market Definition**

Within a broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN16[] **Regulated Practices, Market Definition**

The boundaries of a relevant 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 > Sherman Act > General Overview

HN17[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws were enacted for the protection of competition, not competitors.

Evidence > Admissibility > Statements as Evidence > Compromise & Settlement Negotiations

HN18[] Statements as Evidence, Compromise & Settlement Negotiations

Fed. R. Evid. 408 codifies a trend in case law that permits cross-examination concerning a settlement for purpose of impeachment.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN19[] Tying Arrangements, Per Se Rule

Per se condemnation of a tying arrangement may be warranted when the seller possesses the degree or kind of market power that enables it to force customers to purchase a second product (which the buyer either does not want at all or would prefer to purchase elsewhere on different terms) in order to obtain the tying product. Proof of a per se unlawful tying arrangement requires proof of the existence of two separate and distinct products or services.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN20[] Price Fixing & Restraints of Trade, Tying Arrangements

If the product in the second market would be accepted anyway, because of its own merit then, of course, no leverage is involved; there is no use of the seller's market power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN21[] Price Fixing & Restraints of Trade, Tying Arrangements

There is no per se rule against tying arrangements unless a substantial volume of commerce is foreclosed thereby. The controlling consideration is whether a total amount of business, substantial enough in terms of dollar volume so as not to be merely de minimis, is foreclosed to competition by the tie.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN22[] Regulated Industries, Higher Education & Professional Associations

Even if not per se unlawful, a business practice may violate the antitrust laws if it is found to impose an unreasonable restraint on competition under the Rule of Reason analysis. The Rule of Reason focuses directly on the challenged restraint's impact on competitive conditions. It entails an analysis of the purposes and effects of an allegedly anticompetitive practice.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN23[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A finding of illegality under the Rule of Reason presupposes a determination that the effect upon competition in the marketplace is substantially adverse. The percentage of business controlled by defendant and the strength of the remaining competition are relevant considerations.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN24[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

While the antitrust laws regulate conduct, as distinguished from intentions, the reason for adopting the particular remedy and 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 or intent may help the court to interpret facts and to predict consequences.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN25[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In order to establish a cause of action under either a per se or rule of reason analysis, the plaintiff must demonstrate both that the antitrust laws were violated and that it suffered fact of damage in consequence of that violation. Plaintiff must show a violation of the antitrust laws, the fact of damage, and some indication of the amount of damage.

Antitrust & Trade Law > Sherman Act > General Overview

HN26[] Antitrust & Trade Law, Sherman Act

It is as unlawful to prevent a person from engaging in a business as to drive him from it. Generally, a potential competitor has standing if he can show a genuine intent to enter the market and a preparedness to do so.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN27[] Antitrust & Trade Law, Sherman Act

In order to prevail under *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, plaintiff must prove that defendant's conduct constitutes a contract, combination, or conspiracy which unreasonably restrains trade.

Counsel: **[**1]** Bancroft Haviland, Esq., Philadelphia, Pennsylvania, Robert G. Levy, Esq., Berryl Speert, Esq., Allan Hillman, Esq., Cynthia Leppert, Esq., Frank, Bernstein, Conaway & Goldman, Baltimore, Maryland, for Plaintiff.

Thomas D. Barr, Evan R. Chesler, Robert N. Feltoon, Kaare Phillips, Cravath, Swaine & Moore, New York, New York, K. Robert Conrad, John H. McKeon, Jr., Conrad & O'Brien, Philadelphia, Pennsylvania, Howard Webber, Steven M. Edwards, James G. Szymanski, Davis, Markel & Edwards, New York, New York, for Defendant.

Judges: Thomas N. O'Neill, Jr., United States District Judge.

Opinion by: O'NEILL

Opinion

[*266] MEMORANDUM

THOMAS N. O'NEILL, JR., UNITED STATES DISTRICT JUDGE.

AMI brought this action asserting federal and state law claims against IBM, [1] which filed several counterclaims. [2] The parties agreed to try the liability aspect of AMI's claim under *Section 1* of the Sherman Act [3] **[**3]** separately. AMI's claim has two parts: [4] AMI alleges that IBM's net pricing policy constitutes an unlawful tying arrangement and that IBM's Installation and Warranty Service Charge constitutes an unreasonable restraint of trade. The issues were tried before me non-jury; [5] this memorandum **[**2]** constitutes my findings of fact and conclusions of law. *See Fed. R. Civ. P. 52(a)*. Jurisdiction over the *Section 1* claims is based on *28 U.S.C. § 1337*. Suit is brought pursuant to Section 4 of the Clayton Act, *15 U.S.C. § 15*.

NET PRICING

An IBM 308X net priced upgrade is an MES (Miscellaneous Equipment Specification) or feature (a specific set of computer products) that is installed in an IBM model 308X computer by removing parts from the computer and replacing them with different parts. Ritchie, Tr. 1076-77; Rizzo, Tr. 1188-90. Generally, the purpose of any up grade (308X upgrades included) is to enhance the performance of the computer, often to increase the capabilities of a used computer to match the performance level **[*267]** of a newer model. Upgrades include model upgrades (MIPS upgrades), increases in memory capacity (memory upgrades), and increases **[**4]** in the number of computer channels (channel upgrades). *See* Ritchie, Tr. 1077; Bigando, Tr. 1232; Lynn, Dep. Tr. 62.

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[1] In Count I of the complaint, AMI charges IBM with violations of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; in Count II, with a violation of *Section 2*, *15 U.S.C. § 2*; in Count III, with unfair competition; and in Count IV, with tortious interference with business relationships and prospective business relationships. At trial, AMI dismissed with prejudice Count III of its complaint. AMI, Opening Statement, Tr. at 3.

[2] In its first counterclaim, IBM charges AMI with breach of contract; in the second counterclaim, with tortious interference with the performance of contracts; and in the third, fourth, and fifth counterclaims, with copyright infringement.

[3] *Section 1* of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." *15 U.S.C. § 1*.

[4] AMI's *Section 1* claim contains a third part, based on IBM's alleged interference with AMI's ability to acquire parts from independent firms, see Complaint, para. 28(b), but the parties agreed not to raise this issue at the initial trial.

[5] This case was initially assigned to the Honorable Clarence C. Newcomer, U.S. District Court Judge for the Eastern District of Pennsylvania. It was reassigned to me on January 28, 1987. Trial began on February 3, 1987.

IBM 308X net priced upgrade contracts provide that the installation and removal of parts is to be performed by IBM employees, and that the removed parts become the property of IBM and are returned to the company. [6] **[**5]** Ritchie, Tr. 1086-87; Rizzo, Tr. 1188-90; Levin, Tr. 78-80, 744; PX 139; PX 140; PX 138. IBM issues its net priced upgrade customers a credit for the parts removed by IBM engineers during the installation of a net-priced MES. *E.g*., Levin, Tr. 78; PX 457; PX 145. A customer who purchases a net priced upgrade from IBM is not charged separately for the labor associated with performing the upgrade. *See* DX 829. The customer receives a single price quotation for the final, installed product. [7]

IBM's 308X product line consists of 14 models with a performance power range of 3 to 30 million instructions per second (MIPS), and a price range of $ 960,000 (3083E) to $ 6,300,000 (3084Q). *See* DX 1799. Upgrades are net priced only if they involve the removal and return of parts (such as TCMs) [8] from the **[**6]** upgraded computer. The majority of MIPS upgrades, [9] *see* Levin, Tr. 78, and numerous memory upgrades [10] are net priced by IBM.

[7]** Upgrades which do not require the removal of TCMs or other parts (such as the 3083J to 3081K model upgrade) are not net priced and are optionally available from IBM on an SWRPQ basis; *i.e*., without IBM's labor included. [11] An upgrade purchased on an SWRPQ basis may be installed by third parties, such as AMI, or by IBM, if the customer chooses and pays for the service. All 308X channel upgrades and many memory upgrades are available on an SWRPQ basis.

[*268] AMI asserts that IBM's net pricing of 308X upgrades constitutes an unlawful tying arrangement under *Section 1*. As ultimately defined by AMI, the alleged tying product consists of the IBM parts necessary to fabricate and install the equivalent of 308X net priced upgrades, and the tied product consists of the **[**8]** engineering

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[6] IBM decided to apply net pricing to the 308X line of computers in 1980. The first 308X computer (the 3081D) was announced in November of 1980. DX 1799. However, IBM also had a net pricing policy with respect to the earlier line of 303X computers; many, perhaps all, 303X MIPS upgrades were net priced. *See* A.P.F. at para. 118; Allen, Tr. 286-288. Net pricing was first implemented in the late 1960's. Ritchie, Tr. 1078. AMI challenges net pricing only as it applies to the 308X line of computers.

[7] Computer manufacturers other than IBM generally quote a single price for the parts and labor included in upgrades. *See* English, Tr. 1566-67 (Burroughs); Ramsburg Dep. Tr. 6-7 (Control Data Corporation); Nielson Dep. Tr. 7 (NCR); Ikezoye, Dep. Tr. 6-7 (Hewlett Packard); Gibbs, Dep. Tr. 5-6 (Prime Computer); Edstrom, Dep. Tr. 4-5 (Amdahl Corporation); *see also* MacNaughton Study, DX 1634, pp. 1-3. AMI "often" or "usually" charges its customers a single price for parts and labor when it installs an upgrade or feature for its customers. *See, e.g*., Lewis, Tr. 492, 502, 1735; Smith, Tr. 613-14; Loria, Tr. 676. UCS (Ultimate Computer Services), one of AMI's principal competitors, "normally" also charged a single price for an installed upgrade or feature. LaRocca, Tr. 1164-65.

[8] TCMs (Thermal Conductor Modules) will be discussed in greater detail below. *See infra* pp. 278-280, 283. Here I note only that the recovery of TCMs from 308X computers being upgraded was a major reason for implementing the net pricing policy. *E.g*., Armstrong, Tr. 902.

[9] The following 308X model (MIPS) upgrades are net priced: 3081 D to 3801 K; 3081 G to 3081 K; 3081 GX to 3081 KX; 3081 K to 3084 Q; 3081 KX to 3084 QX; 3082 16 and 24 to Q 48; 3082 X 16 and X 24 to X 48; 3083 B to 3083 J; 3083 B to 3081 G; 3083 B to 3081 K; 3083 BX to 3081 GX; 3083 BX to 3083 JX; 3083 E to 3083 B; 3083 E to 3083 J; 3083 EX to 3083 BX; 3083 JX1 to 3081 KX1. *See* PX 127 at 39895; *see also* Levin, Tr. 78-79; Allen, Tr. 291-292.

[10] The following 308X memory upgrades are net priced: 3081G 16, G 24, and G 32 to G 48; 3081 G 16, G 24, and G 32 to G 64; 3081 K 16, K 24 and K 32 to K 48; 3081 K 16, K 24 and K 32 to K 64; 3081 GX1 to 3081 GX2; 3081 GX2 to 3081 GX3; 3081 KX1 to 3081 KX2; 3081 2 to 3081 KX3; 3083 BX0 to 3083 BX1; 3083 BX2 to 3083 BX3; 3083 EX to 3083 EX1; 3083 EX2 to 3083 EX3; 3083 JX0 to 3083 JX1; 3083 JX2 to 3083 JX3; 3084 Q 32, Q 48 and Q 64 to Q 96; 3084 Q 32, Q 48 and Q 64 to QC8; 3084 QX 3 to 3084 QX 4; and 3084 QX 4 to 3084 QX 6. *See* PX 127 at 39895; *see also* Levin, Tr. 78-79. Allen, Tr. 291-292.

[11] It is unclear what "SWRPQ" stands for. As Mr. Gibson of IBM stated, "don't ask me what an SWRPQ means, it really doesn't mean anything. But it is simply the MES or an RPQ for that matter priced without IBM labor . . . ." PX 377 at 89707.

services involved in the fabrication and installation of such upgrades. [12] AMI's Post-Trial Reply Memorandum of Law (hereinafter "A.R.M.") at 9.

[9]** I.

HN1[] A tie exists when a seller refuses to sell a product (the tying product) alone and insists that any buyer who wants it must also purchase another product (the tied product). *See* L. Sullivan, Handbook of the Law of Antitrust § 150, at 431 (1977). "The Sherman Act does not prohibit 'tying', it prohibits 'contract[s] . . . in restraint of trade'." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21 n.34, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. Only a tying arrangement which imposes an unreasonable restraint of trade is unlawful.

HN2[] Certain tying arrangements are *per se* unlawful under the antitrust laws; that is, they are deemed unreasonable as a matter of law and "no specific showing of unreasonable competitive effect is required." *Fortner Enterprises v. United States Steel, 394 U.S. 495, 498, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)* ("*Fortner* I"); *see generally* Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958) **[**10]** (respecting *per se* unlawful arrangements in general: "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."). [13] **[**11]** A tying arrangement which does not warrant *per se* condemnation may be found to violate the Sherman Act under a rule of reason analysis. [14] *Hyde, 466 U.S. at 17-18*; *Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 287 (3d Cir. 1978)*. *Per se* rules and the rule of reason are mechanisms "employed 'to form a judgment about the competitive significance of the restraint.'" *NCAA 468 U.S. at 103* (quoting *National Soc'y of Prof. Engineers v. United States,* ***[*269]*** *435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978))*.

II.

AMI contends that IBM's net pricing of 308X upgrades is *per se* unlawful. A.M. at 15. ***HN3***[] To establish a *per se* tying violation, plaintiff must show: 1) the existence of two separate and distinct products or services and an agreement conditioning the sale of the tying product to the purchase of the tied product; 2) that the seller possesses

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[12] In its complaint, AMI defined the tying product as the parts needed to upgrade IBM large scale main frame computers, and the tied product as IBM installation service. Complaint, at para. 28(a). During the course of litigation, AMI also defined the tied product as the engineering labor necessary to reconfigure IBM large scale main frames, *see* Plaintiff's Proposed Findings of Fact and Conclusions of Law (hereinafter "A.P.F.") at para. 151, or the engineering services necessary to perform net priced reconfigurations of IBM's large scale main frame computers. *See* Plaintiff's Post-Trial Memorandum of Law (hereinafter "A.M.") at 44.

IBM's net pricing applies only to certain upgrades sold new by IBM. Reconfiguration activities include services as to which IBM's net pricing policy does not apply (e.g., upgrades with used parts, removals and reinstallations of customer-owned parts or upgrades, cycle conversions and refurbishments). *See, e.g.*, PX 105, p. 76525; Levin, Tr. 64; Gibson, Dep. Tr. 35-36. When used by AMI to refer to the tied product, the term reconfiguration must mean only those activities to which net pricing applies.

[13] "The rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct." *Hyde, 466 U.S. at 15 n.25* (citations omitted). However, the per se doctrine in tying cases has always required an elaborate economic analysis. *See* *id. at 34* (O'Connor, J., concurring). "There is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." *National Collegiate Athletic Ass'n v. Bd. of Regents of U. of Oklahoma, 468 U.S. 85, 104 n.26, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*.

[14] Four justices in *Hyde*, including Chief Justice Burger and Justice Powell, asserted that all tying arrangements should be analyzed under the rule of reason. *466 U.S. at 35* (O'Connor, J., concurring). Many scholars agree. *See* *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 671 n.2 (7th Cir. 1985)*, *cert. denied*, ***475 U.S. 1129, 106 S. Ct. 1659, 90 L. Ed. 2d 201 (1986)***.

sufficient economic power with respect to the tying product to restrain free competition appreciably in the market for the tied product; and 3) that the seller has thereby foreclosed a "not insubstantial" amount of interstate commerce **[**12]** in the tied product. *See, e.g., Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551*; *Fortner I, 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252*; *Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984)*; *Bogus, 582 F.2d 277 (3d Cir. 1978)*. The Supreme Court's decision in *Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551*, suggests that an inquiry into the legality of a tying arrangement under the *per se* rule requires an elaborate economic analysis.

I conclude that IBM's net pricing policy does not warrant *per se* condemnation. AMI has failed to establish that IBM possesses the requisite market power. AMI has also failed to prove that it, or anyone, has been foreclosed from a viable business opportunity as a result of IBM's conduct. [15] My finding that AMI has not been deprived of a viable business opportunity implicates several of the concerns underlying the Sherman Act and the *per se* rule against tying in particular.

[13]** A.

HN5[] Application of the *per se* rule against tying requires proof that the seller possesses economic power in the market for the tying product. The degree or form of economic power which must be established has been described in various ways. The Supreme Court, however, has consistently held that proof of the existence of monopoly power is not required.

In *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*, in an attempt to define the requisite economic power, the Court referred to "the wielding of monopolistic leverage", or the exploitation by a seller of "his dominant position in one market to expand his empire into the next." This language was "construed" in *Northern Pacific* as requiring only "sufficient economic power to impose an appreciable restraint on free competition in the tied product." *356 U.S. at 11*. "The source from which the power is derived **[*270]** and whether the power takes the form of a monopoly or not" were said to be irrelevant. *Id*. In *Fortner I*, the Court explained **[**14]** that "economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market." *394 U.S. at 502-03*. For purposes of assessing economic power, the Court stated that the proper focus is "whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." [16] *394 U.S. at 504*. In *United States Steel Corp. v. Fortner Enterprises, Inc.,*

[15] Notwithstanding net pricing, buyers could acquire new 308X upgrade parts from IBM, without IBM installation service included, on an over the counter (OTC) basis. *See, e.g*., Levin, Tr. 89-97; PX 455; PX 456; PX 457. IBM contends that its sale of the alleged tying and tied products separately precludes application of the *per se* rule against tying. Post Trial Oral Argument, Chesler, Tr. 69-70; *see Northern Pacific, 356 U.S. at 6 n.4*. ("Of course, ***HN4***[] where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price."). However, even when the products are sold separately, the *per se* rule may apply if the option is "not viable." *Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 62 (4th Cir. 1969)*, *cert. denied*, ***397 U.S. 920, 25 L. Ed. 2d 101, 90 S. Ct. 928 (1970)***

It appears that IBM's OTC prices for TCMs were not available until late 1983. *See* PX 609; PX 261; PX 269; Smith, Dep. Tr. 158-59. Once established, the OTC prices for 308X upgrade parts typically exceeded the sum of IBM's price for the net priced upgrade and the value of the parts removed from the upgraded machine. Levin, Tr. 89-97; PX 128A-P. For example, in 1983, a 308D machine sold for $ 3 million and a 308K sold for $ 3.6 million. A D to K net priced upgrade sold for $ 600,000. PX 455. The OTC price for the parts required to perform D to K upgrade was $ 4.58 million. *Id*. The price structure encouraged buyers to buy net-priced upgrades rather than the parts alone for installation by third parties, such as AMI. Although the disparity between the OTC parts prices and the prices for net-priced 308X upgrades was not always as great as in the D to K example (especially when the value of the parts removed and returned to IBM is taken into account), *see* PX 456; PX 457; PX 458, and may have allowed for third-party installation in special circumstances, the OTC option was not, on the whole, sufficiently viable to preclude application of the *per se* rule. This does not mean that the OTC pricing structure was itself unreasonable or unlawful. *See infra*, pp. 296-297.

[16] Despite the language contained in *Fortner I*, the Court later observed that the treatment of the law on market power in *Fortner I* was in some ways less "far-reaching" than in *Northern Pacific and United States v. Loew's Inc., 371 U.S. 38, 9 L. Ed. 2d 11, 83*

429 U.S. 610, 620, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977) ("*Fortner II*"), the Court repeated that there is no requirement "that the defendant have a monopoly or even a dominant position throughout the market for a tying product." Instead, the focus of attention is on "whether the seller has the power, within the market of the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *Id*. (footnote omitted). "In short," said the Court, the issue is "whether the seller has some advantage not shared **[**15]** by his competitors in the market for the tying product." *Id*.

In its most recent tying decision, the Court emphasized the importance of proof that the seller has "some special ability - usually called 'market power' - to force a purchaser to do something that he would not do in a competitive market." *Hyde, 466 U.S. at 13-14.* **[**16]** The focus is on the seller's power to "force" or "coerce":

> ***HN6***[] The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

Id. at 12. Proof of a seller's power to force involves proof that the seller enjoys "significant market power", *id. at 26*, or a "dominant market position." *Id. at 27*.

1.

AMI relies in part on evidence of IBM's market share to support its contention that IBM possesses sufficient economic power to compel application of the *per se* rule. ***HN7***[] Market share is calculated by reference to a relevant product and geographic market. [17] Briefly stated, "the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross -- elasticity of demand **[**17]** between the product itself and substitutes for it." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. "The purpose of market definition is to determine whether market power exists"; therefore, "market definitions must account for all factors affecting the ability of the [defendant] to raise prices or restrict competition." *Weiss v. York Hosp., 745 F.2d 786, 826 (3d Cir. 1984)*, *cert. denied*, *470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985)*.

For purposes of determining IBM's economic power with respect to the tying product, AMI defines the relevant market as the market for large scale main frame computers. *E.g*. A.P.F. at para. 251. According to AMI, a large scale main frame computer is one that is, at the time of its introduction into the market place, among the largest in **[*271]** memory capacity, the fastest in computing **[**18]** speed, and the most expensive of computers available. Levin, Tr. 752. Large scale mainframes, says AMI, typically are priced in excess of $ 1.75 million. [18] **[**19]** Levin, Tr. 753. IBM's revenues from the sale of new large scale mainframes (including MES sales) [19] from 1981 to 1985 exceeded $ 16 billion (1981: $ 1.918 billion; 1982: $ 3.07 billion; 1983: $ 3.589 billion; 1984 $ 3.807 billion; 1985: $ 3.666 billion). PX 482; PX 15; PX 48. Based on AMI's definition of what constitute non-IBM large scale main frames [20] and its calculation of the revenues received by firm's selling such products, IBM's share of revenues of all sales

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S. Ct. 97 (1962) (copyright), which could be read to make actual market power irrelevant. *See* *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620 n.13, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)* ("*Fortner II*") (quoting Dam, 1969 Supreme Court Review, 25-26). *Fortner I* did not change the requirement of proof of "market power in the sense of power over price." *Id*.

[17] There is no dispute concerning AMI's definition of the relevant geographic market.

[18] Prior to trial, AMI defined large scale mainframe computers as "electronic data processing systems with a typical systems price in excess of $ 1 million". *See* AMI's Answers to IBM's Third Set of Interrogatories, No. 2 (Dec. 31, 1986).

[19] The MES sales included in the calculation consist of IBM sales of MIPs upgrades (model upgrades), memory upgrades, channel upgrades, and other features. A.P.F. at para. 3, 14. Between 1982 and 1986, IBM's revenues from the sale of 308X MIPS upgrades exceeded $ 2 billion. DX 3001B.

[20] Although AMI includes IBM MES sales in its calculation of IBM large scale mainframe revenues, it does not appear to include non-IBM upgrade sales in the calculation of non-IBM large scale mainframe revenues. If such upgrades are sold by IBM's competitors, it is a mistake to exclude the revenues they generate.

of new large scale mainframes was 70.2% in 1981, 78.0% in 1982, 79.0% in 1983, 78.6% in 1894, and 75.9% in 1985. PX 482; PX 15, PX 48. Also based on AMI's definition of what constitute non-IBM large scale main frames, IBM's share of total shipments of large scale main frames (presumably shipment of MESs is included in IBM figures) was 61.0% in 1981, 70.1% in 1982, 76.0% in 1983, 74.5% in 1984, and 65.0% in 1985. PX 483; PX 15, PX 48.

Standing alone, AMI's market share evidence tends to show that IBM enjoys substantial economic power. However, AMI's definitions of large scale mainframes and the relevant market are flawed in several respects and tend to overstate IBM's market share and power. [21]

[20]** AMI does not expressly include upgrades of large scale main frame computers in its relevant market definition, but does include IBM's revenues from the sale of 308X upgrades in its calculation of IBM's share of the purported relevant market. If it is AMI's contention that upgrades do not belong in the relevant market, then AMI's calculation of IBM's share of the relevant market must be reduced accordingly. However, upgrades of large-scale main frame computers belong in the relevant market. Professor Richard C. Levin, AMI's expert economist, included parts and labor required to upgrade large scale main frame computers in the relevant market consisting of large scale main frame computers. Levin, Tr. 750-51. According to Prof. Levin, the parts and services required for an upgrade, and the upgrade that they together produce, can under certain circumstances be a substitute for a new machine; and "the prices of upgrades are constrained to some extent by the . . . prices of computers themselves." *Id*. If upgrades were excluded from the relevant market definition, AMI would have to be excluded from the market, since AMI does not sell large scale mainframes. *See* Levin, Tr. 792.

[21]** At trial, Prof. Levin acknowledged that the International Data Corporation report on which AMI relied to determine what computers are large scale main frame computers, *see* Levin, Tr. 783, omits "scores, indeed hundreds of computers available in the marketplace today which have as much or more MIP capacity" as some IBM computers which appear in the survey. Levin, Tr. 786-87; 789. AMI's reliance on IBM documents (PX 15; PX 48) also raises doubts concerning the reliability of AMI's market share data, since it is unclear that **[*272]** the documents were intended fully to reflect IBM's competition from other manufacturers of large scale mainframe computers. To the extent that AMI's market share evidence reflects the IDC's classification scheme, such evidence tends to overstate IBM's share of the relevant market because it fails to include non-IBM revenues from products which may fairly be described as large scale mainframe computers.

Even if AMI's market share evidence properly accounted for all sales of new large scale mainframes, a relevant market consisting solely of large scale main frame computers (and upgrades) is unduly narrow for purposes of assessing IBM's economic power **[**22]** and tends to overstate it.

HN8[] Substitutes exist for every product and a relevant market definition "cannot meaningfully encompass that infinite range;" therefore, "the circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times Picayune, 345 U.S. at 612 n.31* (including general and classified newspaper advertising and excluding advertising placed in other communications media in New Orleans). However, it is also improper "to require that products be fungible to be considered in the relevant market." *United States v. E.I. duPont deNemours & Co., 351 U.S. 377, 394, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)* (including cellophane and all flexible wrapping materials in same relevant market in *Section 2* case). The relevant market definition must include all "commodities reasonably interchangeable by consumers for the same purposes. . . ." *Id. at 395*. It must include all producers which "have the ability - actual or potential - to take significant amounts **[**23]** of business away from each other." *Smithkline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3d Cir.)*, *cert. denied*, *439 U.S. 838, 58 L. Ed. 2d 134, 99 S. Ct. 123 (1978)*. Prof. Levin substantially agreed with these statements of the considerations pertinent to market definition, *see* Levin, Tr. 171, and acknowledged

[21] The flaws are discussed more fully below. Here I note only that AMI's market share data are limited to new large scale mainframe sales, whereas AMI's alleged relevant market is not limited to new large scale mainframes. It consists of new as well as used large scale mainframes. IBM's share of sales of new computers only partly reflects IBM's power in a market consisting of all largescale mainframes, including those owned by leasing companies and marketed in competition with IBM.

that products may be in the same relevant market when they are alternatives only "under certain circumstances", or when the pricing of one product constrains the pricing of another only "to some extent." *Id. at 750-51*.

To support its relevant market definition, AMI relies heavily on IBM documents which AMI contends demonstrate that IBM recognizes a separate market for large scale main frame computers. *See* A.M. at 76-77. IBM "Significant Win/Loss Reports" (SWLRs) were monthly reports prepared by IBM's marketing divisions and furnished to IBM's Chairman and members of IBM's Management Committee. Armstrong, Tr. 909-910; Levin, Tr. 756, 800. The SWLRs stated, for each reported competitive situation, the IBM product offering, the competitive product offering(s) faced by IBM, and whether IBM won or lost the sale. Levin, Tr. 756. **[**24]** Prof. Levin examined a sample of SWLRs covering the periods December 1980 through September 1981, April and June 1983, December 1984, January 1985, February 1985, May 1985, and June 1985. *Id. at 759*. For each reported situation in which the IBM product offering was a large scale mainframe (a 3033 product, a 308X product, or MES upgrade of such a product), Prof. Levin classified the reported competitive alternative as a large scale or mid-scale computer, based on the International Data Corporation's "Large Scale Computer Census" classification scheme. *Id at 757-59*. In 281 out of 288 (or 97.6%) reported cases in which the IBM offering was a large scale mainframe, the competitive alternative was also a large scale mainframe or an upgrade to a large scale mainframe. *Id*; PX 480. The competitive alternatives included leasing company placements of new or used large scale mainframes, and leasing company offerings of upgrades or reconfigurations of large scale mainframes. [22]

[25]** **[*273]** The usefulness of IBM's SWLRs and Prof. Levin's analysis of them to support AMI's relevant market definition is limited by several considerations. IBM regarded SWLRs as poor and unrepresentative indicators of actual market activity, and discontinued their use. *See* Armstrong, Tr. 910-13; *see also* Quinlan, Tr. 1050-53, 1057-59; DX 2201. [23] Nevertheless, assuming that SWLRs accurately reflect actual market activity, they show a large number of situations in which non-IBM large scale main frame computers (included by AMI in its relevant market definition) competed with IBM computer offerings which AMI does not include in its market definition. [24] AMI's reliance on only those instances in which the large scale mainframe offering was an IBM computer, rather than a non-IBM computer, is inconsistent with the relevant market definition it advances. Finally, it is worth remembering that ***HN9***[] "it is not the perceptions of manufacturers but those of consumers which are most salient in the determination of market boundaries." *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 30* ***[**26]*** *(3d Cir.) cert. denied, 439 U.S. 876, 58 L. Ed. 2d 190, 99 S. Ct. 214 (1978)* (footnote omitted) (*Section 2*).

The evidence compels **[**27]** the conclusion that AMI's asserted market definition is untenably narrow. AMI improperly excludes from its market definition a host of products which provide reasonable alternatives to purchases of large scale mainframe computers and upgrades and constrain IBM's ability to raise the prices of these products or exclude competition. The result is that IBM's market power is significantly less than AMI contends, even before evidence relevant to assessing IBM's economic power other than demand substitutability evidence is considered.

a.

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[22] AMI relies on other IBM documents also reflecting competitive situations involving IBM offerings of large scale mainframes or upgrades to such computers. Although it is not clear who examined the documents, AMI contends that they yield results consistent with Prof. Levin's conclusions based on IBM SWLRs. *See* A.F. paras. 273-275.

[23] With respect to documents in the preceding footnote, AMI acknowledges that IBM's SWLR's reflect a relatively small percentage of competitive situations. According to the documents, IBM shipped 83 computers per month, and reported 30 situations per month. The documents do not establish the number of competitive situations involving IBM which did not result in a sale and which were not reported. Nor is it clear that every competitive situation which resulted in a sale was reported.

[24] The same is true with respect to the competitive activity AMI asserts is reflected in the numerous IBM documents neither sampled nor discussed by Prof. Levin. It appears that large scale mainframes competed with products outside AMI's market definition in approximately fifteen percent of all competitive instances in which at least one of the offerings was a large scale mainframe.

AMI's proposed market definition fails to account for the competition IBM faces from companies offering large scale main frame computers for lease. AMI acknowledges the presence of such competition, *see* A.P.F. at para. 21 and the evidence cited therein, [25] but fails to incorporate it into the relevant market definition. An economically meaningful market definition must include all the products and services that actually or potentially compete with IBM products in question or constrain IBM's pricing and product decisions. Levin, Tr. 171.

[28]** Leasing companies, such as Comdisco and CMI, purchase computer equipment from manufacturers and lease it to users. From a consumer's standpoint, they are an alternative source of computer equipment. They compete with IBM. *See* Lewis, Tr. 452-3; LaRocca, Tr. 1209; Phillips, Tr. 1586; Pontikes, Dep. Tr. 16; Walker, Dep. Tr. 19-20. Leasing companies own approximately 40 percent of all large scale mainframe computers, as defined by AMI. Levin, Tr. 764-65, 858-9. Prof. Levin testified that IBM's share of the market would be reduced by an amount he was unable to determine if leasing companies were taken into account in AMI's market definition. *See* Levin, Tr. 837-38, 764, 804. If leasing company transactions involving computers comparable and in many cases identical to the large scale mainframes marketed by **[*274]** IBM are included in the relevant market, and the market is measured on a "transaction basis", [26] IBM's share of the market, according to Prof. Almarin Phillips, who testified for IBM as an expert economist, drops to 34.4 percent. Phillips, Tr. 1600-11; DX 1923. Prof. Phillips testified that such a share would not reflect "overwhelming" activity in the market on IBM's **[**29]** part. *Id. at 1611*.

AMI relies on *United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945)* to support its exclusion of leasing companies from the relevant market. *See* A.R.M. at 79-86. In *Alcoa*, upon consideration of the defendant company's market position over a period of years and based on the conclusion that the production of "secondary" ingot was as much within Alcoa's control as the production of the "virgin" ingot from which it was derived, the Court decided to disregard "secondary" competition in its calculation of Alcoa's market share. *148 F.2d at 425*. Unlike the situation in *Alcoa*, there is evidence in this case that leasing companies, which also lease non-IBM equipment, effectively compete with IBM and constrain IBM's ability to set prices or exclude competition in the market **[**30]** for new large scale main frame computers. *See e.g.*, A.P.F. para. 29 and the evidence cited therein. Leasing companies, therefore, properly belong in the relevant market applicable to this litigation. *See ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 428 (N.D. Cal. 1978)*, *aff'd sub nom. Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980)*, *cert. denied*, *452 U.S. 972, 69 L. Ed. 2d 983, 101 S. Ct. 3126 (1981)* ("Memorex II"). [27]

[31]** b.

As shown below, AMI also improperly excluded from its relevant market definition other products and services which offer potential buyers reasonable and viable alternatives to the purchase (or leasing) of large scale mainframe computers or upgrades to such computers. Their availability in the marketplace constrains IBM's power to command noncompetitively high prices and restricts IBM's ability to impose unwanted or burdensome terms on an appreciable number of buyers interested in acquiring computer systems or enhancing the performance of existing computer systems. These alternatives also pressure IBM to keep up with the market's growing technological demands. *See e.g.*, Phillips, Tr. 1585.

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[25] Prof. Levin acknowledged that "leasing companies are competitors of IBM when they market IBM manufactured equipment in competition with IBM." Levin, Tr., 764-65; *see also id. at 758*.

[26] Prof. Levin also has measured market shares on a transaction basis, Levin, Tr. 842-45, which appears to be an acceptable measurement standard. *See* DX 1665 p.3.

[27] Even if leasing companies were to be excluded from the relevant market definition, so that IBM's market share would not decline accordingly, the significant constraints they impose on IBM's market behavior must enter into any proper assessment of the significance of IBM's market share. *See In re IBM Peripheral EDP Devices Antitrust Litigation, 481 F. Supp. 965, 979 (N.D. Cal. 1979)*, *aff'd sub nom. Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377 (9th Cir.)*, *cert. denied*, ***464 U.S. 955, 78 L. Ed. 2d 329, 104 S. Ct. 370 (1983)***.

Thus, AMI incorrectly excluded many smaller capacity computers manufactured both by companies which do and companies which do not also manufacture large scale mainframe computers as defined by AMI. *See* Levin, Tr. 796-800. AMI excludes these products from the relevant market in part because the IDC report on which Prof. Levin relied did not classify them as large scale mainframes, and in part because AMI contends that there is only limited evidence of substitutability between these **[**32]** smaller computers and large scale mainframes. *Id., at 759-60, 782*. For purposes of this action, the reliability of the IDC report is suspect. *See* *supra. p. 271*. The evidence shows sufficient competition between the smaller computers and large scale mainframes to require their inclusion in the relevant market.

At trial, marketing executives and users of complex computer systems acknowledged a trend toward "distributed data processing", in which smaller capacity computers are used in conjunction with or in place of large scale mainframes. Mr. Quinlan, President of IBM's North Central Marketing Division, discussed the increasing phenomenon, perhaps beginning in the 1970's, of "hierarchal systems" and "distributed **[*275]** systems" involving combinations of large computers, smaller computers, and terminals. Quinlan, Tr. 1043-44. Such systems provide alternatives to the acquisition of large scale main frames, as the situation involving J.C. Penney illustrates. *Id*. He also referred to instances in which the smaller computers (which, in fact, tend to be quite large) are "clustered" to look like and perform functions comparable to those performed by IBM's large scale mainframes. **[**33]** He referred to numerous instances (e.g., involving DuPont Research and Carrier Corporation) in which the smaller computers (excluded from AMI's market) competed successfully against IBM large scale mainframes. *Id. at 1050-53, 1058-59*; *see* DX 2201. Mr. Armstrong, IBM's Senior Vice President and Director General of IBM Europe, gave several examples of such competition, including the New York Stock Exchange's replacement of its IBM System 360 Model 50 computer (included in AMI's market) with over 200 Tandem "mini-computers" (excluded from AMI's market). Armstrong, Tr. 897-98. An executive of Core States Financial Corporation testified that his company moved away from using IBM large scale mainframes for at least one application, and opted for a system of multiple computers manufactured by Tamden and not included in AMI's market. Shah, Tr. 1516-20. A Hewlett Packard executive stated that his company's HP 3000 product line of computers (excluded from AMI's market) competes with IBM 308X computers in part because of a trend toward decentralized processing. Ikezoye, Dep. Tr. 4-6. An NCR official expressed a similar view. Nielson, Dep. Tr. 4-5; *see* English, Tr. 1557, 1565 (illustration **[**34]** of trend toward decentralized processing, involving Federal Mogul Corporation); DX 1786. A study entitled "Long Range Computing Strategy Report" prepared for Kent State University by Peat, Marwick, Mitchell and Company in 1984 discussed the "trend away from older, large single processing systems . . . towards systems based on large number of small processors with local intelligence, linked by communications." DX 360, pp. 4-5, 49-52. Kent State's Director of Informations Systems testified that Kent State ultimately replaced a Burroughs model 6812 computer (included in AMI's market) with an IBM 3081D, but not without seriously considering purchasing a system of clustered DEC VAX 11/785 computers (excluded from AMI's market). McKinley, Tr. 1487-90, 1494-90.

There were many instances in which systems of smaller computers provided alternatives to large scale mainframe computers; the instances involved wide-ranging computer applications in different commercial settings. Such competition cannot be considered marginal. IBM considered the competition significant. In 1975, it reviewed one hundred of IBM's largest accounts and concluded that a significant number of customers, "almost two-thirds, **[**35]** were concluding to off-load their systems, their large systems to competitive distributed processing systems," Armstrong, Tr. 887-94; DX 1632, none of which are included in AMI's market. Prof. Levin's assertion that such competition is limited and therefore excludable from the market is unsupported by the record.

The same is true with respect to fault tolerant processing, in which smaller capacity computers are used essentially in parallel to ensure continuous processing capability for applications frequently performed by large scale mainframes. AMI excludes fault tolerant computers from its relevant market on the theory that they occupy a "specialized market nitch." *See* A.P.F. at para. 269; Levin, Tr. 802. The weight of the evidence, however, was to the contrary and compels their inclusion in the market. *See* Shah, Tr. 1517-21, 1524, 1530; Quinlan, Tr. 1055-56, 1059-63.

c.

AMI's relevant market also improperly fails to include peripheral products such as storage devices, input/output devices, disk drives or disk tapes. Storage devices store data for later access by the central processing unit (CPU). Input devices feed data to the CPU; output devices receive or accept data **[**36]** from the CPU. Disk drives and desk tapes may perform all three functions.

[*276] AMI acknowledges that "external data storage devices are in a limited sense technological substitutes for the internal memory of a large scale mainframe." A.P.F. at para. 278. AMI excludes storage devices from the relevant market in part because it contends that they are not economic substitutes in the sense that their prices constrain the pricing power of a hypothetical monopolist of large scale mainframes. Levin, Tr. 761-62. AMI takes substantially the same position with respect to computer software, the programs that enable computer systems to function and perform a variety of tasks, A.P.F. at para. 279, which AMI excludes from the market. AMI's assertions are inconsistent with the evidence. Mr. Beckwith, IBM's Director of Service, testified that IBM always considers the peripheral products offered by competitors when IBM arrives at a "competitive price" for its computers. Beckwith, Tr. 1279-83. Input/output devices particularly are among the various "components" IBM examines to determine the price of its products. *Id*. Competitive software offerings also influenced IBM pricing decisions, **[**37]** Beckwith, Tr. 1279-83, and at least one computer user testified concerning the "trade offs" between software and hardware. McKinley, Tr. 1493.

There is a more fundamental reason for including peripheral products and software (systems software and application software) in the relevant market than the fact that they constrain IBM's pricing decisions with respect to large scale mainframes. As discussed below, peripheral products and software provided significant and reasonable alternatives to a wide variety of upgrades and modifications of large scale mainframes. *See, e.g.*, Staire, Dep. Tr. 19-20; Armstrong, Tr. 876-78. Other such alternatives which AMI's market definition also failed to take into account include smaller computers used to offload applications from large scale mainframes (including computers smaller than those previously discussed); devices for adding memory, speed, or capacity to processors; and computer service bureaus, which are companies providing data processing services to others. Further, AMI's market definition, to the extent that it includes upgrades at all, appears limited to MIPS upgrades. A.P.F. at para. 291. Such a limitation also is unwarranted and **[**38]** inconsistent with the evidence.

According to Charles I. Staire, Consultant to B.F. Goodrich, there are "many different ways," to enhance the performance capabilities of a computer system. Staire, Dep. Tr. 3-4, 19-20. Mr. Armstrong testified that a buyer interested in increasing the capacity of a computer system will consider "all of [the] elements that make up the computer systems in order to determine what is the most efficient way, most economical way to solve his problem." Armstrong, Tr. 876-78. Among the possibilities are increases in the computer's memory capacity and channel speed, and improvements in the computer software or peripheral devices like disk drives or disk tapes. *Id*. Mr. McKinley of Kent State added disk storage and main memory components as an alternative to upgrading the CPU of a 3081D computer. McKinley, Tr. 1500-01. Bipin Shah of Core States Financial Corporation postponed an upgrade or the purchase of a larger computer by improving "inefficiencies in the software," in communications, and in disk drive utilization. Shah, Tr. 1523. Thomas English of Federal Mogul testified that his company has "upgraded the CPUs from one model to the next, but usually **[**39]** before [the company] get[s] to that it's a memory upgrade, it is adding channels, it is adding other I/O [input/output] devices, disk, tape, so forth." English, Tr. 1565-66. Gary Smith of CMI testified that alternatives to upgrading a computer, in the sense of adding a MIPS upgrade, include replacing the computer, adding a second computer, adding additional memory, adding additional I/O devices, and off-loading work to other computer systems including those operated by service bureaus. Smith, Tr. 605-06. Robert Van Hellemont of Thomson McKinnon Securities stated that, "rather than upgrading," a user can "add increased memory," add "increased discs or tape storage," offload "application to service [bureaus]", or offload "applications onto some number of other smaller computer systems." Van **[*277]** Hellemont, Dep. Tr. 7, 76-79. Numerous other witnesses testified similarly. Harry Myland, one of the founders of AMI, acknowledged that a user "has a variety of options" to upgrading a CPU, including "memory upgrades or feature designs," "channel adds," and "internal speed improvements." Myland, Dep. Tr. 62, 187. Such components, enhancements, and available services permit users **[**40]** at least to postpone buying upgrades of CPUs or larger (new or used) computers for a significant period of time. Phillips, Tr. 1587. A market definition which ignores such competition is unrealistic.

d.

A box swap, which typically refers to the purchase of a new machine and the sale of an old one, is the "functional" and physical equivalent of an upgrade. *See* Levin, Tr. 170-72, 766. Box swaps can also be performed with used machines; for example, with machines owned by leasing companies. Allen, Dep. Tr. 59-60; Myland, Dep. Tr. 189-90; Van Hellemont, Dep. Tr. 76-77. Users seek box swaps or upgrades at roughly the same time in the life cycles of computers actually in place. *See* Lewis, Tr. 1718-19, 1727-28. Although AMI has shown that a box swap is not an alternative to a 3081K to 8084Q upgrade, box swaps are viable alternatives to most MIPs upgrades and should therefore be included in the relevant market definition. [28]

[41]** e.

Upgrades using parts provided by the customer, or by a leasing company from a machine of one of its lessees, also provide computer users with important alternatives to new upgrades or new machines. *See* Levin, Tr. 744-45. At his deposition, Mr. Allen acknowledged that the existence of 308X donor parts impacted on a user's decision to purchase new upgrades from IBM. Allen, Dep. Tr. 964. As with box swaps, upgrades using parts taken from other machines may yield physically and functionally identical results to the purchases of new upgrades. Levin, Tr. 171, 182-83. The viability of used-parts upgrades as an alternative to upgrades performed with new parts may be limited, in practical terms, by the relative scarcity of necessary used parts, especially those needed for MIPs upgrades. Levin, Tr. 110-12; Allen, Tr. 339-40. However, the evidence does not support their total exclusion. [29] *See, e.g*., Levin, Tr. 182-83. For example, between 1983 and 1986, AMI performed 237 (out of 244) 308X memory upgrades or downgrades, and 137 (out of 138) 308X channel upgrades or downgrades, with parts removed from and reinstalled on existing equipment. *See* DX 1363, pp. 8792-94, 9276-78; **[**42]** 8977; DX 1894D; DX 1894 B; DX 1894C; DX 1363, pp. 8543-44; DX 1895C. CMI also goes into the "user community" to purchase "memory, features, machines, and upgrades". Loria, Dep. Tr. 228-29; *see also* Nolin, Dep. Tr. 85-86 (AMI); LaRocca, Tr. 1165-67 (UCS).

f.

IBM's market share declines steeply from the figure suggested by AMI if the relevant market definition is expanded, as the evidence requires, to include (at least to some extent) leasing companies, smaller capacity computers, peripheral products (storage devices, input-output devices, etc.), **[**43]** memory upgrades, channel upgrades, software, and service bureaus. Prof. Phillips, IBM's market expert, while not attempting to measure IBM's share of a strictly defined market, *see* Phillips, Tr. 1594-95, established that IBM accounted for: 20.3 percent of the "value of shipments of [electronic data processing] products worldwide from U.S. plants plus software and service revenues"; 30.8 percent of 1984-1985 **[*278]** "shipments of general purpose digital computers with the unit value" exceeding $ 250,000 (recorded at FOB platform; the actual installed retail price of such computers exceeded $ 1 million); and 32.2 percent of the "data processing revenues from the top one hundred firms who [had] data processing revenue" for 1984 and 1985. [30] Phillips, Tr. 1596-1600; DX 1749, DX 1751; DX 1753. AMI did not attempt to measure IBM's share of any market other than the untenably narrow relevant market it advanced at trial. Although market share is

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[28] Prof. Levin acknowledged that box swaps can under certain circumstances be alternatives to upgrades, Levin, Tr. 182, and appeared to include box swaps in the relevant market. Levin, Tr. 766. *But see* *Id. at 743-49*. AMI excludes box swaps.

[29] Including used-part upgrades and service bureaus, and to a lesser extent, box swaps, in the relevant market may raise analytical problems similar to those involved in the decision to include leasing companies in the market. *See* *Transamerica, 481 F. Supp. at 979*. As with leasing companies, I find that a meaningful market analysis must take these alternatives into account, whether or not they are included in the relevant market definition.

[30] Prof. Phillips' figures tend to understate IBM's market share to the extent that he includes competition from maintenance companies, which IBM contends belong in the relevant market, I.P.F. at para. 103, and AMI correctly excludes. The figures tend to overstate IBM's market share to the extent that, in DX 1749, they fail to reflect revenues from leasing companies. *See* Phillips, Tr. 1597-98. Prof. Phillips offered no opinion concerning the proper definition of the relevant market. Phillips, Tr. 1584, 1594.

but one measure of a firm's economic power and should be considered in light of other market factors, it seems clear that market shares in the range suggested by Prof. Phillips do not support a finding that a company possesses sufficient **[**44]** economic power to apply the *per se* rule against tying arrangements. *E.g., Hyde, 466 U.S. at 26-27* & n.43 (30 percent share in market for tying product not enough to constitute market power); *Times Picayune, 345 U.S. at 611-13* (30 to 40 percent not enough); *Ball Memorial Hosp., Inc. v. Mutual Hospital Ins. Inc., 784 F.2d 1325, 1330-31, 1334-37 (7th Cir. 1986)* (over 50 percent not enough).

2.

The analysis so far has focused on what may be described **[**45]** as demand substitutability or cross-elasticity. A thorough analysis of a firm's economic power also takes into account such considerations as: supply substitutability; other aspects of market structure, general market performance; and the market performance of the defendant company. An examination of important market and industry characteristics further supports the conclusion that IBM lacks the requisite economic power.

HN10[] The absence of significant entry barriers in a given market or industry suggests that firms operating in the market or industry lack market power, even when they enjoy appreciable market shares. *See, e.g. United States v. Waste Management, Inc., 743 F.2d 976, 983-84 (2d Cir. 1984)*; *Ball Memorial Hosp., 784 F.2d at 1335*. [31] Conversely, "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." [32] *In re IBM Peripheral, 481 F. Supp. at 976* (footnote omitted). The evidence established substantial entry [33] and **[**46]** growth of competition in the data processing industry embraced by the correctly defined relevant market.

A number **[**47]** of companies other than IBM manufacture a wide range of computers having the processing power of IBM large scale mainframe computers. Several of these (including Digital Equipment Corporation, Data General, Hewlett Packard, Tandem, and NCR) were admittedly excluded from the report upon which Prof. Levin relied to determine what constitute large scale mainframes. *See* Levin, Tr. 786-87, 789; 796-800. AMI has not offered evidence of the market shares any of these individual competitors enjoy.

[*279] The number of computer leasing companies competing with IBM in the market for large scale mainframes has grown during recent years. Kenneth Pontikes, a founder of Comdisco, one of the world's largest leasing companies, [34] Robertson, Tr. 707, testified that there were over 500 leasing companies in operation in 1986, Pontikes, Dep. Tr. 17, up from only about a "handful" in 1970. *See* DX 2168, p.7. The comparable growth of the Computer Dealers and Lessors Association supports Mr. Pontikes' assertion. *See* DX 2168, p. 7; LaRocca, Tr. 1207. Comdisco enjoyed considerable growth between fiscal years 1982 and 1986, when it reported a net profit of $ 79 million on revenues totaling **[**48]** $ 902 million (Comdisco reported net profits of $ 29 million on revenues of $ 415 million for fiscal year 1982). Pontikes, Dep. Tr. 6-7. CMI, another major leasing company, reported revenues of $ 140 million for 1982, and $ 284.7 million for 1985. DX 1073, p., 4; DX 2168, p. 21; Smith, Dep. Tr. 187-88; DX 1071 p. 6.

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[31] Prof. Phillips testified that "even if a firm had 100 percent of the market today, if there aren't any impediments to entry, that would effectively preclude that firm from having market power." Phillips, Tr. 1577-78. I do not need to evaluate this opinion.

[32] I agree with AMI that "the capacity 'to force' [for purposes of invoking the *per se* rule against tying] does not require the existence of monopoly power in a defined relevant market." A.M. at 36; *see* *supra, p. 270*. The market and industry characteristics I examine here are indicia of market power in general, not just monopoly power. *See, e.g.*, Phillips, Tr. 1577-1600.

[33] There is evidence of firms departing the market as well, in part reflecting the rapid technological developments taking place in the market: "As [technology] provides a new opportunity, it usually forecloses an old one." Phillips, Tr. 1581-82.

[34] In terms of IBM list price, Comdisco owns approximately $ 7 billion in IBM equipment. Pontikes, Dep. Tr. 11. Comdisco has a larger inventory of 308X computers than it ever had of 303X computers. *Id*.

The number of companies, like AMI, engaged in the business of converting and modifying computer equipment also has grown in recent years. AMI itself illustrates the relative ease of entry into the field. It was formed in 1973 with an initial investment of $ 1,500. Allen, Dep. Tr. 216-18; Ade, Dep. Tr. 92; Myland, Dep. Tr. 4, 63. AMI reported earnings of $ 15 million for the period 1973 to 1981, and over $ 53 million in the time period covered by the complaint. *See* DX 1821A. In 1984, AMI employed **[**49]** approximately 30 "field engineers", [35] **[**50]** DX 1922, and declined an acquisition offer by CMI for $ 20-$ 30 million. Myland, Dep. Tr. 440-46. UCS, which engaged in the conversion and modification of computer equipment, was founded in 1972 by five persons and an initial capitalization of a "couple [of] thousand dollars." LaRocca, Tr. 1161-64, 1168-75. In 1985, TRW, Inc. acquired UCS for $ 7.5 million up front plus a contingency payment estimated in excess of $ 3 million over a three-year period. *Id*. at 1177-79. UCS's business experienced its greatest growth and success during the time period covered by AMI's complaint. [36] *Id.; see also* Harnett, Tr. 1750-51.

3.

The characteristics of the data processing industry and IBM's market performance also undermine AMI's contention that IBM possesses the economic power necessary to impose *per se* liability. ***HN11***[] Technological progress or innovation in an industry generally reflects the presence of economic competition in the market, and is generally inconsistent with the wielding of undue economic power by a firm or group of firms in the industry. *See, e.g., Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488, 497 (9th Cir. 1977)*, *cert. denied*, *434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 (1978)*. The data processing industry has enjoyed impressive technological growth in recent years. "Enormous technological change in computer hardware has occurred in recent years . . . and **[**51]** customers are now able to obtain substantially increased computer power at less cost than was ever possible before." DX 360, p. 10; *see also*, DX 380, p. 21. In a 1986 report, Burroughs, a company which competes with IBM, *see* A.P.F. at para. 283, characterized the "information systems industry" as "highly competitive" and observed that competition **[*280]** in recent years has "intensified as the members of the industry, including many new competitors, have increased the number of products offered." PX 188, p. 5. [37] Control Data Corporation, which also competes with IBM, *see* A.P.F. at para. 281, reported in 1986 that "the market for general purpose electronic digital computer systems [was] highly competitive," PX 245, p. 3, and that "rapid technological change in the computer industry [had] intensified in recent years as a result of shortened product life cycles and increasing foreign and domestic competition." *Id. at 5*.

[52]** IBM has contributed greatly to the rapid rate of technological innovation in the industry. Prof. Levin acknowledged that "IBM's success in the data processing industry is attributable in part to its role as one of the leading innovators in [the] economy." Levin, Tr. 866. IBM's development of the TCM technology central to this litigation provides a good illustration. IBM spent over a billion dollars and over one thousand man-years of labor to develop the TCM and TCM board. [38] Toole, Tr. 1008. As Prof. William J. Baumol, who testified as an expert economist for IBM, said, IBM's development of the TCM technology was "forced by market pressures, which were demanding quicker, easier, simpler, more reliable installation, which competitors were approximating at the very same time and which IBM was forced to do." Baumol, Tr. 1658-59.

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[35] The level of employee skill required for a firm to compete successfully is a relevant entry barrier consideration. *See Transamerica, 481 F. Supp. at 976*. According to Mr. Chisholm of AMI, anyone capable of doing "field-engineering" type work is capable of doing "installation, discontinuance, upgrades and refurbishment." Chisholm, Dep. Tr. 44. Mr. Myland of AMI testified that "anyone with a knowledge a little over basic doorbell circuitry . . . can do feature enhancement, modification, and additions on IBM equipment." Myland, Dep. Tr. 59.

[36] A survey conducted on IBM's behalf concluded that the number of companies engaged in "conversion, upgrade, downgrade activity" grew from 10 in 1970 to nearly 100 in 1985. *See* Phillips, Tr. 1589.

[37] While recognizing the presence of competition in the industry, Burroughs described IBM as the "dominant competitor". *Id*.

[38] IBM's research and development expenditures for 1982-1985 totalled $ 15.5 billion and consumed approximately 9 percent of IBM's gross income over that period of time. DX 1924.

[53]** IBM's price/performance improvement record also reflects the presence of strong competitive forces in the relevant market. In 1952, IBM announced its 701 computer, which had a price-performance measurement of.02 MIPs per $ 1,000,000. In 1981, IBM announced its 3081K, which employed TCM technology and had a price/performance ratio of 3.1 MIPS per $ 1,000,000 - an increase of over 1500 percent. Granito, Tr. 939-40; DX 1793; *see also* DX 2021. The 3081K computer represented an increase of more than 120 percent over IBM's 303U computer, announced four years earlier. *See* DX 1793. Further, IBM's computers were priced with sensitivity toward the "competitive environment" in which the company operated. Ross, Tr. 1364, 1390-91 Prof. Levin acknowledged that one measure of market power is a firm's ability "to move the price [of its products] around without constraint from products outside the market." [39] Levin, Tr. 781-82. IBM lacked such power.

[54]** 4.

AMI's contention that IBM possesses sufficient power to justify *per se* condemnation of IBM's net pricing policy relies heavily on the asserted "uniqueness" of the TCM technology incorporated into the 308X (and 3090) product line. [40] ***HN12***[] Even **[*281]** absent a showing of market dominance, the requisite economic power may, under special circumstances, be inferred from the desirability or uniqueness of the tying product. *See, e.g., United States v. Loew's, 371 U.S. 38, 45, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*.

[55]** IBM obtained a patent for its TCM technology in 1976. PX 598; Granito, Tr. 978-79. TCMs are the "building blocks" or "brains" of the 308X and 3090 computers. Pontikes, Dep. Tr. 29-30; Allen, Dep. Tr. 373-75. They are the critical components of the computer hardware needed to perform 308X upgrades (especially MIPs upgrades); that is, they are the critical components of the alleged tying product. According to AMI, "the uniqueness and sufficiency of economic power of the tying product, parts (TCMs) for net priced 308X MIPS upgrades, are independently established by the existence of patented TCM technology." A.M. at 40.

Contrary to AMI's assertion, ***HN14***[] neither the uniqueness of a product nor the fact that it is patented alone establishes the requisite economic power. *Hyde, 466 U.S. at 37 n. 7* (O'Connor, J., concurring) ("A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power.") At least one Court has rejected "any absolute presumption of market power for **[**56]** copyright or patented product. . . ." [41] *A.I. Root Co. v. Computer Dynamics, Inc., 806 F.2d 673, 676 (6th Cir. 1986)*. *But see Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1340 n.4 (9th Cir. 1984)* ("When the tying product is patented or copyrighted . . . sufficiency of economic power is presumed."), *cert. denied*, *473 U.S. 908, 87 L. Ed. 2d 657, 105 S. Ct. 3534 (1985)*. [42]. "[A] patent holder has no market power in any

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[39] Prof. Levin asserted that another measure of a firm's market power is its rate of return, measured on a stock market valuation basis. Levin, Tr. 860-61. Courts have relied on evidence of a defendant's profit record on the theory that persistent excess profits are inconsistent with market competition. *See, e.g., duPont, 351 U.S. at 404*. The evidence concerning IBM's rate of return on stock to stockholders does not warrant the conclusion that IBM possesses market power. *Compare* DX 1215 (IBM) *with* DX 1352 (AMI).

[40] AMI also relies on the fact that large numbers of customers have accepted the tie. *See* A.M. at 40. This argument requires proof that, at least as to an appreciable number of buyers in the relevant market, net pricing imposed an unwanted or burdensome condition of sale. *See Fortner I, 344 U.S. at 503-04*. As AMI acknowledges, the argument also requires evidence that "no factor other than the economic power of the seller explains this acceptance." A.M. at 35; *see Fortner II, 429 U.S. at 618 n.10*; *see also Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1225 (3d Cir.) cert. denied*, ***429 U.S. 823, 50 L. Ed. 2d 84, 97 S. Ct. 74 (1976)*** (proof ***HN13***[] of acceptance of a burdensome or uneconomic offer of a "tied" product is some evidence of coercion, but such proof alone does not establish, prima facie, the coercion element of a tying claim.) Accepting the continued viability of the reasoning in *Fortner I*, AMI's argument fails for lack of evidentiary support, as is discussed below. *See infra* pp. 291-292.

[41] At most, a patent is prima facie evidence of the necessary market power. *See Times-Picayune, 345 U.S. at 611 n.30*, quoting *Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 307, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)*. *But see Hyde 466 U.S. at 37 n.7*. Countervailing evidence must be considered.

relevant sense if there are close substitutes for the patented product." *Hyde, 466 U.S. at 37 n.7* (O'Connor, J., concurring); *see also* *Northern Pacific, 356 U.S. at 10 n.8* ("Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity.") Similarly, one Court has held that "factual uniqueness" is insufficient as a matter of law to establish market power. *Will, 776 F.2d at 672*; *accord, Fortner I, 394 U.S. at 505 n.2* ("Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves."); *see also* *Fortner II, 429 U.S. at 620-21* **[**57]** (the kind of uniqueness considered relevant in tying product cases requires proof that the seller possesses some special "advantage not shared by his competitors"). If competitors can design and offer a package similar to defendant's product for a similar cost, there is no barrier and no market power, and hence no special advantage for purposes of establishing "uniqueness". *Will, 776 F.2d at 673*.

[58]** IBM freely licenses its TCM patent. *See* Granito, Tr. 987. Further, the great majority of TCM's are owned and controlled by the leasing companies, which compete with IBM and which own 90 percent of all 308X machines sold by IBM. *See* DX 1847; PX 25. AMI and other companies engaged in the business of upgrading IBM 308X computers use TCMs owned by the leasing companies to perform conversion and modifications. Companies **[*282]** such as Amdahl, Burroughs, Cray, CDC, and others, which AMI acknowledges compete with IBM in its narrowly defined market for large scale mainframe computers, *see, e.g.*, A.P.F. at paras. 273-64, presumably manufacture computer parts comparable to IBM's TCMs in terms of price and processing power. Even if no such comparable products exist, AMI has not shown that IBM's competitors are somehow prevented from developing products to rival the TCM.

I conclude that the factual uniqueness of IBM's TCMs, which admittedly represent a major technological advance and reflect the increasing demand for technological innovation in the data processing industry, does not warrant an inference that IBM possesses sufficient economic power to impose *per se* liability. **[**59]** The inference of market power is especially unwarranted where IBM's share of the relevant market is not exceptionally high and other market factors suggest the presence of economic competition in the field.

B.

"Within [***HN15***[]] a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. AMI also seeks to establish the requisite economic power by reference to a relevant submarket comprised of the parts and services required for the conversion and upgrade of large-scale mainframe computers. [43] A.P.F. at para. 285.

[60]** ***HN16***[] The boundaries of a relevant 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,

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[42] The court in *Digidyne* also stated that the requisite economic power may be inferred from the tying product's uniqueness, and that, therefore, "it should seldom be necessary in a tie-in sale case [involving a unique product] to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market." *Id. Digidyne* has been criticized on several grounds, *see e.g., Data General Corp. v. Digidyne Corp., 473 U.S. 908, 87 L. Ed. 2d 657, 105 S. Ct. 3534* (White, J., dissenting from denial of certiorari); *Will, 776 F.2d at 673 n.4*, and I decline to follow it.

[43] AMI also refers to a submarket consisting of upgrades and modifications of IBM large scale mainframe computers. *See* A.M. at 57, 81. A submarket definition limited to IBM's own product line is untenable. Prof. Levin denied the existence of such a submarket. Levin, Tr. 772-74. Courts have generally rejected market definitions limited to the defendant's products. *See, e.g., Seidenstein v. National Medical Enterprises Inc., 769 F.2d 1100, 1106 (5th Cir. 1985)*; *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 488 (5th Cir. 1984)*; *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 117-18 (3d Cir. 1980)*, *cert. denied*, ***451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)***; *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1349 (3d Cir. 1975)*. Further, the facts of this case do not support a conclusion contrary to the general rule, as my discussion of AMI's proffered submarket definition shows.

and specialized vendors." *Brown Shoe, 370 U.S. at 325*. The evidence precludes a finding that parts and services required for the conversion and upgrade of large mainframes constitute a submarket distinct from the market consisting of large scale mainframe computers. [44]

There was considerable evidence of competition between, and cross-elasticity of demand for, upgrades and a variety of products, including the large scale mainframes themselves. *See supra pp.* ***[**61]*** *271-277*. For example, Mr. Chisholm of AMI acknowledged that, "as a general matter, a new box is an alternative to an upgrade. . . ." Chisholm, Dep. Tr. 34. Upgrades and large scale mainframes are reasonable alternatives serving similar data processing needs. The price-sensitivity evidence is especially important. [45] Upgrade prices constrain the prices of new large scale processors; IBM set its net upgrade prices to equal the price differentials of its 308X computers so that customers would not buy one product at the exclusion of the other. *See e.g., supra* note 15; DX 1861; *see also* Levin, Tr. 163-64. Finally, IBM upgrades and mainframes are built at the same manufacturing plants and are generally **[*283]** installed by comparably skilled engineers.

[62]** AMI's evidence of IBM's economic power within the alleged submarket also is inadequate. AMI asserts that IBM possesses power in the relevant submarket because IBM performed 2,070 308X MIPs upgrades (of which 1,874 were net-priced), while AMI performed only 16 (of which 11 were equivalent to IBM net-priced upgrades). A.P.F. at para. 299; *see also* PX 465; Levin, Tr. 110-11. Were there proof of the existence of a relevant submarket consisting solely of upgrades and conversions, or especially of a submarket comprised exclusively of upgrades and conversions of IBM computers, then such evidence might support the inference of power AMI seeks to draw. However, AMI has failed to establish the existence of the prerequisite submarket.

C.

There are separate grounds for concluding that *per se* condemnation of net pricing is unwarranted. The amount and value of labor involved in performing 308X MIPS upgrades is insignificant compared to the value of the requisite upgrade parts. As a result, AMI has not been foreclosed from a viable business opportunity by IBM's policy.

1.

A major design objective for the TCM and TCM board technology (the TCMs are plugged into the TCM board) was to enable **[**63]** alterations to 380X computers to be performed relatively quickly and with little labor. Granito, Tr. 925-27, 950, 979-81. There is ample evidence that IBM attained the desired result. The TCM technology allowed 308X upgrades to be performed considerably faster, with fewer parts involved, and with less risk of malfunctions than was possible with previous technologies, including the technology embodied in IBM's 303X product line. *See* Granito, Tr. 951-57; Brong, Dep. Tr. 80; Broomall, Dep. Tr. 68; Morrow, Dep. Tr. 163-65. For example, the labor required to add 1.1 MIPS to a 3033S processor (to convert it to a 3033N) was up to 20 times greater than the labor required to add 2 MIPS to a 3083E processor (to convert it to a 3083B). *See* Chisholm, Dep. Tr. 62-68; DX 1799.

The resulting and dramatic decline in the amount and value of labor required to perform 308X upgrades has redefined the niche in the computer market occupied by AMI. This decline has eliminated business opportunities once available. By itself, such a result does not offend the antitrust laws. ***HN17***[] The antitrust laws were enacted **[**64]** for "the protection of competition, not competitors." [46] *Brown Shoe, 370 U.S. at 320*. The value of the labor content of 308X MIPS upgrades is de minimus for antitrust purposes.

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[44] Prof. Levin failed to recognize a distinction between a market consisting of conversions and upgrades of large scale mainframes, and a market comprised of the large scale computers themselves. Levin, Tr. 774-76.

[45] In *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 28 (3d Cir.)*, *cert. denied*, ***439 U.S. 876, 58 L. Ed. 2d 190, 99 S. Ct. 214 (1978)*** upon which AMI relies, evidence that price differentials did not significantly impact on customer preferences supported the argument that distinct submarkets existed.

[46] *See also ILC Peripherals v. International Business Machines Corp. (Memorex I), 448 F. Supp. 228, 233* ("Just as buggy whip manufacturers had to face the fact that the invention of the automobile meant the end of their market as they had known it, this

IBM's Director of Finance, Alan Ross, prepared a chart setting forth, among other things, IBM's calculations of the value of the labor content of all 308X MIPS upgrades performed during the years relevant to the complaint. *See* DX 1805A. Mr. Ross used 1985 MES prices and the 1985 hourly rate for field installation labor. Based **[**65]** on Mr. Ross's calculations, the value of the labor content of the upgrades averaged 1.2 percent of the net MES price. *See* DX 3001. With respect to all but the D to K upgrade, the value of the labor content equalled or was less than 1.2 percent of the net price of the MES. [47] *Id*.

At his deposition, Larry Allen, AMI's President, stated that if IBM sold the parts required for an E to B upgrade for $ 417,600 (*i.e*., at a price reflecting a reduction of $ 2,400 from the net MES price of $ 420,000, to account for the value of IBM labor not **[*284]** provided), it would not present AMI with a viable opportunity to compete with IBM. Allen, Dep. Tr. 938-39; *see also* Allen, Tr. 371. AMI would not be able to compete with IBM if the value of the labor content of the E to B upgrade were.6 percent **[**66]** of the net MES price for the upgrade. *See also* Allen, Dep. Tr. 968-69 (B to K upgrade). Nor would AMI, according to Mr. Allen, be able to compete with IBM if the value of the labor content of a 308X MIPS upgrade equalled.9 percent of the net upgrade price. Allen, Dep. Tr. 968 (B to J upgrade); Allen, Tr. 372. Contrary to his deposition testimony, Mr. Allen stated at trial that the same parts prices and labor content figures would, in fact, present AMI with a viable business opportunity. *See* Allen, Tr. 369-372. I regard Mr. Allen's trial testimony on this subject as hyperbolic. I credit his deposition testimony, and not his trial testimony.

At trial, Mr. Allen also testified that AMI would be presented with a viable business opportunity if it were able to buy 308X MIPS upgrade parts from IBM without IBM labor included at prices reflecting a labor content value equal to 1.2 percent of the net MES price. Allen, Tr. 373-74. Mr. Allen's testimony contradicted his earlier statement that no service organization, including AMI, could survive on a 1.87 percent return on its investment in parts needed to perform upgrades. *See* DX 2066. [48] **[**68]** I do not credit Mr. Allen's testimony **[**67]** that AMI could survive on a 1.2 percent rate of return on its investment in upgrade parts. *See also infra* note 68. There was no other evidence that AMI could survive on such a rate of return. [49] If AMI were to buy the upgrade parts from IBM at IBM's "MES price without labor" [50] (*see* DX 1805A, Column 6), it would not, on the whole, be able to perform the upgrades and charge customers what IBM charges for the same upgrades on a net price basis and still recover what AMI would regard as an acceptable profit. [51]

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new disk storage technology will have a serious impact on the market for customer-removable disk products. However, the antitrust laws were not designed to insure the maintenance of the status quo for any competitor.")

[47] The value of the labor content also exceeded 1.2 percent of the value of the net priced MES with respect to the CX to EX upgrade, *see* DX 3001, but the number of such upgrades performed (2)is insignificant.

[48] In July, 1984, during settlement discussions, AMI declined IBM's offer to sell AMI 308X upgrade parts without IBM labor included at prices below IBM's net MES prices. Mr. Allen wrote: "On 3081 quantities ordered on your contract as presented, AMI would spend over three million dollars. Our maximum return on this purchase would be $ 65,000. That makes a 1.87 percent return on our investment. I am quite confident that no service organization can survive on that profit margin." DX 2066; *see* Allen, Tr. 374-75. DX 2066 is admissible for impeachment purposes under *Fed. R. Evid. 408*. *See, e.g., Reichenbach v. Smith, 528 F.2d 1072, 1075 (5th Cir. 1976)* ("Rule ***HN18***[] 408 codifies a trend in case law that permits cross-examination concerning a settlement for purpose of impeachment."); *Stainton v. Tarantino, 637 F. Supp. 1051, 1080-82 (E.D. Pa. 1986)*.

[49] At his deposition, Mr. Allen asserted that he could not state what AMI would regard as an acceptable rate of return on its investment in parts. *See* Allen, Tr. 378-79.

[50] Such prices are lower than IBM's net MES prices, against which Mr. Ross's labor content percentages are calculated. Thus, the figures in DX 1805A, Column 7, slightly understate what AMI's rate of return would be if it bought IBM parts at the SWRPQ price and installed upgrades at prices charged by IBM for net priced upgrades.

[51] I reach this conclusion, and my final decision, without consideration of DX 2069 and AMI's response thereto. However, I note that, on October 10, 1985, AMI rejected IBM's settlement offer to sell AMI numerous net priced MESs without IBM labor included at prices consistent with Mr. Ross's calculations. *See* A.P.F. at paras. 310, 312; DX 2069. Although *Fed. R. Evid. 408* limits the

[69]** Were IBM required to price and sell 308X upgrade parts and labor separately, it would not be required to sell the parts at a price lower than the difference between the MES net prices and Mr. Ross's figures for the value of the labor content of 308X upgrades, provided that Mr. Ross's calculations allow IBM to recover its direct and indirect labor costs, plus a reasonable profit. [52] IBM 308X upgrade parts sold at such prices would not present AMI with a viable **[*285]** business opportunity. Unless Mr. Ross's estimates are unduly low, AMI has not been forceclosed from a viable business opportunity as a result of net pricing.

AMI argues that "the labor content **[**70]** of net priced MIPs upgrades, as estimated by IBM, is significantly understated," A.T.M. at 46, and that IBM's estimated value of the labor content is "unrealistically low." *Id. at 47*. [53] Of course, where two products are sold only as a package, it is difficult to ascertain the true cost of either. *See* *Hyde, 466 U.S. at 15*.

a.

Mr. Ross's figures are based on the pricing methodology that is used by IBM to determine its SWRPQ prices for memory and model upgrades. Ross, Tr. 1369, 1381-82; *see also* Granito, Tr. 984; Beckwith, Tr. 1284-96, 1298, 1358. IBM sells the J to K MIPS upgrade (which does not require the removal of TCMs) optionally on an SWRPQ basis at the price listed on Mr. **[**71]** Ross's chart. It is IBM's actual SWRPQ price. IBM used the same method to determine the value of the labor component of the other MESs which IBM sells only on a net priced basis. *See* Ross, Tr. 1881-82. Thus, although the calculations for upgrades other than the J to K upgrade were made for trial purposes, the methodology employed was not. As Mr. Ross's chart explains, the labor content of every MIPS upgrade is determined by: 1) taking the average installation hours for each upgrade from IBM's field service cost estimates; 2) multiplying those hours by the 1985 field installation rate for IBM labor; 3) adding 7 percent for travel time and 10 percent for contingency; and 4) subtracting $ 100 for handling. *See* Ross, Tr. 1378-79, 1381-83, 1396-97; DX 1805A; DX 2215.

As AMI contends, IBM's figures underestimate the value of the alleged tied product because Mr. Ross's estimates account only for field installation labor. AMI's definition of the tied product includes all engineering labor required to perform the upgrade, including the engineering services performed prior to the installation of the upgrade. The fabrication work not taken into account by Mr. Ross's estimates includes **[**72]** planning (e.g., determining the computer's E.C. level) [54] and diagnostic work, and the revision of the (upgraded) computer's microcode. [55] Levin, Tr. 64-66. Fabrication work may require a different degree of skilled labor than is required by field installation work. *See* Gibson, Dep. Tr. 333-34; Beckwith, Tr. 1316-17.

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admissibility of evidence of settlement discussions, AMI included the fact that it declined IBM's 1985 settlement offer in its Proposed Findings of Fact and, thus, may have waived any objection to its admissibility.

[52] Prof. Levin acknowledged that, if IBM's labor content figures enable IBM to recover all costs associated with the properly defined service component of upgrades, plus a profit, then IBM would be under no obligation to set its prices at a level at which AMI could earn a profit. Levin, Tr. 218-19; *see also* Baumol, Tr. 1697; Ross, Tr. 1398-99.

[53] AMI does not assert that IBM's labor component prices are "predatory"; *i.e.*, below cost. AMI suggests, however, that IBM transfers profits from its sale of the parts required to perform upgrades to its sale of the labor services involved. A.R.M. at 39. There is no evidence to support this assertion.

[54] The EC (engineering change) level of a machine must be determined before building the upgrade. The EC levels of machines may differ even within the same model. *See* Allen, Tr. 251-52. IBM installs ECs at no charge to the customer. Granito, Tr. 963-65.

[55] Microcode contains programs which support each configuration of a 308X computer and control various computer functions. Allen, Tr. 251-52; Zartler, Dep. Tr. 63. In order to reconfigure a 308X computer, it is necessary to modify the machine's microcode. *See* Allen, Tr. 251-53, 267-70. Such modification may involve the alteration of one to sixty microcode diskettes. *Id. at 252-53, 268-69*.

Although the amount and quality **[**73]** of fabrication work needed to perform 308X upgrades is relatively small and considerably less than it was with respect to prior technologies as a result of the TCM technology and the automated Machine Level Control System, *see* Ross, Tr. 1384-85; Bigando, Tr. 1236-39; Granito, Tr. 961-62, 976-77; Beckwith, Tr. 1285, 1300-01, 1316-17, an adjustment must be made to Mr. Ross's figures to account for the work. [56] (I discuss the necessary adjustments below. *See infra* p. 287). Otherwise, and except for what AMI calls the "IBM test", which IBM does not do, IBM's estimate of the labor component of 308X upgrades, reflected in Mr. Ross's calculations, includes all the activities which AMI asserts are **[*286]** necessary to perform the upgrade. *See* Beckwith, Tr. 1292-94. [57]

[74]** AMI also contends that the hourly rate contained in Mr. Ross's estimates understates the actual value of the labor ("installation" and "fabrication") required to perform upgrades, in part because the $ 165/hr rate reflects IBM's standard hourly rate for maintenance services (on a time and materials basis) and not the rate IBM used when it performed upgrades on an RPQ basis. A.M. at 47; *see* Lewis, Tr. 499-500. AMI ignores the fact that the hourly rate used by Mr. Ross was the rate actually used by IBM to determine the SWRPQ price of the J to K upgrade. Further, IBM uses the same customer engineers to perform upgrades as it uses to do maintenance work. Beckwith, Tr. 1284-96, 1298, 1358; Granito, Tr. 984. The $ 165/hr rate enables IBM to recover its labor costs plus a profit. Ross, Tr. 1381-82. The prices used by Mr. Ross are IBM's real prices for the services provided. *See* Beckwith, Tr. 1284-94.

AMI argues that IBM's $ 165/hr rate is significantly lower than the rate reflected by the prices AMI and IBM obtained for "reconfiguration" services using donor or customer-owned parts. [58] During the relevant years, AMI performed eleven upgrades equivalent to 308X MIPS upgrades **[**75]** using customer-owned parts, and received considerably more than $ 165/hr. *See* PX 466; Levin, Tr. 110-11. AMI's evidence that IBM charged and obtained upgrade prices reflecting hourly labor rates greater than Mr. Ross's estimates, however, is unpersuasive. [59]

[76]** AMI asserts that IBM would have charged Comdisco $ 50,000 to perform a "Q-split", making IBM's effective hourly rate $ 1000. A.P.F. at para. 156; *see* Lewis, Tr. 1714-15; *see also* DX 2268; DX 1579. IBM's hours to perform a Q-split are 50.6. *See* DX 1579. A "Q-split" involves separating an IBM Q mainframe into two model 3081K computers operating independently. *See* DX 2268. There is no evidence that IBM performed the Q-split (AMI did it for $ 30,000), Lewis, Tr. 492-93, 1714-15, and a Q-split is not an upgrade. What IBM would charge for the labor component of a reconfiguration which is not a model upgrade is of little relevance to the issues in this litigation. More importantly, AMI's calculation of IBM's effective hourly rate incorrectly assumes that the $ 50,000 price reflected only IBM's labor charges; in fact, IBM's labor charges accounted for less than twenty percent of the total price. *See* DX 1579.

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[56] IBM argues that fabrication work, to the extent not already included in Mr. Ross's figures, is trivial; *see* IBM's Proposed Findings of Fact and Conclusions of Law at para. 260; however, I do not think that it can be overlooked.

[57] IBM's estimates of the labor hours required to upgrade 308X computers are generally the same as AMI's, and in some cases exceed AMI's estimates - even though IBM does not include (and AMI does include) the time needed to perform what AMI describes as "IBM test" and "Determining Parts". *See* DX 1580 (especially, p. 90654); DX 1805; PX 447-58; PX 447-60; PX 447-62; PX 447-68; *see also* Chisholm, Dep. Tr. 62-67; *cf*. DX 1926.

[58] AMI contends that this is the "best method" to determine the value of the allegedly tied engineering services, A.M. at 44, since it reflects customer demand. AMI argues that "[Mr.] Ross's estimates do not . . . reflect the value of reconfiguration service in the marketplace." A.R.M. at 32. However, IBM's SWRPQ price for the J to K upgrade, which is based on a $ 165 hourly rate for installation labor, is IBM's actual competitive price in the market.

[59] At best, AMI has shown that on several occasions it was able to perform the equivalent of IBM 308X MIPs upgrades while charging substantially more for its labor services than IBM. However, IBM showed that, based on AMI admissions (.9 rate of return and 3 percent inventory costs, *see infra*), AMI would have had no viable business opportunity even if it would have been able to command the higher prices and perform the upgrades. *See* DX 3000.

AMI also established that IBM requested $ 200,000 to perform a "Q to K/K to Q" reconfiguration for Comdisco, *see* Lewis, Tr. 1714-15, which AMI estimates requires 85.5 hours of engineering labor. *See* PX 447-68; Allen, Tr. 264-66. IBM estimates 105 hours. **[**77]** *See* DX 2281 at 2; DX 2282 at 2; DX 2283 at 2; DX 2284 at 2; DX 2268A (the exhibits show the FE hours involved in the requisite activities). Comdisco paid AMI $ 80,000 to do the "Q to K/K to Q" reconfiguration. Lewis, Tr. 1714-15. AMI implies, but does not assert, that IBM's hourly rate for services required to perform a "Q to K/K to Q" reconfiguration **[*287]** exceeds $ 2000. However, the $ 200,000 price quotation included the price of necessary parts; the effective hourly rate was about $ 200. *See* DX 1579 at 3; DX 2281 at 2; DX 2282 at 2; DX 2284 at 2; DX 2268A; DX 2279.

AMI also contends that Mr. Ross's estimates understate the true labor content of 308X MIPs upgrades because they "do not take account of the fact that a net priced MES sold by IBM includes the labor content of one year of warranty service." A.M. at 47. AMI's argument appears to be that the labor involved in performing 308X MIPS upgrades (previously defined as "installation" and "fabrication" labor) also includes the labor component of the warranty maintenance service provided with IBM net priced upgrades. Although AMI has relied on various definitions of the tied product during the course of litigation, **[**78]** *see supra* note 12, it never advanced such a definition prior to trial and cannot pursue it at this time. *Cf.* *Johnson v. Trueblood, 629 F.2d 287, 294-95 (3d Cir. 1980)*, *cert. denied*, *450 U.S. 999, 68 L. Ed. 2d 200, 101 S. Ct. 1704 (1981)*. Furthermore, AMI provided no evidence concerning the labor content of IBM's warranty maintenance service. The prices of IBM's maintenance agreements do not equal IBM's costs for providing the service.

The evidence compellingly showed that technological advances incorporated in the 308X computer system have reduced the amount of labor involved in performing 308X MIPs upgrades [60] to an amount which is insignificant and de minimus for antitrust purposes. With a modification to account for "fabrication" labor, I adopt Mr. Ross's estimates of the labor content of 308X MIPS upgrades. I also credit Mr. Ross's assertion that IBM's $ 165 hourly rate for installation services allows it to recover its labor costs plus a reasonable profit. Therefore, were I to require IBM to sell the parts involved in such upgrades without IBM labor included, I would not require IBM to sell the parts at a price reflecting a greater **[**79]** reduction from IBM's current net price than that suggested by Mr. Ross's figures, after adjusting for fabrication work. [61]

b.

To reflect more accurately the amount (and quality) of the labor component of 308X MIPS upgrades as AMI has defined it, Mr. Ross's figures must be adjusted to include fabrication work. Prof. Levin testified that Mr. Ross's "installation" figures had to be adjusted by as much as 65 percent. *See* Levin, Tr. 105-09; *see also* PX 462; PX 463; PX 464; PX 416; PX 425. The evidence does not warrant such an increase. [62] Prof. Levin's estimates of the **[**80]** "fabrication" component of 308X MIPs upgrades relies on IBM prices for certain memory and channel upgrades performed by IBM with customer-owned parts between December 1983 and November 1984, from which AMI calculated the percentage of the total labor attributable to "fabrications and support (non-installation) activities." *See* A.P.F. at para. 168. Prof. Levin's estimates expressly include more than just fabrication activities and do not involve model (MIPS) upgrades. The reliability of the methodology and the figures, for purposes of calculating the fabrication component of 308X MIPS upgrades, is therefore suspect.

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[60] Although the focus has been on MIPS upgrades, my analysis applies to all 308X upgrades involving TCM technology. Half of all memory upgrades were net priced, but not all of them involved the TCM technology; some used the predecessor MST technology.

[61] Nor would I require IBM to sell the necessary parts on an OTC basis at an aggregate price lower than the price suggested by Mr. Ross's estimates, after adjusting for fabrication.

[62] Even if Mr. Ross's figures were increased by 65 percent, AMI would not have a viable business opportunity if only a few of the expenses AMI would necessarily incur to perform the work were taken into account. *See* DX 3001; DX 1927; *see also* Levin, Tr. 197-204; Ross, Tr. 1392-96.

Furthermore, the field engineering prices relied upon by Prof. Levin were "corrected" by IBM, *see* Ross, **[**81]** Tr. 1387-89, and made "more competitive" in 1984, before **[*288]** this action was brought. [63] *See* PX 377 at 89707. Mr. Ross relied upon the corrected, "more competitive", and uncontested 1985 prices. *See* Ross, Tr. 1387-89; DX 2091; PX 410; PX 422; PX 464. Prof. Levin knew that IBM had changed the prices he used to arrive at the 65 percent adjustment figure, but made no attempt to adjust the figure to reflect IBM's corrected prices. Levin, Tr. 119-22, 125-28, 131-33. IBM did and, using Prof. Levin's methodology, determined that non-installation (including fabrication) services accounted for 11 (not 65) percent of the total labor involved in performing upgrades. *See* Ross, Tr. 1398-99; PX 410; PX 422; PX 464; DX 3001A. This is the most accurate estimate produced at trial and I adopt it. Mr. Ross's figures, which excluded the amount of labor represented by fabrication work, must therefore be increased by 11 percent to account for the total labor (as defined by AMI) involved in 308X MIPS upgrades.

[82]** c.

Using IBM's 1985 labor and MES prices, adjusting Mr. Ross's calculation of the labor component by 11 percent, and taking into account a few of the expenses (inventory and transportation costs) AMI would incur if it performed all MIPS upgrades IBM performed during the relevant years, [64] one can assess the impact on AMI's business if IBM unbundled its sales of 308X MIPS upgrade parts and labor, and AMI bought the parts from IBM and acquired all of IBM's MIPS upgrade business. [65] **[**83]** AMI would lose over $ 35 million. *See* DX 3001A. [66]

AMI disputes IBM's assertion that AMI would always incur inventory holding costs of 3 percent of the upgrade purchase price. [67] A.R.M. at 36. The 3 percent figure is based on an interest rate of 12 percent and a holding period of 3 months. *See* PX 379, at 19, 21; Allen, Tr. 378. AMI's principal argument is that AMI would not incur such costs if AMI's major customers, the leasing companies, instead of AMI, purchased and stored the parts for subsequent use. A.R.M. at 37. AMI does not deny that it would incur inventory holding costs if it had to warehouse the parts itself. AMI stored 303X parts it acquired from IBM for subsequent installations, and incurred the 3 percent inventory carrying cost. Levin, Tr. 195, 199. Further, Mr. Allen stated that AMI would incur the 3 percent inventory cost **[**84]** if it "were permitted to compete in this market of [308X] net **[*289]** priced MESs." Allen Tr. 377-78; *see also* DX 197 (AMI inventory of MESs it owned). I therefore conclude that it is appropriate to include such holding costs among AMI's expenses.

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[63] AMI suggests that IBM's lower and "more competitive" SWRPQ installation labor price of $ 165/hr. was designed to prevent third party installation of IBM features bought on an SWRPQ basis. *See* A.R.M. at 35 n*. AMI relies on a 1983 memorandum by Mr. Gibson in which he states, "Since third parties see an opportunity here, we should re-examine the SWRPQ price," and "It appears the $ 221 effective rate is high and allows enough of an umbrella for a third party to install the MES." PX 151. The memorandum, however, refers to a 303X feature, not a 308X upgrade, *see id*., and the effective hourly rate was not $ 221/hr, as Mr. Gibson assumed, but $ 161/hr. *See* PX 440 (stating that if the $ 161 hourly rate were to be modified, it should be increased to $ 186/hr.). Furthermore, absent proof of below-cost pricing, it would not be unlawful for IBM to "reexamine" its prices in order to compete more effectively.

[64] Additional expenses which AMI would incur include: the increased labor costs required to perform the additional upgrades (this amount would be large, *see* Houghton, Tr. 1453-56; Beckwith, Tr. 1302-03; Baumol, Tr. 1650-51; Ross, Tr. 1396; DX 1776A); additional expenses for marketing and inventory management; increased expenses for property, plant, and equipment; additional inventory insurance; and added interest expenses. *See* Houghton, Tr. 1453-56; Baumol, Tr. 1650-55; DX 1925.

[65] If AMI took over only a portion of IBM's business, its revenues and expenses would be adjusted accordingly, and the impact on AMI's business would be proportionately the same.

[66] The only way AMI could engage in the 308X upgrade business profitably, were the needed parts sold without IBM labor, would be if customers were willing to pay a substantial premium for AMI's services. The record does not support a finding that such a possibility exists. *See infra*. pp. 290-291.

[67] AMI does not appear to contest IBM's assertion, which is supported by the record, that AMI would incur out of pocket travel expenses equivalent to $ 1,500 per transaction. *See* Levin, Tr. 203; PX 379, at 20-21.

AMI's business prospects would not be greatly improved if its anticipated inventory costs were reduced from 3 percent to 2 percent (to reflect a shorter holding period) and actual IBM prices (rather than 1985 prices) for 308X upgrade labor and MESs (net-priced) for the period 1982 to 1986 are considered. [68] **[**85]** In such event, AMI would lose over $ 26 million. [69] *See* DX 3001B; Ross, Tr. 1400-01.

My conclusion that AMI has no viable business opportunity concerning 308X upgrades excludes from the analysis at least as many considerations favorable to IBM as to AMI. For example, I have not further adjusted Mr. Ross's figures concerning the value of the labor component of 308X upgrades to reflect an arguably greater level of skill that may be involved in fabrication work. *See* *supra p. 283*. [70] On the other hand, I have not included in my assessment of AMI's business opportunities a range of additional and evidently considerable expenses which AMI would incur proportionately to the amount of IBM upgrade business it took over. *See supra* note 64. These refinements would not change the fact that technological advancements have so reduced the amount of labor involved in performing 308X MIPS upgrades that it represents a relatively insignificant percent of the value of the associated hardware.

[86]** 2.

HN19[] *Per se* condemnation of a tying arrangement may be warranted when the seller possesses the degree or kind of market power that enables it to force customers to purchase a second product (which the buyer either does not want at all or would prefer to purchase elsewhere on different terms) in order to obtain the tying product. *Hyde, 466 U.S. at 17-18*. Proof of a *per se* unlawful tying arrangement requires proof of the existence of two separate and distinct products or services. I have already concluded that AMI has failed to show that IBM possesses the requisite economic power to force or coerce buyers. My findings that the value of the labor content of 308X MIPs upgrades is negligible and that IBM's net pricing has not precluded AMI from engaging in a viable business are relevant to the issue of the existence of two separate products.

"Whether one or two products are involved turns . . . on the character of the demand for the two items." *Hyde, 466 U.S. at 19*; *see also, Will, 776 F.2d at 671 n.1* ("A tie involves products **[**87]** that may be sold in separate markets."). In this case, no unlawful tying arrangement can exist unless there is sufficient demand for the labor service involved in performing 308X upgrades, separate from the demand for the requisite parts, to identify a distinct product market in which it is efficient to offer the former separately from the latter. *See Hyde, 466 U.S. at 21-22*.

AMI has failed to establish the requisite separate demand for the services it defines as the tied product. [71] The evidence **[*290]** is especially lacking with respect to end-users of 308X computers. Although some expressed an interest in having a choice among suppliers of upgrades, *see, e.g.*, Shah, Tr. 1529-30; English, Tr. at 1567-69, most expressed no interest in having 308X upgrade parts and labor provided separately. End-users tended to view the parts and labor as a single product. William E. McKinley, of Kent State University, testified that he was "very definitely not interested in having parts arrive from one source and installation arriving from another source."

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[68] If actual IBM prices for 308X labor and net priced MESs are used instead of Mr. Ross's original figures, which applied 1985 prices for both through the period 1982 to 1986, the average labor content of all MES upgrades would be.8 percent of the purchase price of the net priced MES, *see* DX 3001B; i.e., an amount lower than Mr. Ross's estimate of 1.2 percent, and lower than the.9 percent deemed unprofitable by AMI.

[69] If actual prices during the 1982-1986 period are used, and the 3 percent inventory cost figure retained, AMI would lose over $ 48 million.

[70] I relied on Prof. Levin's methodology, which made no distinction between the quality of installation and fabrication labor, but measured only the additional quantity of labor associated with fabrication work.

[71] At trial, AMI counsel acknowledged that if the value of the labor content of 308X upgrades were de minimus, the two products would be considered a "single product": If that were the case, "what the customer really wants is the feature. He doesn't care about the installation." AMI Opening Statement, Tr. 10-12. AMI counsel stated that "$ 2400 out of a much larger cost for the feature" would be de minimus. *Id*. That is the case involving the E to B 308X upgrade. *See* DX 1805A.

McKinley, Tr. 1503-04. Bipin Shah, of Core States Financial Corporation, testified that he did not "shop around for **[**88]** parts and labor." His company asks for a single "upgrade price, total, end to end . . . you come in and do the whole job and you quote a price on that." Shah, Tr. 1526. Thomas English, of Federal Mogul Corporation, had no interest in separately acquiring the parts for upgrades and shopping around for installation services. English, Tr. 1566-67. Thomas Druding, Computer Configurations Specialist for City of Philadelphia, testified that he was not aware of any situation in which the City had requested separate prices for upgrade parts and installation. Druding, Dep. Tr. 9-11. First Pennsylvania Bank of Philadelphia purchased J to K upgrade parts (which IBM sells SWRPQ) from one source and used AMI to install the upgrade, but did not purchase the parts from IBM or another company which could also install the upgrade. Wilde, Dep. Tr. 26-34. David Ness, of TV Guide, testified that he was uncertain but thought he would be interested in purchasing 308X upgrade parts without the labor included if his company's technical staff had the skill to perform the upgrade. Ness, Tr. 1550.

[89]** Unlike end-users, leasing company witnesses expressed a desire for alternative sources of upgrade parts and labor. CMI Executive Vice President Gary Smith distinguished between the parts and labor involved in an upgrade, and said CMI wanted the option of having "IBM or . . . somebody else do the work." Smith, Tr. 579. Melvin Lewis of Comdisco testified that Comdisco wanted IBM to price parts and labor separately. [72] Lewis, Tr. 478-79, 1717. Comdisco wished to have the choice of having AMI install upgrades using parts (features) purchased from IBM without IBM labor included because of the greater "flexibility" AMI provided. *See* Lewis, Tr. 456-57, 476-78, 480-82, 548-49. CMI also regarded AMI's relatively prompt reconfiguration service as important. *See* Smith, Tr. 581-82.

[90]** Although there was evidence of demand on the part of some leasing companies for separately-provided 308X upgrade labor, AMI failed to establish the existence of demand for such labor at the prices AMI would admittedly have to charge in order to provide the service. For AMI to engage in the business of providing 308X upgrade services (based on the schedule of upgrade parts prices IBM would be entitled to set), it would have to charge considerably more than IBM for essentially the same service.

There is insufficient evidence of demand for upgrade labor at prices AMI would have to charge to support a conclusion that a competitive market for 308X upgrade labor does or could exist. Leasing companies have purchased virtually no 308X model, memory, or channel upgrades without IBM labor included (in order, for instance, to have AMI install the upgrade) when such upgrades were available on an SWRPQ basis (which roughly equals the price IBM would be entitled to charge for its parts). [73] *See* DX 2265; DX 1063; DX 1584. Every J to K upgrade purchased by **[*291]** CMI and Comdisco was bought with IBM installation service included even though IBM also sold the feature on an SWRPQ basis. **[**91]** [74] *See* Lewis, Tr. 1720; Smith, Dep. Tr. 130-33. AMI bought only two J to K upgrades from IBM (out of 142 such upgrades sold by IBM) on an SWRPQ basis between 1982 and 1985. Allen, Tr. 382. AMI installed only one of the two J to K upgrades; it used the parts of the second J to K upgrade to perform a B to J upgrade. *See* Allen, Dep. Tr. 1252, 1256-57; DX 79; DX 137; DX 1363, p. 8333. One of the reasons why AMI was uninterested in buying more SWRPQ J to K upgrades from IBM was the price. Allen, Tr. 374-75, 380-83; DX 1805; DX 1401 at 16-23, 42, 45, 56.

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[72] In the majority of instances when Comdisco sells an upgrade to an end user, it does not quote a separate price for the installation labor involved in the upgrade; it sells the user a "result that includes both the parts and the labor." Lewis, Tr. 502-03. CMI also generally charges its upgrade customers a single price for the parts and the installation labor. Smith, Tr. 613-14; *see also*, Loria, Tr. 674-76. CMI's customers generally request a single price for the installed upgrade. Smith, Tr. 614.

[73] The "MES Price(s) Without Labor" set forth in DX 1805 fail to deduct for installation labor and would have to be reduced accordingly.

[74] Witnesses from CMI and Comdisco testified that neither company knew that IBM sold upgrades (including the J to K) without IBM labor included. *See* Lewis, Tr. 1721; Loria, Tr. 654-58; 660-61; Smith, Tr. 611-13. I do not credit such testimony, as there was documentary evidence (requests for IBM "SW" prices) to the contrary. DX 2265 (Smith); DX 2261, DX 2262, DX 2263 (Loria); DX 2260, DX 2266 (Lewis). Further, the SWRPQ procedure has existed since 1975. DX 2219. SWRPQ prices are readily available from IBM. *See* Ross, Tr. 1371-72; Robertson, Tr. 693-94; Ritchie, Tr. 1114, 1120. AMI acknowledged that SWRPQ prices are made available from IBM when specifically requested. A.P.F. at para. 99.

[92]** AMI produced evidence that Comdisco used AMI to install a number of MESs even though Comdisco had bought the MESs from IBM with IBM installation labor included. *See* Lewis, Tr. 545-46, 500-01. However, Mr. Lewis of Comdisco explained that he would use AMI installation service only if it were "lesser than, the same as, or in rare exceptions, only a slight premium above the prevailing IBM list price." Lewis, Tr. 549. Using an E to B upgrade as an example, Mr. Lewis testified that he would not regard an AMI hourly rate of $ 1500 for installation service as only slightly greater than an IBM hourly rate of $ 180 or $ 200. [75] Lewis, Tr. 1724. Mr. Smith of CMI testified that, other things being equal, he did not wish to pay 10, 20 or 30 times more than necessary to obtain installation service. Smith Tr. 607-09. When AMI performed a J to K upgrade for CMI with the J to K upgrade parts AMI bought from IBM on an SWRPQ basis in 1984, it charged CMI the same price IBM would have charged for the installed upgrade; it did not charge a premium. *See* DX 55; DX 57; PX 1-y at 140, 836.

[93]** 3.

The evidence that leasing companies would not select AMI's more expensive installation services if IBM unbundled the sale of 308X features and labor is relevant also to the issue of IBM's economic power. AMI sought to establish that IBM possesses the requisite market power to warrant *per se* condemnation by reference to the "substantial volume of purchases of unwanted IBM engineering service as a result of net pricing. . . ." A.R.M. at 25. For example, AMI contends that, absent net pricing, Comdisco "would utilize AMI or other third party fabricators to fabricate and install a significant number of upgrades." A.P.F. at para. 106.

AMI's position requires proof that buyers considered the requirement of buying IBM labor a burdensome term of the 308X upgrade sales agreement and would not have purchased IBM's labor but for IBM's requirement that they do so. *See* *Northern Pacific, 356 U.S. at 7-8* ("The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints."); *Fortner I, 394 U.S. at 503-04* **[**94]** (The "concern is whether the seller has the power to raise prices, or impose other burdensome terms **[*292]** such as a tie-in, with respect to any appreciable number of buyers within the market."); *Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 69 (4th Cir. 1969)* ("Acquiescence in the burdensome term by an appreciable number of customers gives rise to an inference" of economic power.); *cert. denied*, *397 U.S. 920, 25 L. Ed. 2d 101, 90 S. Ct. 928 (1970)*.

The evidence established that buyers who complained about having to purchase IBM labor along with upgrade parts assumed that they could obtain installation labor from alternative sources, such at AMI, at prices comparable to or competitive with those of IBM. Based on the evidence, I conclude that no buyer would have regarded the purchase of IBM labor as "unwanted" or "burdensome" had it known of the disparity of prices at which IBM and AMI would provide installation labor if IBM discontinued net pricing. Absent net pricing, buyers would likely continue to use IBM installation services. Therefore, proof of the purchase of IBM's labor by buyers opposed to net pricing does not establish **[**95]** that IBM possesses the economic power to "force" or "coerce" buyers into buying a product they do not want. "If ***HN20***[] the product in the second market would be accepted anyway, because of its own merit then, of course, no leverage is involved; . . . there is no use of the seller's market power." *Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1218 (3d Cir.)*, *cert. denied*, *429 U.S. 823, 50 L. Ed. 2d 84, 97 S. Ct. 74 (1976)*; *see also* *Fortner II, 429 U.S. at 618 n.10* (The approach to establishing economic power suggested in *Advance Business Systems* "depends on the absence of other explanations for the willingness of buyers to purchase the package. . . ."). [76]

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[75] Using customer-owned parts, AMI charged Comdisco between $ 25,000 and $ 30,000 for installing an E to B upgrade, requiring approximately 20 man hours. Lewis, Tr. 1723. Based on Mr. Ross's calculations, the value of IBM installation service for an E to B upgrade, requiring about 13 man hours of labor, *see* DX 1926, is $ 2,400. DX 1085A. Based on these facts and Mr. Lewis' assertions, it is fair to conclude that Comdisco would not select AMI over IBM to install a new E to B upgrade if it had the choice. In view of this evidence, I do not accept AMI's assertion at closing argument that leasing companies "don't care whether the service costs $ 2400 or $ 20,000." Post Trial Oral Argument, Levy, at 30.

[76] Even if there had been proof of acceptance by buyers of burdensome terms, such proof would be evidence of coercion, but would not, alone, "suffice to establish, prima facie, the coercion element of an illegal tie-in claim." *Ungar, 531 F.2d at 1225*.

[96]** 4.

HN21[] There is no *per se* rule against tying arrangements "unless a substantial volume of commerce is foreclosed thereby." *Hyde, 466 U.S. at 16*; *see also* *Fortner I, 394 U.S. at 501* (The "controlling consideration is . . . whether a total amount of business, substantial enough in terms of dollar volume so as not to be merely *de minimis*, is foreclosed to competition by the tie.").

If Mr. Ross's unadjusted estimate of the value of the labor component of 308X MIPS upgrades is used, and that amount is multiplied by the number of such upgrades performed by IBM during the relevant time period, and those figures are added, the sum ($ 23,158,000) approximates the total value of the allegedly tied product. [77] *See* PX 461; Levin, Tr. 104. Mr. Ross's figures are based on 1985 prices for IBM labor and net-priced MESs. *See* DX 3001A. If the average of actual IBM net MES prices and labor prices for the relevant period are used, and the value of the fabrication component is taken into account, the result ($ 20,639.261) is a closer approximation of the total **[**97]** value of the allegedly tied upgrade labor. DX 3001B.

Were the sole "relevant figure" the "dollar volume of all sales of the tied item", as AMI contends, A.R.M. at 31, I would conclude that AMI had satisfied the requirement of substantiality of effect on interstate commerce. *See, e.g.,* *International Salt Co. v. United States, 332 U.S. 392, 395-96, 92 L. Ed. 20, 68 S. Ct. 12 (1947)* ($ 500,000); *Fortner I, 394 U.S. at 502* ($ 190,000). However, the *per se* rule's substantiality requirement reflects a concern with "impact on competition" and the amount of commerce foreclosed. *See* *Hyde 466 U.S. at 16*. [78] AMI has not shown that it engaged **[*293]** in an activity foreclosed by IBM's net pricing. Upgrade **[**98]** services on 308X computers were materially different from upgrade work on predecessor computer systems. Nor has AMI shown that it would have engaged in the 308X upgrade business but for net pricing. AMI has failed to establish the "adverse impact on competition" with which the antitrust laws are concerned "because no portion of the market which would otherwise have been available to other sellers has been foreclosed" by IBM. *See* *Hyde, 466 U.S. at 16*.

D.

[99]** *HN22*[] Even if not *per se* unlawful, a business practice may violate the antitrust laws if it is found to impose an unreasonable restraint on competition under the Rule of Reason analysis. *See, e.g.,* *Hyde, 466 U.S. at 29*; *Fortner I, 394 U.S. at 503*. AMI contends that IBM's net pricing is unlawful under the Rule of Reason. A.M. at 49. "The Rule of Reason . . . focuses directly on the challenged restraint's impact on competitive conditions." *National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*. It entails an analysis of the purposes and effects of an allegedly anticompetitive practice. *See* *United States v. American Tobacco Co., 221 U.S. 106, 179, 55 L. Ed. 663, 31 S. Ct. 632 (1911)*.

HN23[] A finding of illegality under the Rule of Reason "presupposes a determination . . . . that the 'effect upon competition in the marketplace is substantially adverse.'" *Columbia Metal, 579 F.2d at 26* (footnote omitted). **[**100]** The percentage of business controlled by defendant and the strength of the remaining competition are relevant considerations. *See* *Times-Picayune, 345 U.S. at 615*. I have already concluded that IBM large scale mainframe computers and upgrades to such computers face considerable competition from a variety of data processing products and services, the effect of which is to deprive IBM of the power to raise prices or impose burdensome terms, such as tie-ins, on buyers. *See* *NCAA, 468 U.S. at 110 n.42* ("The 'reasonableness' of a particular alleged restraint often depends on the market power of the parties"; market power is one test of reasonableness). The availability of wide-ranging alternatives to IBM net priced upgrades (and the parts involved in

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[77] The $ 23 million figure only approximates the total value of the allegedly tied labor component in part because it excludes fabrication labor and includes the value of the labor component of J to K upgrades, which were optionally available on an SWRPQ basis.

[78] In *Fortner I* the Court stated that the "relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit." *394 U.S. at 502*. AMI's portion of the foreclosed volume of commerce is not at issue here. The *Fortner I* Court did not consider the situation in which the plaintiff bringing suit has failed to show it would or could have engaged in the commercial activity allegedly foreclosed by the tie.

the upgrades) [79] precludes a finding that IBM's net pricing policy has any appreciable anticompetitive effect on the market as a whole. *See* *Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 537-38 (7th Cir. 1986)*; *Will, 776 F.2d at 671-74*; *A.I. Root, 806 F.2d 673*; *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, 732 F.2d 1403, 1408 (9th Cir. 1984).* **[**101]** Prof. Levin acknowledged that if there existed economically viable, reasonable, or realistic alternatives to IBM 308X upgrades, any anticompetitive effects of the alleged tie would be substantially mitigated if not completely eliminated. *See* Levin, Tr. 153-55; *accord* Baumol, Tr. 1645.

AMI has also failed to establish that net pricing has an anticompetitive impact on the market for 308X upgrade labor services. *See* *Hyde, 466 U.S. at 29* (requirement that plaintiff prove that the contract "unreasonably restrained competition" involves "an inquiry into the actual effect of the exclusive **[**102]** contract on competition among anesthesiologists."); *see also* *Pitchford v. Pepi, Inc., 531 F.2d 92, 101 (3d Cir. 1975)*. The amount of labor involved in performing 308X MIPS upgrades is, for antitrust purposes, negligible, **[*294]** and AMI has failed to show that it could compete with IBM for the provision of 308X upgrade services if a market for such services existed as a result of IBM's discontinuation of net pricing. The evidence also warrants the conclusion that no other third party fabricator would be able to compete effectively. *See* Baumol, Tr. 1645-46.

Although AMI has failed to establish that IBM's net pricing policy had an appreciable adverse impact on competition, it is desirable under the Rule of Reason analysis to review IBM's reasons for implementing 308X net pricing:

> ***HN24***[] While the antitrust laws regulate conduct, as distinguished from intentions, . . . "the reason for adopting the particular remedy [and] the purpose or end sought to be attained . . . are all relevant facts. This is not because a good intention will save an otherwise objectionable **[**103]** regulation or the reverse; but because knowledge or intent may help the court to interpret facts and to predict consequences."

Alberta Gas Chemicals Ltd. v. E.I. duPont de Nemours & Co., 826 F.2d 1235, 1251 (3d Cir. 1987) (Becker, J., dissenting) (quoting *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918))*; *see* *Times Picayune, 345 U.S. at 615* (Reasonableness inquiry under Section I focuses in part on "whether the action springs from business requirements or purpose to monopolize."); *see also* *NCAA 468 U.S. at 104 n.26* (tying arrangements "may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis."). *But see* *H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 246 (5th Cir. 1978)* ("Absent anticompetitive effect, an unlawful intent will not establish a rule of reason violation. . . .").

1.

IBM introduced evidence of legitimate business justifications for its 308X net pricing policy. In addition, Michael Armstrong, the IBM executive who decided in 1980 to apply net pricing to **[**104]** the 308X product line, testified that IBM's management did not consider the impact net pricing might have on third party fabrication and installation activity, in part because it regarded the amount of labor involved as trivial. Armstrong, Tr. 903-05. I credit Mr. Armstrong's testimony.

The principal goal sought to be served by net pricing was the prompt and proper return of TCMs removed from upgraded 308X computers. Reusability was a key design objective incorporated into the TCM technology. *See* Armstrong, Tr. 902-03, 904-05; Toole, Tr. 1012-13; Ross, Tr. 1365-67; DX 1136, p. 2. By 1978, IBM assumed that a large portion of the TCMs to be used in 308X computers, upgrades, and field spares would come from TCMs removed from installed equipment and converted into equivalent-to-new (ETN) condition. The reusability of TCMs was "critical to the pricing" of the 308X product line. Ross, Tr. 1365-66; DX 1136, p. 2. IBM assumed that 25 to 30 percent of the total component demand for the 308X series would be met with reused components. Ross, Tr. 1366.

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[79] Besides buying net-priced upgrades, buyers wishing to increase their data processing capabilities may: buy replacement or additional computers of various sizes and processing power; add input/output devices; select appropriate software; install upgrades with used parts; subcontract to computer services and service bureaus; and to a more limited extent, swap machines or upgrades. *See* *supra pp. 271-277*.

The ETN program allowed IBM to maximize its supply of 308X machines and upgrades, and reduce unit cost, in part by avoiding having to **[**105]** construct additional manufacturing facilities. *See* Ross, Tr. 1365-67; Toole, Tr. 1011. But for the reusability of TCMs, IBM "would have not been satisfying the market requirements." Armstrong, Tr. 902-03. An IBM official testified that, in 1980, IBM faced a shortage of supply of TCMs and that, but for the ETN program, the effect of the shortage on the 308X program would have been "unquantifiable but devastating." Toole, Tr. 1017.

IBM has converted tens of thousands of TCMs into ETN condition and reused them in 308X processors and upgrades. *See* Ross, Tr. 1366. It is faster and less expensive to ETN a TCM than to build a new one: a TCM can be ETN'd in one or two weeks on IBM's manufacturing line (involving about 25 operations) as opposed to 6 to 9 months to make a new one (involving about 325 operations). Toole, Tr. 995-96; **[*295]** Granito, Tr. 949; DX 1850. The ETN procedure costs IBM less than $ 6000 per TCM. Toole, Tr. 1028-29; Baumol, Tr. 1691. The manufacturing cost of a TCM is $ 12,000. [80] Granito, Tr. 981-82. Once ETN'd, TCMs are marketed as if new and sold at prices for new TCMs. Toole, Tr. 1008-09, 1030-31.

[106]** The success of the ETN program, critical to the marketing and pricing of TCMs, depended on the proper handling of removed TCMs and a careful monitoring of the number and types of operations performed on them. Granito, Tr. 945-47; Ross, Tr. 1412. According to Mr. Ross, IBM could reuse TCMs only "if we knew and we got them back on a timely manner and we understood the . . . precise condition of those TCM's" when they were returned. Ross, Tr. 1412. "It is the number of times those TCMs are plugged and unplugged and capped and uncapped that is critical, and without knowing which machine they came from, we would have no assurance as to their quality or their usability." *Id*. Since 1979, IBM has tracked each manufactured TCM by serial number to be certain that each TCM is reused within the guidelines established for TCM reuse. Granito, Tr. 946-47. TCMs exceeding IBM's reusability guidelines are scrapped. *Id*.

IBM could not rely on other parties to observe the TCM handling guidelines necessary to preserve the reusability of TCMs, or even to return parts removed during the installation of a net priced upgrade. *See, e.g.*, Van Hellemont, Dep. Tr. 174-76; Allen, Dep. Tr. 88-89, **[**107]** 527-28, 1324-35; DX 88; DX 89; DX 90; Smith, Dep. Tr. 214-15. Further, as an IBM official explained, the credit-for-return system suggested by AMI as a replacement to net-pricing was unworkable. *See* Ross, Tr. 1377-78. AMI offered no testimony on the subject of a credit-for-return system.

IBM's net pricing policy was and is a legitimate and reasonable way to ensure the prompt and proper return of TCMs needed to sustain the ETN program and the commercial success of the 308X line of products. [81] Net pricing facilitated the development and marketing of TCM technology, and thereby enhanced technological progress and economic competition in the data processing industry. Given the existence of legitimate reasons for net pricing, and the fact that its procompetitive effects outweigh its virtually nonexistent anticompetitive impact, I conclude that AMI's rule of reason challenge to net pricing fails.

[108]** 2.

Although I find that the record as a whole does not support AMI's assertion that net pricing was IBM's "solution to third party fabricator competition", *see* A.M. at 13, there is some evidence tending to suggest the contrary. Most important is the fact that IBM applies net pricing to numerous 308X memory upgrades that do not require the return of TCMs. [82] Lewis, Tr. 1738. IBM's net pricing of such upgrades is inconsistent with IBM's principal stated

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[80] This figure does not include IBM's TCM research and development costs. Granito, Tr. 982.

[81] It is worth repeating that IBM requires the return of removed TCMs only when a new net-priced upgrade is bought from and installed by IBM. Over 90 percent of IBM's 308X computers are privately owned; the owners of those computers can do as they wish with their TCMs. *See* DX 1847; PX 25; *see also* Baumol, Tr. 1692-93.

[82] The evidence does not establish the total value of net priced 308X memory upgrades which incorporate only the older MST technology, but AMI counsel put the figure in the "many millions of dollars" range. A.R.M. at 2. IBM does not dispute AMI's

justification for net pricing and therefore raises doubts about IBM's motives. *See, e.g., White Motor Co. v. United States, 372 U.S. 253, 270 n.9, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)* (Brennan, J., concurring) (Restriction on competition which is broader than reasonably necessary to achieve defendant's legitimate needs "invites suspicion."). However, not all such memory upgrades are net priced (only those involving the removal of other key parts are), and no 308X channel upgrade (also not requiring the return of TCMs) is **[*296]** net priced. AMI does not claim that IBM's net pricing of non-TCM 308X memory upgrades constitutes a distinct antitrust violation, and there was little evidence at trial concerning **[**109]** memory upgrades.

What AMI regards as direct evidence of IBM's anticompetitive intent is minimal and does not outweigh the ample evidence of IBM's legitimate business reasons for implementing net pricing. AMI established that IBM knew that at least one major leasing company was dissatisfied with IBM MES delivery and installation schedules, *see* A. Carr, Dep. Tr. 249, 26, 32-33, 80-81, 97-99, that IBM was aware of increased third party installation activities, and that IBM considered how to respond to such activities. For example, Mr. Gibson stated in an IBM internal memorandum dated April 19, 1983, that it "has become apparent **[**110]** that more and more MESs are being installed by third parties . . . ." PX 137. However, Mr. Gibson testified that he was referring to the installation of SWRPQ upgrades, which are not affected by net pricing. Gibson, Dep. Tr. 191-192. Similarly, Mr. Biggar, President of IBM's Field Engineering Division (FED), reported in December, 1982, that employees in the division raised "concerns regarding third party installing IBM MESs on IBM systems", including the concern that third parties were able "to cut the price on installation" of MESs sold without IBM labor included, and that some of the concerns had to be resolved "in order for FED to maintain the feature installation business in a competitive and professional manner." PX 277. However, the memorandum does not state whether it refers to 308X or 303X equipment, or both, or whether it involved model, memory, or channel upgrades.

As the preceding examples illustrate, most if not all of the documents and statements upon which AMI relies to show that net pricing reflected anticompetitive designs have limited probative value because they were made or written on unknown dates or over two years after IBM decided to implement net pricing. [83] **[**111]** It is also unclear whether much of the evidence involves 308X upgrade activities; 303X upgrade work; general reconfiguration work; or removal and reinstallation activity involving customer owned parts and equipment. *See* PX 119; PX 275. Such removal and reinstallation activity is unrelated to IBM's net pricing policy.

3.

IBM also offered evidence of procompetitive justifications for its OTC price structure, discussed *supra* note 10, and its serial number designation **[**112]** policy, under which customer orders for IBM features, model conversions, or RPQs had to be accompanied by a designation of the serial number of the machine on which the ordered parts were to be installed. *See* DX 1325, p. 1; PX 168, p. 1; PX 377, pp. 89712-13; Ritchie, Tr. 1090-93. The policy did not apply to OTC parts. Neither practice individually is the basis of a claim by AMI, [84] and neither practice, alone or in conjunction with the other, or with net pricing, imposes an unreasonable restraint of trade.

a.

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assertion that, in 1984, IBM's revenues from the sale of all net priced memory upgrades exceeded $ 70 million. *See* A.P.F. at para. 79.

[83] For example, AMI refers to the fact that the following question was posed to Mr. Armstrong at an IBM presentation in 1982: "Should IBM resist third party expansion into labor intensive activities, such as feature/model addition and removal, equipment relocation and maintenance?" PX 119 at 48690; *see also* PX 275; Gibson, Dep. Tr. 376-77. AMI also introduced an IBM Agenda containing "RECOMMENDATIONS" for "ACTIONS ON RECONFIGURATION" in which the following appears: "NET PRICED MESs INSTALLED BY IBM." PX 272. The document is undated.

[84] For example, AMI does not discuss the serial number designation policy in its post-trial memorandum of law. In its post-trial reply memorandum, AMI states that it would have no complaint concerning the serial number requirement if "parts are available from IBM as a viable alternative." A.R.M. at 35.

IBM priced the TCMs comprising an upgrade so that the aggregate price of the TCM's equalled or exceeded the price of the upgrade. IBM sought to ensure that customers would not buy the parts instead **[**113]** **[*297]** of the upgrades they comprised, [85] since IBM's profit projections for the 308X line of products were based in part on its sale of 308X upgrades. *See* Ross, Tr. 1370-75.

In some cases the upgrade price is well below the aggregate TCM price because some of the TCMs are also used in other, more expensive upgrades and were priced based on those upgrade prices. *See* Ross, Tr. 1373. IBM's OTC pricing structure provided a reasonable mechanism to facilitate IBM's recovery of its substantial investment in 308X technology. *See* Ross, Tr. 1376. Prof. Baumol testified that it was proper and often necessary to price parts at a level equal to or exceeding the price of the completed product the parts make up, especially in industries (such as the data **[**114]** processing industry) where continued technological progress depended on the recovery of research and development expenditures. Baumol, Tr. 1667-68; *see also* Levin, Tr. 862-63.

AMI essentially contends that the OTC price for the parts of an upgrade must be less than the upgrade price by an amount equal to the value of the fabrication and installation labor involved in the upgrade. *See* Levin, Tr. 80-81, 96-97, 156-57, 165. Even if there were legal support for the proposition, [86] because AMI is not entitled to an aggregate parts price that is below the upgrade net price by an amount greater than the price of the service component, the aggregate parts price to which AMI would be entitled under such a theory would leave too small a margin for AMI to offer upgrade services in competition with IBM.

[115]** b.

IBM announced its serial number designation policy in June of 1979. The policy "applies to everyone", Ritchie, Tr. 1094, including AMI, leasing customers, and end-users. *See* Loria, Tr. 639, 670; Bigando, Tr. 1242-43. Prior to 1979, purchasers were permitted to and did order features against "zero serial numbers", *see* PX 169, a practice which enabled purchasers, especially leasing companies, to inventory IBM MESs. In April, 1979, Mr. Gibson of IBM reported that 41 percent of all MESs ordered from IBM were for "zero serial numbered MES orders." PX 169 at 50883. Prof. Levin testified that IBM's policy inhibited "the flexibility of leasing companies", and limited "their ability to respond in a speedy fashion" to customer needs. Levin, Tr. 82-83. A Comdisco official stated that the serial number requirement gave his company "fits" and cut down on its "flexibility". Pontikes, Dep. Tr. 49-50. Yet there was evidence that leasing companies and other third parties were able to inventory parts despite IBM's policy. *See, e.g.*, DX 197; Nolin, Dep. Tr. 59-60, 68-69. The large number of IBM computers owned by the leasing companies provided them with a valuable source of necessary **[**116]** parts and machines against whose serial numbers to order and redesignate ordered parts from IBM. *See A.P.F. at para. 197; Robertson, Tr. 725-26, 727-28; A. Carr, Dep. Tr. 197-200, 202-03, 283-84*.

The legitimate business interests of IBM served by the serial number designation policy are not outweighed by the leasing companies' desire for greater flexibility. Mr. Ritchie of IBM testified that the policy was implemented in part to address planning and production problems faced by IBM as a result of the large number of speculative orders for MESs the company received: IBM "had a backlog of orders which - many of which never got installed." Ritchie, Tr. 1092-93; *see also* PX 377, at 89712-13. The serial number designation policy is also an integral part of IBM's computerized system for keeping track of **[*298]** information critical to maintaining, updating, and reconfiguring IBM computers. IBM's Machine Level Control (MLC) records, which are kept on the basis of machine serial numbers, enable IBM to perform numerous tasks accurately and promptly, including: assembling particular features or model conversions (MESs); providing appropriate EC's (modifications periodically installed **[**117]** on computers

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[85] Similarly, the net priced upgrade prices were set so as not to impact adversely on IBM's sale of processors. Ross, Tr. 1370-71, 1375; *see also* Levin, Tr. 163-64. Upgrade prices equalled the price-differentials of computer models. *See* DX 1861.

[86] I am aware of no decision in which a non-predatory price was found to violate the antitrust laws because it was too high. *See, e.g.,* Kartell v. Blue Shield, Inc., 749 F.2d 922, 927 (1st Cir. 1984), *cert. denied*, ***471 U.S. 1029, 85 L. Ed. 2d 322, 105 S. Ct. 2040 (1985)***; Fairdale Farms, Inc. v. Yankee Milk, Inc., 715 F.2d 30, 32 (2d Cir. 1983), *cert. denied*, ***464 U.S. 1043, 79 L. Ed. 2d 174, 104 S. Ct. 711 (1984)***.

to correct design difficulties); and shipping the appropriate parts involved in upgrades. *See* Bigando, Tr. 1235-41; Nolin, Dep. Tr. 126-27; Chisholm, Dep. Tr. 95; PX 377 at 89708, 89717; Granito, Tr. 964; Morrow, Dep. Tr. 149. When the serial number and desired configuration change are "loaded" into the MLC system, the system automatically identifies the parts, instructions, microcode diskettes, and any ECs required to install the upgrade. Bigando, Tr. 1238-40. Thus, the compatability and proper functioning of IBM upgrades depends largely on the accuracy of IBM's MLC records. *See, e.g*., PX 377, at 89708; Lewis, Tr. 523; Allen, Tr. 251-52.

That there may be arguably comparable ways to maintain updated MLC records, *see* Beckwith, Tr. 1340, does not, contrary to AMI's assertion, *see* A.P.F. at para. 203, make IBM's policy unreasonable. Similarly, IBM's acknowledgment, in April 1979, soon before announcement of the policy, that 41 percent of the MESs ordered from IBM were "zero serial numbered MES orders", does not, given IBM's valid explanations for the policy, support an inference that the policy, alone or in conjunction with other IBM practices, reflected **[**118]** an anticompetitive design.

E.

HN25[] In order to establish a cause of action under either a *per se* or rule of reason analysis, AMI "must demonstrate both that the antitrust laws were violated and that it suffered 'fact of damage' in consequence of that violation." *Pitchford v. Pepi, Inc., 531 F.2d 92, 98-99 (3d Cir. 1975)*, *cert. denied*, *426 U.S. 935, 49 L. Ed. 2d 387, 96 S. Ct. 2649 (1976)*; *accord* *Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1320 (5th Cir. 1976)* (plaintiff must show a violation of the antitrust laws, the fact of damage, and some indication of the amount of damage).

Because I conclude that AMI has failed to establish that IBM's net pricing policy was unlawful, I need not address IBM's contention, *see* IBM's Post-Trial Memorandum of Law (hereinafter "I.M.") at 15, that AMI has failed to prove it suffered an "actual injury" or an "antitrust injury", *i.e*., an "injury of the type the antitrust laws were intended to prevent . . . ." *See Cargill Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 490, 93 L. Ed. 2d 427 (1986).* **[**119]** However, I note that my finding that IBM's net pricing policy did not deprive AMI of viable business opportunity would seem to preclude a finding that AMI suffered the requisite injury to its "business or property", *see* Section 4 of the Clayton Act, *15 U.S.C. § 15*, even if net pricing were somehow unlawful.

INSTALLATION AND WARRANTY SERVICE CHARGE

AMI contends that IBM's Installation and Warranty Service Charge (IWSC), which became effective on June 30, 1980, PX 67, unreasonably restrained trade in violation of *Section 1*. A.M. at 62-63. Payment of the IWSC entitled IBM customers to installation and warranty service on IBM computers or MESs bought in the United States or Puerto Rico and shipped to a foreign country during the initial twelve-month period following the sale. [87] PX 67; DX 1381, at 85598; DX 2221, p. 42; DX 1532, at 2. The legality of IBM's IWSC is determined under a rule of reason analysis. *See, e.g.,* *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)* (legality of vertical restrictions limiting territories in which products are resold is to be determined under Rule of Reason). **[**120]**

[*299] I.

Prior to the implementation of the IWSC, IBM's standard U.S. purchase agreements (for computers and MESs) provided for the installation of the machine and a twelve-month period of limited warranty service (including the replacement of failed parts). *See* PX 608 at 3. The agreements excluded warranty coverage for computers installed outside the U.S. or Puerto Rico. [88] *See, e.g*., DX 2121 at 3; Ritchie, Tr. 1097; Beckwith, Tr. 1306. Notwithstanding

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[87] The IWSC also applied to IBM equipment purchased abroad and installed (or reinstalled) in the U.S. or Puerto Rico. The main issue at trial was the legality of the IWSC as it affected exports from the United States.

[88] After institution of the IWSC, IBM's standard purchase agreements continued to contain "essentially . . . the same limited warranty." Ritchie, Tr. 1102; *see also*, DX 2121, at 3; DX 829, at 1; DX 2124, at 5.

the limitation, IBM, as a matter of practice and generally at no additional cost to its customers, *see* PX 67, continued to provide warranty service on exported machines through its offices abroad. Ritchie, Tr. 1097. IBM's practice was consistent with that of other U.S. Computer manufacturers. PX 71.

[121]** A "very substantial" and rapid increase in the movement of IBM computers from the U.S. to foreign and primarily European countries in early 1980 precipitated IBM's announcement of the IWSC, and its discontinuation of the practice of extending warranty service at no extra cost to equipment shipped abroad. Ritchie, Tr. 1097-98; Beckwith, Tr. 1307; Rizzo, Tr. 1213. If buyers wanted fixed-cost IBM installation and warranty service abroad, they had to pay the IWSC. In July, 1980, IWSC fees ranged from 10 to 14 percent of the purchase price of 303X machines, or between $ 250,000 and $ 724,000. PX 452; Levin, Tr. 70. The IWSC did not provide for a rebate or refund of the price of the limited warranty service included in the purchase price, but did give the customer a credit for the out-of-pocket costs saved by IBM if the machine was not initially installed in the country of purchase (IBM kept whatever mark-up there was for the installation service). *See* Levin, Tr. 72-73. [89]

[122]** The increase in the number of customer shipments of IBM computers in early 1980 reflected an international currency imbalance which made it profitable for IBM customers, such as leasing companies, to buy IBM computers in the U.S. and market them in a number of foreign countries in competition with IBM. [90] *See, e.g.*, Lewis, Tr. 466-67; Levin, Tr. 69. Comdisco, for example, in early 1980, purchased new IBM equipment in the U.S. to market in Europe. Lewis, Tr. 467; *see also* PX 61. The addition of IBM's IWSC to the purchase price of a new computer made the export of the machine commercially less attractive and reduced the flow of on-warranty equipment shipped by leasing companies.

Computers purchased in the U.S. and installed in Europe (or in parts of Japan) had to undergo electric cycle conversions in order to function on foreign **[**123]** electrical currents. [91] Allen, Tr. 282-83; Levin, Tr. 60-61. In 1980, AMI was engaged in the business of performing cycle conversions on IBM large scale mainframes. Allen Tr. 283; Lewis, Tr. 459; Smith, Tr. 594. The decline in the shipping activities of the leasing companies resulted, at least temporarily, in a loss of business opportunity for AMI. *See* Allen, Tr. 386.

In 1981, AMI itself became interested in the cross-border shipment of new IBM computers. AMI considered buying two 308X computers abroad at European prices and marketing them in the U.S. Allen, Tr. 285. According to Mr. Allen, the IWSC costs of $ 355,630 for one machine and $ 345,080 for the other made the import and cycle conversion **[*300]** of the computers economically unattractive. [92] Allen, Tr. 285-86.

[124]** II.

AMI contends that IBM's IWSC policy had the unlawful purpose and effect of preventing AMI (and other third party fabricators) from performing cycle conversions of new IBM computers and leasing companies from exporting, importing, and marketing those machines in competition with IBM. *See* A.P.F. at para. 218. AMI also claims that it too was prevented by the IWSC from engaging in the business of cross-border shipments of new IBM computers.

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[89] Due to the difficulties of administering the IWSC and the number of customer complaints about the policy, especially from leasing companies, IBM discontinued the IWSC as of January 1, 1985. DX 2220, at 16; PX 56, at 1; PX 60; Beckwith, Tr. 1308; Ritchie, Tr. 1101; Robertson, Tr. 700. Although AMI criticizes IBM's post-IWSC policy, it does not assert a claim based upon it.

[90] Third party leasing companies, such as Comdisco and CMI, competed with IBM for the placement of large scale mainframe computers with end users in foreign markets. PX 71.

[91] Large scale mainframes operate on 60 cycle electric power in the U.S., and on 50 cycle electric power in Europe and parts of Japan. Lewis, Tr. 459

[92] Although the machines on which AMI requested IWSC quotations were more expensive (in U.S. dollars) to buy in Europe than were equivalent machines in the U.S., Allen Tr. 393; Levin, Tr. 228-29, Mr. Allen hoped to be able to sell them at a price exceeding the difference because of the relatively short supply of the computers in the U.S. Allen, Tr. 285, 391-92. Mr. Allen testified that "the customers who wanted these machines were willing to pay a premium." Allen, Tr. 285.

A.R.M. at 56. IBM argues that AMI lacks standing to challenge the IWSC under either theory. I.M. at 43-44. I disagree.

A.

HN26[] It is "as unlawful to prevent a person from engaging in a business as to drive him from it." 2 P. Areeda & D. Turner, ***Antitrust Law***, § 335 c at 174 (1978); *see also* *Bubar v. Ampco Foods, Inc., 752 F.2d 445, 450 (9th Cir.)*; *cert. denied*, *472 U.S. 1018, 87 L. Ed. 2d 616, 105 S. Ct. 3481 (1985)*; *Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 474-475 (7th Cir. 1982)*; *cert. denied*, *461 U.S. 958, 77 L. Ed. 2d 1317, 103 S. Ct. 2430 (1983)*; **[**125]** *Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 994 (D.C. Cir. 1977)*, *cert. denied*, *436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978)*. Generally, "a potential competitor has standing if he can show a genuine intent to enter the market and a preparedness to do so." *Bubar, 752 F.2d at 450*; *see also* *Grip-Pak, 694 F.2d at 474-75* (plaintiff "may be able to recover lost profits as a manufacturer even though it has not yet started manufacturing, it it had reasonable prospects of doing so which [defendant] snuffed out.").

AMI has made the necessary showing. AMI had experience in the cycle conversion business and had converted IBM computers for shipment abroad. In 1981, AMI had customers who were interested in two 308X computers which could not be purchased in the U.S. without delays. The customers were willing to pay a premium to obtain the machines promptly and AMI considered importing and cycle converting two computers from Europe to meet their needs. AMI regarded fixed-cost IBM warranty service coverage as necessary to the success of the deal, and the only way to obtain such warranty service **[**126]** from IBM at the time was to pay the IWSC. *See* Levin, Tr. 75-76. AMI therefore requested and received an IWSC RPQ from AMI's IBM salesman. The added cost of the IWSC (and AMI cycle conversion service) exceeded the premium the customers were willing to pay. Allen, Tr. 284-86. These facts establish AMI's intent and preparedness to purchase computers for cycle-conversions and cross-border sales, even though AMI did not pay the IWSC. [93]

B.

AMI also has standing to challenge the IWSC by virtue of its participation **[**127]** in the cycle conversion business. U.S. manufactured IBM computers could not be marketed abroad without undergoing cycle conversions, and the cycle conversion business depended on the exportation of computers. AMI performed cycle conversions for Comdisco, CMI, Standard and Chartered Leasing, Techtronics, Volkswagen of America, and other companies. Allen, Tr. 283; Lewis, **[*301]** Tr. 459; Smith, Tr. 594. The cycle conversion business was profitable for AMI. *See* Allen, Tr. 286. AMI typically charged between $ 70,000 and $ 80,000 for each conversion. *Id*. Comdisco regarded AMI's work as excellent, and CMI used AMI for all of its cycle conversion work. Lewis, Tr. 459-60; Smith, Tr. 594. Prior to the implementation of the IWSC, AMI performed cycle conversions on new IBM computers. *See* Allen, Tr. 386. IBM's IWSC inhibited but did not preclude the cross-border shipment of new IBM computers by the leasing companies and limited AMI's cycle conversion business.

The IWSC's impact on AMI's business was not, contrary to IBM's assertion, too remote or speculative to grant AMI standing to sue. [94] The alleged injury to AMI's business was, under AMI's theory, "inextricably intertwined **[**128]**

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[93] I need not agree with AMI that there existed no viable substitute for IBM service warranty under the IWSC to conclude that AMI has standing to test the legality of IBM's policy. The focus of the standing inquiry under Section 4 is not "whether a business practice violates the antitrust laws, but whether a particular plaintiff may recover damages from the effects of the arguably unlawful practice on him or her." *Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 284 (3d Cir. 1978)*.

[94] IBM does not contend that granting standing to AMI will create the risk of duplicative recovery involved in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)* and *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958 (3d Cir. 1983)* *cert. denied*, ***465 U.S. 1024, 79 L. Ed. 2d 682, 104 S. Ct. 1278 (1984)***. IBM's position is that AMI was an insufficiently "direct" victim of the alleged harm to allow it to recover damages. *See* I.M. at 43; *see also* *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 540, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. That AMI, as a business

with the injury (IBM) sought to inflict" on the leasing companies. *See* *Blue Shield of Va. v. McCready, 457 U.S. 465, 484, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. The harm to AMI's business was forseeable to IBM. *See* *id. at 479*. The IWSC impacted directly on AMI's business. *See* *Bravman, 552 F.2d at 100*. AMI was "within that area of the economy . . . endangered by a breakdown of competitive conditions" allegedly resulting from the IWSC. *Blue Shield, 457 U.S. at 480* (quoting *In re Multidistrict Vehicle Air Pollution M.D.L. NO. 31*, *481 F.2d 122, 129 (9th Cir. 1973))*.

[129]** III.

HN27[] In order to prevail under *Section 1* of the Sherman Act, AMI must prove that IBM's IWSC constitutes a "contract, combination . . . or conspiracy" which unreasonably restrains trade. *See* *15 U.S.C. § 1*. AMI has failed to make either showing.

A.

AMI does not contend that IBM engaged in a conspiracy. AMI argues that the existence of the necessary contract or combination was established by evidence that IBM obtained the unwilling agreement of third parties, including leasing companies, to pay the IWSC. *See* A.R.M. at 52. According to AMI, IBM thereby entered into an unlawful contract or combination. *See* *id. at 55*.

The flaw in AMI's contention is that payment by third parties of the IWSC, and thus the formation of a contract or combination, did not adversely impact on AMI's business. Under AMI's theory, payment of the IWSC enabled third parties to export IBM computers, and this favored AMI's cycle conversion business. Thus, AMI performed cycle conversions on new IBM computers in 1984, after AMI's customers paid the IWSC. Beckwith, Tr. 1310; Allen, Tr. **[**130]** 389-90. Although AMI may have been better off without the IWSC, it was not harmed when leasing companies paid the IWSC. What AMI contends injured its business was IBM's 1980 announcement that it would discontinue providing warranty service (at no extra cost) to U.S. machines exported during the initial twelve-month warranty period, since the announcement of the IWSC stemmed the flow of third party shipments. The alleged harm derived not from the contract or combination, as in the principal cases upon which AMI relies, *see* *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*, but from IBM's unilateral decision **[*302]** and policy. [95] IBM independently instituted the IWSC, and such independent action is not proscribed by *Section 1*. *See, e.g.,* *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*.

[131]** B.

AMI contends that "the IWSC had the purpose and effect . . . of eliminating" competition in foreign commerce. A.M. at 62. Assuming that AMI established the existence of a contract or combination under *Section 1*, I find, based on "all of the circumstances of [the] case," *see* *GTE Sylvania, 433 U.S. at 49*, that AMI has failed to prove that the IWSC constituted an unreasonable restraint of trade.

Although implementation of the IWSC dissuaded some leasing companies and AMI from shipping new IBM computers or MESs in competition with IBM, the IWSC's overall impact on competition was insufficiently adverse to support a finding of illegality. AMI has neither defined the relevant market allegedly affected by the IWSC nor attempted to measure the IWSC's impact on such a market. While lack of proof of a relevant market is not fatal to AMI's claim, *see* *Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 460, 90 L. Ed. 2d 445,*

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engaged in cycle conversions, did not (like the leasing companies) compete with IBM in the placement of computers with end-users is nondispositive. *See, e.g.,* *Bravman v. Bassett Furn. Industries, Inc., 552 F.2d 90, 96 (3d Cir. 1977)*.

[95] To the extent that AMI contends that IBM's enforcement of the IWSC (by collecting third party IWSC payments) was necessary to underscore the seriousness of IBM's IWSC announcement and produce the allegedly desired chilling effect on third party shipments, I would regard the argument as too speculative to establish the existence of the necessary contract or combination.

106 S. Ct. 2009 (1986), an inquiry into market power and market structure helps determine the competitive impact of a challenged business practice under the Rule of Reason. *See e.g.,* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984). **[**132]**

Even as to companies which the evidence shows competed or were in a position to compete with IBM for the placement of IBM computers abroad, the IWSC did not impose an unreasonable restraint of trade. IBM did not condition the sale of its computer equipment upon payment of the IWSC. Nor did IBM require payment of the IWSC as a condition to the installation abroad of a machine bought in the United States. *See* Ritchie, Tr. 1099; *see also* Lewis, Tr. 532-33. Payment of the IWSC was optional. *See* DX 1381, at 2; *see also* Baumol, Tr. 1670-72, 1695-96. As an alternative to purchasing warranty service from IBM on an IWSC basis, customers interested in buying IBM computers in the U.S. and placing them abroad, and also interested in having them covered by warranty services, could: provide the installation and/or maintenance services themselves; obtain installation and/or maintenance services on a fixed-cost or time and materials basis from third-party service companies; or obtain such services from IBM on a time-and-materials basis. PX 57; PX 607G at at 24-25; Ritchie, Tr. 1099; DX 1381 at 2. [96] Based on evidence that end-users preferred fixed-price maintenance service over **[**133]** maintenance service on a time-and-materials basis, *see* Smith, Tr. 594-95, third-party fixed-cost installation and/or maintenance services provided the most viable alternative to paying the IWSC. [97] A number of companies were engaged in the provision of such services. *See* DX 1351 (e.g., pp. 6-10); Phillips, Tr. 1589-94.

Payment of the IWSC reduced but did not eliminate the business opportunity created by the currency imbalance. For example, in July, 1980, despite the IWSC, a differential exceeding $ 800,000 remained between the European and U.S. price (in U.S. dollars) **[**134]** for a typical 303X computer. PX 517, at 2; PX 452, *see also* PX 592, at 85635.

[*303] AMI acknowledges that during the relevant time period "there were instances when it might have proved economically feasible to export machines from the United States even after paying the IWSC," A.P.F. at para. 225, but adds that these potential opportunities were closed by delays resulting from IBM's policy of quoting IWSC prices solely on a "request for price quotation (RPQ) basis." *Id*. Although he never requested an IWSC RPQ, *see* Smith, Tr. 615, Gary Smith of CMI testified that "the response time [for obtaining an IWSC RPQ] was too long." *Id. at 592-93*. Mr. Ritchie of IBM acknowledged that third parties interested in IWSC quotes complained about delays attributable to the RPQ process. Ritchie, Tr. 1148-49. However, there is no evidence that such delays resulted from anything other than IBM's inability to determine the appropriate IWSC more quickly. An IWSC was determined on a case by case RPQ basis and was prorated for the number of months remaining on the product's initial warranty. Lewis, Tr. 461-62; Smith, Tr. 592; Ritchie, Tr. 1095; DX 2221 at 42-43; PX 67. The IWSC **[**135]** was intended to reflect IBM's costs for providing warranty service abroad, and calculation of the IWSC depended on several variables, including the country in which the machine would be installed, the model type, and the machine's particular configuration. *See* DX 2221, at 42; PX 67, at 1; Levin Tr. 73-74. "The [IWSC RPQ quotes] could vary with different configurations." PX 73, at 1. IBM therefore did not publish a price list of IWSC charges. Mr. Smith of CMI testified that he told IBM that if he were to place an RPQ for an IWSC, he would need a response within a matter of hours. Smith, Tr. 616. There is no evidence that IBM could satisfy such a request.

The IWSC's impact on the shipping activities of leasing companies is difficult to assess but does not appear to have been preclusive. CMI, with offices in Geneva, Paris, London, Frankfurt, and Munich, continued to import and export used IBM machines (*i.e*., machines off the initial warranty coverage and therefore not subject to the IWSC) after implementation of the IWSC, but did not import or export new computers. Mr. Smith of CMI testified that the IWSC "kept us" from importing or exporting new equipment. Smith, Tr. 595. **[**136]** However, it is unclear that CMI imported or exported new IBM equipment prior to the implementation of the IWSC. *See* Smith, Tr. 593-94. Mr.

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[96] For computers bought in the U.S. and installed abroad, it was impossible to obtain IBM fixed-cost installation and/or maintenance service in the first year after the purchase of the machine without paying the IWSC. Levin, Tr. 75-76.

[97] Third party installation and/or maintenance services may not have been perfect substitutes for IBM fixed-cost warranty services, *see* Lewis, Tr. 469, but they were a reasonable alternative.

Lewis of Comdisco testified that Comdisco did not import or export new IBM MESs or features after institution of the IWSC "because of the RPQ surcharge", Lewis, Tr. 465-66; *see also* PX 61, but also stated that Comdisco "imported at least one" IBM computer under warranty during the IWSC period. Lewis, Tr. 538. He also acknowledged the possibility that Comdisco shipped other on-warranty computers during the same period. Lewis, Tr. 539.

The IWSC's impact on AMI's business was no more harmful. AMI continued to perform cycle conversions for leasing companies on used IBM equipment after the implementation of the IWSC, Allen, Tr. 286; indeed, its cycle conversion business grew during the IWSC period. *See* Allen, Tr. 286, 386-87; DX 1875; DX 1875A. Further, despite Mr. Allen's assertion that AMI's cycle conversion work on new IBM computers "in essence" stopped with the introduction of the IWSC, Allen, Tr. 283, AMI performed cycle conversions on new IBM computers in 1984 and performed more of such conversions in that year than in 1985, the year **[**137]** IBM discontinued the IWSC. Beckwith, Tr. 1310; Allen, Tr. 389-90.

C.

AMI has also failed to establish that IBM's purpose in implementing the IWSC was anticompetitive. The weight of the evidence supports IBM's assertion that it instituted the IWSC in order to accommodate a growing number of customer requests for warranty service on exported machines and to recover substantial unanticipated costs associated with providing such service. IBM's one-year limited warranty on new machines expressly excluded coverage on machines placed outside the U.S. or Puerto Rico during the initial one-year period. *See* *supra, pp. 298-299.* **[*304]** The main reason for the warranty limitation was IBM's desire "to supply IBM products and services through the IBM organization operating in the country where those products are installed or services rendered." DX 2221, p. 42; PX 67 p. 1. Mr. Robertson of IBM testified that "IBM sells equipment in the United States for installation and use within the United States." Robertson, Tr. 699.

The purchase price of new IBM machines subject to the limited warranty included only a price for installation and warranty services to be provided in the country in which **[**138]** the equipment was bought. Nevertheless, prior to the implementation of the IWSC, largely due to the fact that there were not a great number of cross-border shipments, IBM generally provided installation and warranty services to computers exported from the United States to Europe or Japan (and vice versa) during the initial warranty period at no additional cost. Ritchie, Tr. 1097. However, IBM never altered its express limited warranty provision or policy. DX 2221 at 42; PX 67 at 1. The increase in the cross-border movement of IBM equipment by IBM customers (including leasing companies) resulted in increased costs to IBM and disrupted IBM's planning for the provision of warranty and maintenance services. The avowed purpose of the IWSC, supported by the evidence, was to compensate IBM for the additional costs of providing installation and warranty services in a country other than the country of purchase, and to recover for IBM the associated, additional administrative expenses. *See* Ritchie, Tr. 1094 -- 95; Beckwith, Tr. 1307-08; DX 2221, at 42; PX 67, at 1. The IWSC reflected IBM's cost of providing services for a machine during the remaining portion of the initial warranty period **[**139]** that the machines would be outside of the United States. *Id.; see also* Levin, Tr. 73-74.

AMI's assertion that the IWSC amounted to a double charge for IBM installation and warranty service is unsupported by the evidence. Prof. Levin acknowledged that IBM gave customers a credit for its savings on out-of-pocket expenses if the new computer were placed initially in a country other than the country of purchase. IBM, therefore, did not charge customers twice for the costs of one IBM installation. Also, IBM incurred costs of planning for, and ensuring, warranty service (and the necessary administrative organization) in the country of sale whether or not the customer transferred the IBM equipment to another country. The cross-border shipment of the machine resulted in similar and additional costs for IBM for which it was not compensated by the original purchase. Ritchie, Tr. 1094-95; Beckwith, Tr. 1307-08; DX 2221, at 42; PX 67, at 1. AMI has not shown that the price of warranty service included in the original sales price compensated IBM for the warranty service provided abroad.

In an effort to show that the purpose of the IWSC was not to recover unexpected additional costs, AMI **[**140]** refers to the disparity between the IWSC quotes it received in 1981 for two 3081 D16 computers ($ 355,630 and $ 345,080) and IBM's 1985 price for fixed-cost maintenance services on similar computers in the U.S. ($ 63,801 per machine). A.R.M. at 49. Assuming that AMI's calculation of the fixed-cost maintenance service is accurate (there was no trial testimony on the subject), AMI's comparison is of minimal probative value because the two services compared are fundamentally different, involve computer equipment at different product-cycle stages, and are performed pursuant to contracts imposing distinct obligations on IBM. [98] *See* PX 69.

IBM refused to disclose to Comdisco the methodology and underlying details concerning the calculation of the IWSC. *See* PX 64 at 81598; PX 69 at 81593; PX 72 at 2221. IBM **[**141]** denied Comdisco's offer to pay IBM's actual, additional costs and its request to be able to purchase IBM's standard fixed-cost maintenance services during the first year of a new machine. *See* **[*305]** PX 64; PX 72 at 2221. IBM's denial of the latter request was based in part on the fact that the IWSC and the standard maintenance agreements provide for different services. *See* PX 69. These facts do not raise sufficiently serious doubts about the legitimacy of IBM's asserted business justification for the IWSC to support a finding that the policy was unreasonable or unlawful.

AMI's other attempts to establish that the IWSC reflected an anticompetitive purpose also fail. A handwritten, internal IBM memorandum regarding "Cross Border Transaction Proposal - Concerns and Recommendations" stated "There is an implicit assumption that 3rd party conversion will be eliminated." *See* PX 50 at 3918. AMI argues that the document shows that IBM intended the IWSC to eliminate third party cycle conversion activity. *See* A.M. at 65. However, although the document mentions "installation and warranty RPQ", it nowhere expressly refers to the IWSC and AMI produced insufficient evidence **[**142]** linking the document to the IWSC. AMI's interpretation of the memorandum does not follow from a reading of it. Further, the document is dated May 17, 1982, nearly two years after IBM instituted the IWSC.

Another handwritten document captioned "Objective" states, "Support country integrity through marketing and product supply", and "Prevent the non-IBM export of new machines." *See* PX 68. AMI contends that the document reflects IBM's desire to prevent, through implementation of the IWSC, the cycle conversion of new IBM equipment and the resulting competition from leasing companies exporting cycle converted equipment from the U.S. to Europe. A.M. at 64, 65. The document is undated and unsigned, and nowhere refers to the IWSC or any type of warranty service. AMI has failed to connect the document to IBM's IWSC. [99]

[143]** AMI also relies on an unsigned IBM document, dated November 12, 1984 (over four years after announcement of the IWSC) and consisting of numerous pages, one of which contains the following language: "Opportunity Analysis"; "Cross Border"; "IWSC is an Inhibitor (308X)." *See* PX 592 at 85633. Although at least two pages of the document expressly refer to the IWSC, (*see* PX 592, pp. 85633, 85635) and one contains apparently incriminating words, the document provides AMI with little support because AMI made no attempt at trial (or through discovery) to shed light on the meaning of the document or the page on which AMI relies. The disjointed language to which AMI refers is too thin a basis upon which to rest antitrust liability. [100]

[144]** * * * *

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[98] As with IBM's OTC prices for 308X upgrade parts, to the extent that AMI asserts an independent claim on the theory that the IWSC price was unlawfully high, such a claim fails under the Sherman Act.

[99] At his deposition, Paul J. Rizzo, Vice Chairman of IBM and a member of IBM's Management Committee, stated that he was involved in the decision to institute the IWSC, Rizzo, Dep. Tr. 107-108, and that he thought the handwriting on PX 68 was his own. *Id. at 105-06*. At trial, Mr. Rizzo testified that although the handwriting on PX 68 was similar to his handwriting, he was positive that he was not the author of PX 68 and could therefore not recall any of the circumstances surrounding the document. *See* Rizzo, Tr. 1195-1199. Mr. Rizzo stated that the document was written by Phillip Guthoff, a member of IBM's Comparable Planning Staff, in 1980. Neither party called Mr. Guthoff as a witness. I find that Mr. Rizzo's trial testimony was credible.

[100] As concerns the IWSC, this case is unlike *Eiberger v. Sony Corp., 622 F.2d 1068 (2d Cir. 1980)*, *cert. denied sub nom., Simplot v. Strobl, 474 U.S. 1006, 88 L. Ed. 2d 459, 106 S. Ct. 527 (1985)*, upon which AMI relies. For example, in *Eiberger*, Sonam exacted warranty service payments from its distributors even when no warranty services were provided. The warranty fees were designed and operated as penalties to enforce territorial restrictions. There was also an admission by a Sonam official that the warranty fees provided a "good system" "to protect our dealer's territory." ***Id. at 1073***.

For the foregoing reasons, judgment will be entered in favor of IBM and against AMI on AMI's *Section 1* claims based on IBM's net pricing policy and Installation and Warranty Service Charge.

ORDER

AND NOW, 21st this day of July, 1988, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that judgment is entered in favor of IBM and against AMI on AMI's *Section 1* claims based on IBM's net pricing policy and Installation and warranty Service Charge.

Kowalski v. Chicago Tribune Co.

United States Court of Appeals for the Seventh Circuit

May 13, 1988, Argued ; July 22, 1988, Decided

No. 88-1626

Reporter
854 F.2d 168 *; 1988 U.S. App. LEXIS 11094 **; 1988-2 Trade Cas. (CCH) P68,173; 15 Media L. Rep. 2451

RICHARD J. KOWALSKI and HOFFMAN NEWS AGENCY, et al., Plaintiffs-Appellants, v. CHICAGO TRIBUNE COMPANY, Defendant-Appellee

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern District. Nos. 88 C 321, 88 C 172--James F. Holderman, Judge.

Core Terms

distributors, termination, arbitration, contracts, newspaper, injunction, antitrust, preliminary injunction, merits, equitable relief, anti trust law, independent distributor, agency contract, monetary relief, publisher, percent, retail

LexisNexis® Headnotes

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Grounds for Injunctions**

A request for a preliminary injunction is evaluated in accordance with a sliding scale approach: the more the balance of irrevocable harms inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Injunctions, Grounds for Injunctions**

The requirement that a plaintiff show that its chances for winning on the merits are better than negligible is a necessary rather than sufficient condition for a grant of a preliminary injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Injunctions, Preliminary & Temporary Injunctions**

A prerequisite to a preliminary injunction, as to other forms of equitable relief, is a showing that the plaintiff's remedy at law is inadequate.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Covenants not to Compete

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN4[] **Communications, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, forbids a newspaper publisher to fix the retail price of newspapers distributed by independent distributors, even if the object of the price fixing is to prevent the distributors from exploiting the monopoly power conferred on them by the publisher's granting them exclusive territories.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The consignor's setting of the price at which the consignee is to sell the consignor's goods is a form of illegal price fixing.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Breach of Contract

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Contracts Law > Remedies > Equitable Relief > Injunctions

HN6[] **Causes of Action, Breach of Contract**

The strength of a plaintiff's case does not change the requirement of showing that the remedy at law (damages) is inadequate; one could have an open-and-shut case on the merits, yet if one's legal remedy were adequate one, would not be entitled to a preliminary (or any) injunction.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > General Overview

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Claims under the Racketeer Influenced and Corrupt Organizations Act, a statute whose remedial provisions are closely modeled on those of the antitrust laws, are arbitrable.

Counsel: Paul E. Slater, Sperling Slater & Spitz, P.C., Chicago, Illinois, Attorneys for Plaintiff.

James A. Klenk, Sonnenschein, Carlin, Nath & Rosenthal, Chicago, Illinois, Attorneys for Defendant.

Judges: Bauer, Chief Judge, and Cudahy and Posner, Circuit Judges.

Opinion by: POSNER

Opinion

[*169] POSNER, Circuit Judge.

Eighty-four former distributors of the *Chicago Tribune* brought this suit against the Tribune's publisher, charging breach of contract and violation of the antitrust laws. The district court refused to grant a preliminary injunction, and the plaintiffs (apart from those who have settled) have appealed. See *28 U.S.C. § 1292(a)(1)*.

Early in this decade the plaintiffs signed contracts making them independent distributors of the *Tribune* in defined areas, mostly in Chicago's suburbs. This meant that the plaintiffs bought copies of the newspaper from the defendant and resold them to home subscribers and other retail purchasers in their areas. The contracts are uniform and contain elaborate provisions regarding termination--a feature that was **[**2]** necessary since the contracts were to run for ten years. Each contract authorizes the Tribune Company to terminate it "at any time upon thirty days' written notice if such termination is made pursuant to notification sent simultaneously to [all the distributors], announcing a change by Publisher in its method of sale and distribution," provided that the publisher simultaneously "offer[s] to Distributor an alternate means of participation in servicing subscribers in Distributor's Area of Primary Responsibility, either as agent or employee." But the Tribune Company must compensate a terminated distributor for the loss of his contractual rights. If the parties cannot agree on the value of those rights the matter must be submitted to arbitration for a determination of their value, and if the arbitrator decides that the termination was not for "just cause" he is to add 20 percent to the distributor's compensation, as damages. The contracts make arbitration the "exclusive remedy to resolve any dispute concerning the termination of a Distributor," the distributors having "expressly" waived any "right to any remedy in a court of law." Finally, the contracts forbid the arbitrators to reinstate **[**3]** a terminated distributor.

[*170] In the fall of last year the Tribune Company announced that it was going over to a "delivery agent" system, and offered the plaintiffs agency contracts in place of their independent-distributor contracts, which it announced it was terminating. Under the agency contract the Tribune Company would fix the retail price of the *Tribune*, assume the risk of loss or nonpayment of newspapers, assume the responsibility for customer complaints, and purchase and lease back the principal assets of the (former) distributors. The plaintiffs declined the offer and instead brought this suit to enjoin their termination, contending that it is part of an illegal price-fixing scheme (presumably embodied in the agency contracts), and also a breach of contract because the change from independent distribution to agency distribution is not a change in the publisher's "method of sale and distribution." The Tribune Company has replaced the plaintiffs with new agents, each of whom handles a small number of subscribers and has signed the agency contract that the plaintiffs refused to sign. The parties agree that the plaintiffs can still obtain arbitration if they are dissatisfied **[**4]** with the defendant's valuation of their lost rights under the terminated contracts.

HN1[] A request for a preliminary injunction is evaluated in accordance with a "sliding scale" approach: the more the balance of irrevocable harms inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction. See, e.g., *Curtis v. Thompson, 840 F.2d 1291, 1296 (7th Cir. 1988)*; *American Hospital Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593-94 (7th Cir. 1986)*. The common sense of the approach is shown by the limiting case, in which the injunction would do no harm at all to the defendant but denial of the injunction would wreak massive and irrevocable harm on the plaintiff; even if the plaintiff had only a modest chance of prevailing when the case was fully tried, it would make sense to grant the injunction pending the trial, against the chance that he might win after all. The plaintiffs in this case rely heavily on this approach, arguing that unless their chance of winning is "less than negligible" they ought to get the injunction. This is a garbled version of the circuit's standard, which is that the plaintiff must **[**5]** show that its chances "'are better than negligible.'" [Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 387 (7th Cir. 1984)](). But there is a deeper problem with the plaintiffs' argument: they have failed to show that the injunction is necessary to avert any harm to them, let alone to avert massive harm not offset by comparable harm to the defendant if the injunction is granted. ***HN2***[] The requirement that a plaintiff show that its chances for winning on the merits are better than negligible is a necessary rather than sufficient condition for a grant of a preliminary injunction.

The terms of the distribution contracts, entered into by mature businessmen who do not claim to have been hoodwinked or coerced, scotch any contention that the plaintiffs face irreparable harm--harm not fully compensable by an award of monetary relief by the arbitrators--as a result of the termination of the contracts. Contemplating the possibility that the defendant might terminate these contracts with only thirty days' notice, and the consequences if it did so, the plaintiffs agreed that if that happened their only remedy would be to seek a monetary award by an arbitrator--even if the Tribune Company **[**6]** was acting wrongfully, that is, was breaking the contracts rather than terminating them in accordance with their terms. The plaintiffs could have negotiated for some form of equitable relief in the event of termination but they evidently decided that monetary relief would be adequate and expressly waived any other form of remedy. They argue now that they never surrendered their right to seek equitable relief *from a court* in the event of an unjust termination, but we cannot understand how this jibes with the provision in the agreements that makes arbitration the parties' "exclusive remedy to resolve *any* dispute concerning the termination of a Distributor" (emphasis added). In any event, both the elaborate provisions for monetary relief in the distributor agreements and the disavowal **[*171]** of equitable relief in the arbitration clause of the agreements are powerful evidence that the plaintiffs believed that financial compensation--which they can still obtain in arbitration--was an adequate remedy for the termination of the agreements.

HN3[] A prerequisite to a preliminary injunction, as to other forms of equitable relief, is a showing that the plaintiff's remedy at law is inadequate. See **[**7]** *id. at 386*. The principle embraces a case such as this, where the plaintiffs agreed that monetary relief in arbitration would be the only remedy for a breach of contract. Compare *Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 277 (1st Cir. 1981)*. Their present argument that arbitration would be "a hollow formality" unless the Tribune Company is enjoined from terminating the distributorship contracts itself rings hollowly, since the arbitral remedy in the contracts envisages that the distributor has been terminated and forbids the arbitrator to reinstate a terminated distributor, whether on a permanent or interim basis.

The waiver of judicial remedies in the distributorship contracts may or may not embrace a request for an injunction to correct a violation of the antitrust laws (more on this later), but if it does not, still that would not affect our evaluation of the issue of irreparable harm. A single injury is alleged: the termination of the distributor contracts. Whatever the theory on which the plaintiffs seek equitable relief, the remedial provisions in the agreements show that their remedy at law (as we may for these purposes describe monetary relief in arbitration) **[**8]** is adequate. This is not to say that the remedy specified in a contract is always the truest measure of a party's injury in the event of breach; the refusal of courts to enforce contractual penalty clauses, see, e.g., *Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1288-92 (7th Cir. 1985)*, suggests it is not. In this case, however, there is no reason to doubt either the propriety or the adequacy of the remedial measures to which the plaintiffs agreed in the distributorship contracts.

A brief consideration of the merits, intended to be tentative rather than definitive, will provide additional reasons for our conclusion that the plaintiffs have not made out a case for a preliminary injunction. The merits of the contract claim seem threadbare. The contract authorizes the Tribune Company to terminate distributors merely upon announcing a change in the method of distribution, and there can be no serious doubt that the method *was* changed; distribution by employees, by agents, and by independent distributors are well-known alternative methods of distribution in the newspaper industry. See, e.g., *Paschall v. Kansas City Star Co., 727 F.2d 692, 695 (8th Cir. 1984)* (en banc); **[**9]** *Auburn News Co. v. Providence Journal Co., supra, 659 F.2d at 275*; *Knutson v. Daily*

Review, Inc., 548 F.2d 795, 800-01 (9th Cir. 1976); Newberry v. Washington Post Co., 438 F. Supp. 470, 473 (D.D.C. 1977); Oppenheim & Shields, Newspapers and the Antitrust Laws 72-74 (1981). If the method did not change, it is hard to see why the plaintiffs refused to accept reclassification as agents. And even if the termination of the plaintiffs was unauthorized, all that would follow is that they are entitled to 20 percent more money from the arbitrators; there would be no grounds for their asking a district court for an injunction.

The merits of the plaintiffs' antitrust claim are somewhat more substantial. In *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*, the Supreme Court held that **HN4**[] *section 1* of the Sherman Act, *15 U.S.C. § 1*, forbids a newspaper publisher to fix the retail price of newspapers distributed by independent distributors, even if the object of the "price fixing" is to prevent the distributors from exploiting the monopoly power conferred on them by the publisher's granting them exclusive territories. The decision has been much criticized, both in general and with specific **[**10]** reference to the newspaper industry, see Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, *69 Ia. L. Rev. 451 (1984)*, for disserving consumer interests; and its authority has been cast in doubt by later decisions of the Supreme Court. In particular, as we noted in **[*172]** *Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698, 706 (7th Cir. 1984)*, at the time *Albrecht* was decided the granting of exclusive territories to dealers was unlawful per se and therefore did not provide an attractive excuse for placing a lid on the dealers' prices. Now that such imposition is no longer unlawful per se--indeed, now that the Supreme Court is highly sympathetic to efforts by manufacturers to control the distribution of their product, see, e.g., *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*--it may be a valid excuse. The Court in *Business Electronics* cited *Albrecht*, but only for the definition of agreement, and not for the proposition that placing a ceiling over dealers' prices should be equated to placing a floor under those prices.

The plaintiffs have tacked *Albrecht* to another much critized decision, *Simpson v. Union **[**11]** Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*, which treated **HN5**[] the consignor's setting of the price at which the consignee was to sell the consignor's goods as a form of illegal price fixing. We have interpreted *Simpson* as limited to cases where the agency relationship has no other purpose than to circumvent the rule against price fixing. See *Illinois Corporate Travel, Inc. v. American Airlines, Inc., 806 F.2d 722, 725 (7th Cir. 1986)*; *Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437-38 (7th Cir. 1986)*. No such showing has yet been made here. Moreover, we can find no case where an agency agreement has been successfully challenged on antitrust grounds because it prevented the agent from *raising* his price. The facts of this case suggest why. Because most of a newspaper's revenues come from advertising rather than newspaper sales (80 percent, in the case of the *Chicago Tribune*), because advertising revenues depend on circulation, and because circulation is greater the lower the retail price of the newspaper, the Tribune Company has a vital interest in the cheap and effective distribution of its newspaper to the consuming public. It was not satisfied with the independent-distributor **[**12]** system, and after replacing its independent distributors in the City of Chicago with agents was able to bring down the retail price of the paper by 21 percent in the areas formerly served by those distributors. The result was a 23 percent increase in circulation in those areas, and a hefty increase in advertising revenues. The consumer, who occupies center stage in the contemporary jurisprudence of antitrust, was made better off, and so were the Tribune Company and the agents who replaced the distributors. The distributors were made worse off but only because their method of distribution was more costly (or at least higher-priced) than the agency system.

Although *Simpson* teaches that a manufacturer cannot circumvent the rule against price fixing just by calling independent distributors "agents," the agency contracts that the Tribune Company has substituted for the independent-distributor contracts create a bona fide agency rather than just a new nomenclature. The distributors bore the risks of loss of newspapers and of nonpayment by subscribers; those risks have now been shifted to the publisher, who also now deals directly with complaining customers and owns the assets used in **[**13]** the distribution-delivery function. If the new agents resemble the old distributors in the basics of their operations and service, equally the old distributors resemble employees of the Tribune Company who deliver the newspaper in parts of Chicago; all methods of distributing the same product have features in common. Consignment selling is a familiar and legitimate method of distribution; it was not outlawed by *Simpson*, see *Morrison v. Murray Biscuit Co., supra, 797 F.2d at 1438*, and is essentially the method adopted by the Tribune Company.

Since *Albrecht* and *Simpson* have not been overruled we hesitate to suggest that the merits of the plaintiffs' antitrust claim are "less than negligible," but that is not the test, and, even if it were, the plaintiffs would not have shown an entitlement to a preliminary injunction. ***HN6***[] The strength of a plaintiff's case does not change the requirement of showing that the remedy at law **[*173]** (damages) is inadequate; one could have an open-and-shut case on the merits, yet if one's legal remedy were adequate one would not be entitled to a preliminary (or any) injunction. This observation is highly pertinent in the present case, a case in which **[**14]** the antitrust claim merges into the breach of contract claim. The plaintiffs are arguing that the Tribune Company terminated the distributor contracts because it wanted to fix prices, an unlawful motive inconsistent with "just cause" for termination. But, if so, the contracts spell out the remedies (including a 20 percent surcharge) and establish that equitable relief is unnecessary to protect the plaintiffs' interests.

An argument could be made that arbitrators are not authorized to decide questions of federal ***antitrust law*** with binding effect, and at one time the argument would have carried the day, see, e.g., *Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116, 117 (7th Cir. 1978)*; *American Safety Equipment Corp. v. J.P. MaGuire & Co., 391 F.2d 821, 825-27 (2d Cir. 1968)*--but no longer. We took a first, cautious step away from the doctrine of the nonarbitrability of antitrust issues in *University Life Ins. Co. v. Unimarc Ltd., 699 F.2d 846, 850-51 (7th Cir. 1983)* (by rejecting the corollary doctrine that arbitration must be stayed when antitrust issues "permeate" the issues to be arbitrated), and the Supreme Court rejected the doctrine altogether, **[**15]** for international transactions, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)*. Recently the Court relied on *Mitsubishi* in holding that ***HN7***[] claims under RICO (the Racketeer Influenced and Corrupt Organizations Act), a statute whose remedial provisions are closely modeled on those of the antitrust laws, are arbitrable. See *Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)*. Since RICO has nothing to do with international commerce, it seems unlikely after *McMahon* that the principle of *Mitsubishi* can be confined to international transactions. At all events, the plaintiffs in this case are in no position to argue against the arbitration of their antitrust claim when they tell us that far from wanting to reserve that claim for judicial determination they want the arbitrators to decide it and award them treble damages.

This suggests a further problem with the request for preliminary relief. Ordinarily such a request is designed to maintain the status quo pending a full trial of the plaintiff's claim. But what the plaintiffs are really seeking in this case is relief ancillary to arbitration. They want to be reinstated in the **[**16]** hope that if the arbitrators find a violation of the antitrust laws this finding can be used to induce the Tribune Company to rescind the change in its system of distribution. Yet in the distributor contracts the plaintiffs voluntarily surrendered any right to reinstatement. They want arbitration under the contract but do not want to abide by the limitations on the arbitrators' powers.

The order denying the request for a preliminary injunction is

AFFIRMED.

Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield

United States District Court for the District of Rhode Island

July 27, 1988, Decided

C.A. No. 86-0598-B

Reporter

692 F. Supp. 52 *; 1988 U.S. Dist. LEXIS 8639 **; 1988-2 Trade Cas. (CCH) P68,161

OCEAN STATE PHYSICIANS HEALTH PLAN, INC., ET AL., PLAINTIFFS, v. BLUE CROSS & BLUE SHIELD OF RHODE ISLAND, DEFENDANT

Core Terms

buyer, prudent, subscribers, damages, coverage, contractual relationship, estimated, participating, antitrust claim, anti trust law, Sherman Act, marketing, anticompetitive, enrollment, market share, contracts, market power, antitrust violation, healthcare, non-participating, rates, competitors, resigned, Pools, compensatory damages, financing, relevant market, monopoly power, profits, costs

LexisNexis® Headnotes

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Civil Procedure > Trials > Jury Trials > Jury Deliberations

Civil Procedure > Remedies > Damages > Monetary Damages

HN1[] **Right to Jury Trial, Actions in Equity**

In actions which blend claims for both legal relief in terms of monetary damages and equitable relief by way of injunction, a jury shall first determine the issue of damages.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[] **Trials, Judgment as Matter of Law**

The standard of review in setting aside a jury verdict is narrow. In determining the motion for judgment notwithstanding the verdict, the court must evaluate the evidence in the light most favorable to plaintiffs. But the plaintiffs are not entitled to unreasonable inferences based on speculation and conjecture. A motion for judgment notwithstanding the verdict should be granted when as a matter of law, no conclusion but one can be drawn. Therefore a motion for judgment notwithstanding the verdict should be denied if after reviewing the evidence in the light most favorable to the plaintiffs and drawing all reasonable inferences in their favor, there is sufficient evidence to support the verdict. A jury verdict supported by the evidence may not be set aside simply because the judge would have reached a different result.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN3[] **Judicial Officers, Judges**

The standard of review for granting a new trial is not as stringent as for granting a judgment notwithstanding the verdict. But the trial judge may not set aside a verdict simply because he or she would have reached a different verdict. In granting a motion for a new trial the judge must find that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN4[] **Clayton Act, Claims**

Section 15 of the Sherman Act, more commonly known as Section 4 of the Clayton Act, provides that a plaintiff can recover threefold the damages he sustains and the cost of the suit, including attorney's fees if the plaintiff shows an injury in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15*. To establish an antitrust violation, plaintiffs must show that defendants engaged in monopolization acts in violation of *Section 2* of the Sherman Act.

Antitrust & Trade Law > Clayton Act > Penalties

Torts > Business Torts > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Civil Procedure > Remedies > Damages > Monetary Damages

HN5[] **Clayton Act, Penalties**

Section 2 of the Sherman Act defines the criminal violation of monopolization and its penalties. *15 U.S.C.S. § 2*. But the mere existence of a violation cannot support a private action under Section 4 of the Clayton Act. Plaintiffs must show that they suffered an injury to business or property as a result of the antitrust violation. What constitutes an injury to business or property is less than clear. The words "business or property" refer to commercial interest. However, injury to business or property is defined in terms of a tautology. Since Section 4 of the Clayton Act provides a money damages remedy, it must be an injury which the jury is able to quantify in dollars. It is the kind of injury that the antitrust laws were designed to prevent, namely damage as a result of anticompetitive conduct.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN6[] **Private Actions, Remedies**

Plaintiffs do not have to prove that the antitrust violation was the sole cause of the injury. But the Plaintiffs must show a causal relationship between the injury and the violation. Furthermore, the plaintiffs must prove some indication of the amount of damages. Thus, to be liable under the antitrust laws means that one has to violate the antitrust laws and that violation has resulted in an injury to the business or property of the plaintiff, i.e., there was fact of damage.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN7[] **Private Actions, Remedies**

To establish that defendant violated antitrust laws the plaintiff must prove the following elements by a preponderance of the evidence: 1) the defendant had monopoly power in a relevant market; 2) that the defendant willfully acquired or maintained that power through restrictive or exclusionary conduct; 3) that defendant's activities occurred in or affected interstate commerce; and 4) that plaintiff was injured in its business or property because of defendant's restrictive or exclusionary conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

The terms "monopoly power" and "market power" are generally used interchangeably. "Monopoly power" is the power to control prices or exclude competition in a relevant market. The relevant market is the "area of effective competition" where the defendant operates. Relevant market is identified by the product and its interchangeability plus the geographic area. Usually the trier of fact defines the relevant market.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

It is not a requirement to an antitrust suit that plaintiff and defendant be in the same relevant market. Plaintiff, however, must meet the standing requirement that it alleged that it suffered an injury to its business or property as a result of the defendant's conduct. *15 U.S.C.S. § 15*. The First Circuit requires that the person injured by the alleged antitrust violation be within a target area, which draws a line and excludes persons whose injuries are too remote.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Insurance Law > Industry Practices > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN10[] **Monopolies & Monopolization, Actual Monopolization**

Courts must consider the market share of the alleged monopolist as an important factor in determining the existence of monopoly power. In unregulated industries, courts measure market power by defining the relevant product and geographic market and compute the defendant's market share. In a regulated industry, such as health care insurance, a heavy reliance on market share statistics probably would be an inaccurate or misleading indication of monopoly power. Thus, the size of a regulated company's market share should be a point of departure in determining the existence of monopoly power. Other factors such as size of competitors, degree of barriers to entry, pricing trends and practices and technological superiority may be considered in determining market power. A monopoly power analysis must focus directly on the defendant's ability to control prices or exclude competition. It is essential to also keep in mind the fact that the antitrust laws were enacted for the protection of competition, not competitors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Monopolies & Monopolization, Attempts to Monopolize**

The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful under the Sherman Act.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN12[] **Monopolies & Monopolization, Actual Monopolization**

Regarding a monopoly, exclusionary conduct includes behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN13[] **Intentional Interference, Elements**

To establish a claim for tortious interference with a contractual relationship, plaintiff must prove by the preponderance of the evidence that a contract existed, that the alleged wrongdoer knew of the contract, that the wrongdoer's interference was intentional, and that damages resulted from it. The plaintiff must show that the defendant intended to do harm without justification. The defendant has the burden of proving sufficient justification for an interference.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN14[] **Remedies, Injunctions**

Section 16 of the Clayton Act, reads in part that any person or corporation shall be entitled to sue for injunctive relief against threatened loss or damage by a violation of the antitrust laws under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage. *15 U.S.C.S. § 26*. Injunctive relief is available to private parties when the traditional equity principles are met and there is a demonstration of a threatened injury. The traditional elements that a moving party must show for injunctive relief are: 1) irreparable harm to the plaintiff if the injunction is not granted, 2) inadequacy of a legal remedy, 3) that the public interest will not be adversely affected by granting the injunction; 4) that the harm to plaintiff outweighs any harm to the defendant by granting the injunction. But in order to prevail, plaintiff must demonstrate a significant threat of injury from an impending violation of the antitrust laws. Plaintiff need only show a threat on injury, not an actual injury.

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Steven E. Snow, James Purcell, Partridge, Snow & Hahn, Providence, Rhode Island, for Defendant.

Judges: Francis J. Boyle, Chief United States District Judge.

Opinion by: BOYLE

Opinion

[*54] FRANCIS J. BOYLE, CHIEF UNITED STATES DISTRICT JUDGE.

STATEMENT OF FACTS

Defendant, Blue Cross & Blue Shield of Rhode Island, has been charged by Plaintiffs with restraint of trade and monopolization in violation of both federal and state law. After trial, a jury awarded Plaintiffs compensatory damages in the total amount of $ 2,693,437 and punitive damages in the amount of $ 250,000 for wrongful interference with contractual relationships, and found that Blue Cross & Blue Shield of Rhode Island was guilty of monopolization but awarded it no damages. Now pending are the Defendant's motion for judgment notwithstanding the verdict on the antitrust and tortious interference with contractual relationships claims. In the alternative, the Defendant seeks a new trial **[**2]** only on the interference with contractual relationships claims and not on the antitrust claims. Plaintiffs seek injunctive relief and an additur on the antitrust claims. In addition, the Defendant filed a counterclaim against the Plaintiff-Intervenors, the Physicians and Surgeons Association of Rhode Island, Inc. and thirteen individual members of the class, to prevent the Plaintiff-Intervenors from collectively negotiating fees with Blue Cross. [1]

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[1] The Physicians and Surgeons Association of Rhode Island and nineteen individual physicians intervened seeking injunctive relief and monetary damages against Defendant Blue Cross, a claim dismissed at trial. The Defendant Blue Cross also claimed against the Plaintiff-Intervenors alleging that Plaintiff-Intervenors violated Section One of the Sherman Act by conspiring to

Plaintiffs claimed that the Defendant violated Sections One and Two of the Sherman Antitrust Act, *15 U.S.C. §§ 1*, *2 (Supp. 1986)*, violated the analogous Rhode Island Antitrust Statutes, *R.I. Gen.* **[**3]** *Laws § 6-36-1 to 26* (Supp. 1985), and breached the common law duty not to wrongfully interfere **[*55]** with contractual relationships. The Plaintiff Ocean State Physicians Health Plan, Inc. and the Plaintiff class of physicians sought monetary damages against the Defendant due to Blue Cross's business programs which for short hand purpose of reference are called prudent buyer, adverse selection, and HealthMate. Plaintiffs claimed that those programs were unlawful. Plaintiffs saught a permanent injunction prohibiting Defendant from using its prudent buyer and HealthMate programs.

THE PARTIES

The Plaintiffs, Ocean State Physicians Health Plan, Inc. (Ocean State) and Anthony J. Kazlauskas and Jeffrey C. Winters, on behalf of the class of physicians, commenced suit against the Defendant Blue Cross & Blue Shield in September 1986. The class of physicians was defined by a court order dated April 2, 1987 to include "all physicians who contract with Ocean State to provide physicians services and who are also reimbursed by Blue Cross & Blue Shield of Rhode Island for the provision of physician services to defendant's subscribers." The Defendant, Blue Cross & Blue Shield of Rhode Island, is a non-profit hospital and medical services corporation which **[**4]** provides insurance for hospital and medical expenses.

Ocean State is a health maintenance organization (HMO) with headquarters in Warwick, Rhode Island. As an independent practice association type HMO, Ocean State contracts with physicians to provide medical care to its subscribers; Ocean State then pays its contracted physicians on a fee for service basis. Initially, subscribers paid little or no additional cost other than the premium paid to the HMO. The physicians' practice remained independent from the HMO.

In 1980, Ocean State submitted its license application to the Rhode Island Department of Health. It began operation by offering hospital and physicians costs coverage to employee groups of twenty-five or more. Originally, Medserco, a St. Louis based company managed Ocean State. Presently, United HealthCare, a Minnesota based company, manages Ocean State and is its single principal shareholder owning 20% of the stock. The remaining 80% of shares are held by some of the physicians who provide services to Ocean State subscribers. New Ocean State participating physicians pay up to $ 1,000 to contract with Ocean State to provide health services to Ocean State subscribers.

Ocean **[**5]** State is a federally qualified HMO. It determines its rates based on a community rating method. *42 U.S.C. Section 300e-1(8)* provides that an HMO may choose to group by individual or family but within the chosen group, rates are to be equal subject to adjustment factors, such as age and sex. State law permits Blue Cross & Blue Shield to base its premiums for employer groups on the prior actual experiences of each particular insured group.

FACTUAL BACKGROUND - PROCEDURAL

In April 1987, the Court granted Plaintiffs Winters' and Kazlauskas' motion for class certification after the Defendant failed to object. The class, as noted, included all physicians who contract with Ocean State and who are also reimbursed by Blue Cross & Blue Shield. It was estimated that 900 physicians were certified as members of the class.

Although in their original complaint Plaintiffs did not request a jury trial, they subsequently demanded a jury trial. At the conclusion of Plaintiffs' case, the Court granted the Defendant's motion for a directed verdict on all claims under Section One of the Sherman Act against Ocean State and the class of physicians. The Court also granted Blue Cross & Blue Shield's motion **[**6]** for a directed verdict against the Plaintiff-Intervenors. At the conclusion of the case, the jury returned a verdict finding Blue Cross & Blue Shield liable to both Ocean State and the class of physicians on the Section Two antitrust claims. The jury, however, awarded no damages. On the claim of tortious

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collectively negotiate with Blue Cross and sought injunctive and declaratory relief. There is no present threat to negotiate; therefore, the claim is denied as premature.

interference with contractual relationships, the jury found Blue Cross & Blue Shield liable **[*56]** to Ocean State and awarded compensatory damages of $ 947,000 and punitive damages of $ 250,000. The jury also found Blue Cross & Blue Shield liable to the class of physicians on the interference with contractual relationships claim and awarded $ 1,746,437 in compensatory damages.

Pending before the Court are both equitable and legal claims. Plaintiffs move for a permanent injunction against prudent buyer and HealthMate. In addition, they seek an additur to the class of physicians on the antitrust claim. Defendant moves for a judgment notwithstanding the verdict on the antitrust claims and intentional interference with contractual relationships claims. In the alternative, the Defendant seeks a new trial on the claims of interference with contractual relationships.

FACTUAL BACKGROUND

For **[**7]** many years Blue Cross of Rhode Island and Blue Shield of Rhode Island were the unchallenged leading health care financing organizations in Rhode Island. Blue Cross of Rhode Island was incorporated in the 1930's as a non-profit hospital service corporation that provided insurance coverage for hospital services. Blue Shield of Rhode Island was incorporated later and limited its insurance coverage to payment of physician charges. Blue Cross of Rhode Island and Blue Shield maintained separate Boards of Directors, reserves, and auditing of financial statements.

Under an administrative services agreement, however, Blue Cross provided management and staff for Blue Shield. Usually Blue Cross and Blue Shield policies were marketed together as a package to employers. Occasionally, an employer could purchase Blue Cross coverage alone, but employees were not permitted to purchase only Blue Shield coverage. Neither Blue Cross nor Blue Shield were marketed with other health insurance.

In 1971, Rhode Island Group Health Association (RIGHA) a group model Health Maintenance Organization (HMO) entered the Rhode Island health care financing market. A group model HMO employs physicians to serve the medical **[**8]** needs of its subscribers. Services are usually provided at a fixed location and this was initially true of RIGHA. RIGHA had little impact on Blue Cross & Blue Shield's share of the market. RIGHA entered into an agreement with Blue Cross & Blue Shield whereby RIGHA would purchase hospital services through Blue Cross. Thus, RIGHA enjoyed Blue Cross & Blue Shield hospital discounts; while Blue Cross & Blue Shield benefited because they then claimed RIGHA subscribers within their membership and thereby increased their claimed size of the market. As a result, Blue Cross was further able to negotiate favorable agreements for the cost of hospital care.

In addition, RIGHA entered into a joint marketing agreement with Blue Cross & Blue Shield to coordinate marketing activities. Both agreements were terminated in March 1982, after a newspaper article disclosed the arrangement. There was testimony, however, that the sharing of hospital and physician discounts continued through May 1986.

In 1980 at the time Ocean State applied to the Rhode Island Department of Health for licensing as an HMO, Blue Cross & Blue Shield continued to dominate the health care financing market. Blue Cross & Blue Shield **[**9]** controlled a very large percentage of the market. Competition from other health care financing insurers was virtually non-existent. RIGHA was then the only licensed HMO in Rhode Island and its market share was minimal.

Although Blue Cross & Blue Shield researched the financial background of Medserco, Ocean State's original management company, and considered using that information to discredit Ocean State's regulatory application, it did not do so. Blue Cross and Blue Shield took an active interest in Ocean State's licensing procedure, but did not oppose the application. Subsequently Ocean State's application was approved.

At about the same time Blue Cross and Blue Shield were negotiating a merger. In 1982, after two years of negotiations the two companies merged to form one corporation, Blue Cross & Blue Shield of Rhode **[*57]** Island, [hereinafter Blue Cross & Blue Shield] which provided both hospital and physician insurance coverage. One Board of Directors and one Chief Executive Officer managed the new corporation.

In addition, the General Assembly of the State of Rhode Island enacted the Health Maintenance Organization Act of 1983, *R.I. Gen. Laws §§ 27-41-1 et seq*. (Supp. 1986), **[**10]** which was modeled after the federal HMO Act, *42*

U.S.C. § 300e-9 (Supp. 1986). Rhode Island is unique in the large percentage of employees covered by employer provided health plans. The State Act incorporates a dual choice provision which requires employers to offer a licensed qualified HMO as an employee choice for health insurance if an HMO provides services in the area where the employee resides. Blue Cross & Blue Shield challenged this dual choice provision as inconsistent with provisions of the federal Employee Retirement Income Security Act (ERISA). *See* *29 U.S.C. §§ 1001-1461 (Supp. 1987)*. In *Blue Cross of R. I. v. Cannon, 589 F. Supp. 1483 (D.R.I. 1984)*, the suit was dismissed because it was not ripe; however, it was noted that the employer's obligation to provide an HMO alternative is subject to the condition precedent of a request by an eligible HMO to be included in the health insurance offering.

As of the Spring 1986, Blue Cross & Blue Shield was faced with a serious competitive problem. While Blue Cross & Blue Shield lost approximately 30,000 of its 543,015 enrollees; Ocean State's enrollment exceeded the most optimistic expectations and had grown to 70,000. Blue **[**11]** Cross & Blue Shield's loss of enrollment was attributed to its increased premium rates and to its lack of an HMO plan which would provide more coverage than traditional Blue Cross & Blue Shield.

Rates had to be increased because Blue Cross & Blue Shield was experiencing financial difficulties. Its cash reserves had dropped below the State law requirement, which requires Blue Cross & Blue Shield to maintain an available cash supply sufficient to pay all operating expenses and claims for not less than a 1 1/2 month period. *See* *R.I. Gen. Laws § 27-19-6* (Supp. 1986). Payments of claims exceeded Blue Cross & Blue Shield's estimates and the amount of revenue generated through premiums was not sufficient to cover Blue Cross & Blue Shield's anticipated costs. Blue Cross & Blue Shield had to raise its premium rates. The increased rates further contributed to its loss of enrollment which further required higher rates to cover the losses due to enrollees dropping out.

Although Blue Cross & Blue Shield dominated the health care financing industry, the loss of enrollment created concern. There was conflicting testimony at trial about Blue Cross & Blue Shield's market share.

Plaintiffs claimed that Blue Cross & Blue Shield controlled 80% of the market. Defendant **[**12]** did not dispute that it was the largest health care cost insurer in Rhode Island, but would not agree that it controlled 80% of the market. Ocean State claimed that 656,650 persons in Rhode Island were eligible to procure private health coverage and that 543,015 persons selected Blue Cross & Blue Shield coverage. Therefore, according to Plaintiffs' calculations Blue Cross & Blue Shield's enrollment share was 82.7%.

Defendant downwardly adjusted this estimate of its market share by making three adjustments to the market share calculation. First, the estimated number of members covered under a family contract was reduced from 3.4 persons to 2.8 persons, which resulted in a 17.64% reduction of Blue Cross & Blue Shield's enrollment share. Next, duplicate coverage was factored into the calculation. The Defendant had assumed that 12% of Blue Cross & Blue Shield's enrollees had duplicate coverage with another Blue Cross & Blue Shield plan and that 8% of Blue Cross & Blue Shield's enrollees had duplicate coverage with another company. Thus, adjustments to the market reduced Blue Cross & Blue Shield's market share to 62.8%. Finally, Blue Cross & Blue Shield assumed the Rhode Island employment **[**13]** base was 10% greater than reflected in the Rhode Island population count because more workers **[*58]** came into the State to work than left the State to work. So Blue Cross & Blue Shield estimated that the total population eligible to select Blue Cross & Blue Shield coverage was 722,315 persons (the Rhode Island population 656,650 + the non-state resident workers 65,665). With the foregoing adjustments, Blue Cross & Blue Shield's market share was 57.1%. The Defendant, although it disputed the Ocean State estimate of Blue Cross & Blue Shield's market share, agreed that it had a substantial share of the market. This was an admission of the obvious. Blue Cross & Blue Shield is clearly the major provider of private health care cost payment in Rhode Island and thus it is the major factor in the competitive market. It clearly had market power. The issue here is whether or not it exercised that power unlawfully.

Both Blue Cross & Blue Shield and Ocean State were experiencing financial problems at about the same time during the Spring and Summer of 1986. Blue Cross & Blue Shield was facing enrollment losses and increased premiums; while Ocean State's operating costs were exceeding its income. Both Ocean **[**14]** State and Blue Cross & Blue Shield had to make changes and adopt new programs. Blue Cross & Blue Shield responded with the prudent buyer policy, adverse selection, and HealthMate. Ocean State went through a major reorganization, increased the amount of payment subscribers were required to pay for services rendered, and created a program called Speciality Incentive Pools (SIPS).

In May 1986, the Blue Cross & Blue Shield's Board of Directors approved a three prong approach to deal with Blue Cross & Blue Shield's loss of enrollment and financial difficulties. The plan included (1) implementing the "prudent buyer policy," (2) instituting "adverse selection rating factors" and (3) marketing of a new product, which was ultimately called "HealthMate." Blue Cross & Blue Shield submitted a series of riders to the classic hospital and medical service plans to the Department of Business Regulations, (DBR), State of Rhode Island for its approval. The DBR approved the new HealthMate product, which was known as the "Z Plan," "Maps Plus," and "Plan 100 Plus." HealthMate provided 15% more coverage than standard Blue Cross & Blue Shield. It included hospital and medical service plans plus other coverage **[**15]** such as office visits, prescription drugs, student rates, and "good health" benefits. Under HealthMate, subscribers must use participating physicians otherwise the plan would not pay for physician services. In addition, all Blue Cross & Blue Shield participating physicians are required to provide services under HealthMate and to accept the HealthMate payment as payment in full if they wished to remain Blue Cross & Blue Shield participating physicians.

HealthMate was first offered to employees of the State of Rhode Island in July, 1986. This is the largest single group of employees covered by an employer health plan in Rhode Island, and no doubt, that fact prompted the creation of HealthMate. The Department of Administration, the State agency which awarded contracts for health coverage, extended its open enrollment season for selecting a health plan so that HealthMate could be offered. Later, HealthMate was offered to other experience rated groups. HealthMate was never offered alone as a health insurance plan, but was only marketed as an alternative to traditional Blue Cross & Blue Shield if a competing HMO was also being considered as a health insurance option. Today, HealthMate is **[**16]** offered to all employer groups with more than 50 employees.

HealthMate was marketed with financial incentives for employers. If the employer paid the full cost of its employees' health insurance, HealthMate was offered at the same rates as traditional Blue Cross & Blue Shield. If employees were required to contribute to their coverage, then HealthMate was offered at 5% below the cost of traditional Blue Cross & Blue Shield. Ocean State claimed that between June 1986 and August 1987, it lost profits of $ 58,550 because of the head to head marketing and low cost of HealthMate. In addition, Ocean State estimated a $ 59,041 future loss of profits through June 1988.

[*59] To support the tiered pricing for HealthMate and traditional Blue Cross & Blue Shield coverage, Blue Cross & Blue Shield approved an adverse selection policy on June 1, 1986. Blue Cross & Blue Shield implemented the adverse selection policy without approval from the Department of Business Regulation (DBR). In October 1986, DBR ordered Blue Cross to cease using the adverse selection policy until it obtained DBR approval. On November 12, 1986, the DBR approved the adverse selection factors and Blue Cross resumed use of the adverse **[**17]** selection policy.

Blue Cross & Blue Shield was concerned that it would be adversely selected by subscribers if other health plans were offered. "Adverse selection" is jargon which means exactly the opposite of what it says. It has nothing to do with selection of Blue Cross. It is the opposite, the selection of a competitor by a Blue Cross subscriber. It means that Blue Cross & Blue Shield was concerned that it would lose its best (least expensive) members. It was concerned that it would lose a large percentage of its younger/healthier subscribers to a different company with a more comprehensive preventive health plan and be left with an older, less healthy population, causing its claims costs per subscriber to increase. Thus to reflect this possible increase in cost per subscriber, adverse selection factors were applied.

Under the adverse selection policy, employers were offered three different rates for Blue Cross & Blue Shield indemnity coverage. Employers would be charged the lowest rate if the employer only offered traditional Blue Cross & Blue Shield coverage. If the employer offered traditional Blue Cross & Blue Shield, a competing HMO and HealthMate, then the rate for traditional **[**18]** Blue Cross & Blue Shield would be at a middle level. If an employer offered traditional Blue Cross & Blue Shield and a competing HMO but refused to offer HealthMate, then the highest rate for traditional Blue Cross & Blue Shield coverage would be charged.

Adverse selection rate differentials were determined based on a formula which Blue Cross & Blue Shield designed. The formula incorporated two estimates. The first estimate was called the health factor, which concluded that HMO enrollees, on the average, would be 22% healthier (22% less expensive) than the aggregate membership of the employed group.

The second estimate in the adverse selection calculation was Blue Cross & Blue Shield's estimate of the number of subscribers that might enroll in competitive health plans. The estimate was not based on Blue Cross & Blue Shield's prior experience of subscribers switching health coverage but on Blue Cross & Blue Shield's projection. Ocean State contended that Blue Cross & Blue Shield overestimated the number of subscribers who would be lost to competing HMOs, causing the adverse selection calculation to be higher than what was necessary to ensure that its premiums reflected its costs.

In **[**19]** February 1987, the Department of Business Regulations (DBR) released a study of the number of Blue Cross & Blue Shield enrollees that switched to HMOs. It found that fewer enrollees dropped traditional Blue Cross & Blue Shield coverage and replaced it with HMO coverage than Blue Cross & Blue Shield had projected. Many employers complained to DBR about the substantial increase in their premiums, partly due to the adverse selection factors, and they threatened to discontinue Blue Cross & Blue Shield coverage. In February 1987, Blue Cross & Blue Shield decided to base its calculation of losses to competing HMOs upon actual lost enrollment. Thus, the second estimate factor in the adverse selection calculation was adjusted as of February 1987.

Ocean State asserted that the overestimate of loss of subscribers to competing HMO artificially increased price differential which discouraged employers from offering a competing HMO, such as Ocean State. Furthermore, Ocean State claimed that the rate differentials were designed to discourage employers from offering competing health insurance options, or alternatively to force employers to offer HealthMate **[*60]** if a competing health plan was an option.

[20]** Meanwhile, the financial circumstances of Ocean State were also under stress. As a new HMO, Ocean State decided in 1983 that it would withhold 20% of the physicians' fee until the end of the year at which time if Ocean State's operational expenses were in the black then the withholding would be paid to the physicians. This was seen as an incentive to its contracted physicians to keep health care costs low. In 1984 Ocean State returned the withhold to physicians. In 1985, however, Ocean State retained the withhold because cost of operating exceeded Ocean State's estimates. This action occurred in 1986.

Ocean State memberships had risen astronomically, but the rate of increase began to level off. In the spring and summer of 1986, it began to experience financial concerns not different from those of Blue Cross & Blue Shield. Ocean State initiated a drastic management change on July 1, 1986, and designed new incentives for physicians to maintain costs. Not coincidentally, these initiatives were roughly coincident with Blue Cross's trilogy of programs, HealthMate, adverse selection and prudent buyer.

In an effort to control expenses and hopefully to provide a dividend to its physician **[**21]** members, Ocean State implemented the Speciality Incentive Pools (SIPs) as of November 1, 1986. Speciality Incentive Pools is another instance of jargon. It simply means that the physician would be paid his or her full charge rather than only 80% of the charge, if there was enough money left in the pool at the end of the year to do so. Ocean State divided participating physicians into specialty categories. Each specialty was allotted a certain sum of money as its operating budget. Physicians were paid 80% of their charges. If expenses for the specialty category did not exceed estimated operational cost, then the remaining funds in the specialty category would be divided among physicians in that group. Each specialty group had a very good reason to provide services at the lowest cost; thus, the name Speciality Incentive Pools. The 1986 operational cost exceeded Ocean State's estimates. Therefore, nothing additional was paid to participating physicians through the Speciality Incentive Pools.

Blue Cross & Blue Shield expressed concern that physicians were giving greater discounts to Ocean State than to Blue Cross & Blue Shield. In response to the March 25, 1986, decision of Ocean State **[**22]** to retain the 1985 withholdings, Blue Cross & Blue Shield announced the prudent buyer policy on June 6, 1986. The policy, however, did not become effective until November 1, 1986.

Prudent buyer is more jargon. What it means is that Blue Cross & Blue Shield would not pay more to a physician than what the physician was willing to accept for performing the same services for another health care cost provider, including Ocean State. Thus, if physicians were accepting 80% of their charges as payment in full from Ocean State, then Blue Cross would also pay only 80% of physicians charges, as payment in full. Plaintiffs asserted that the prudent buyer policy was fashioned after Blue Cross & Blue Shield's hospital participation policy. Under that policy Blue Cross & Blue Shield participating hospitals who offered competitors discounts, which were comparable or better than the approximate 13% discount provided Blue Cross & Blue Shield, were threatened with termination of their status as participating providers. The hospital participation policy had been successfully implemented and permitted Blue Cross to buy hospital services at the lowest rate.

Under the prudent buyer policy, Blue Cross & **[**23]** Blue Shield would not pay more for physician services than the lowest payment the physician accepted for such services. At trial Blue Cross & Blue Shield contended that it was only trying to get the best price for its subscribers. Blue Cross & Blue Shield required physicians to document that the fees the physicians charged Blue Cross & Blue Shield were the lowest that the physicians charged for that particular service. If a physician failed to document by September 15, 1986 that he or **[*61]** she was not charging Blue Cross & Blue Shield more than he or she was charging its competitors, then Blue Cross & Blue Shield reduced its reimbursement to the physician by 20%. There was evidence that Blue Cross & Blue Shield understood the ramifications of the prudent buyer policy. A handwritten note by a Blue Cross & Blue Shield management employee stated that "not one guy in the state isn't going to know the implication of signing with Ocean State." Plaintiffs made much of this observation.

Plaintiffs contended that approximately one-third of Ocean State's participating physicians resigned from Ocean State as a result of the prudent buyer policy. Testimony was, however, that physicians resigned for **[**24]** many reasons. Some physicians claimed they resigned because they were concerned about the effect of the prudent buyer policy upon their Blue Cross & Blue Shield patients. Others claimed that they could not afford to have their Blue Cross & Blue Shield payments cut by 20%. It is clear that some physicians resigned from Ocean State because of the prudent buyer policy, but is also abundantly clear that the actual number was far less than that contended by Ocean State.

Because about 350 of its 1200 participating physicians resigned, Ocean State claimed that it had to pay for the services of more non-participating physicians in order to provide physician services to its members at a level comparable to the level which existed before the physicians resigned. Although the physicians resignations represented a cross section of specialties, Ocean State contended that certain specialties were harder hit, such as cardiac surgery. Thus, Ocean State had to buy more services from non-participating physicians, which was more expensive. As a result, Ocean State contended that it incurred greater cost for providing physician services to subscribers. Therefore, Ocean State claimed that due to the prudent **[**25]** buyer policy, it had to pay an additional $ 946,260 to non-participating physicians between January 1987 and March 1987.

In addition, Ocean State contended that the reduction of participating physicians caused a reduction in subscribers. There was testimony that some subscribers dropped Ocean State when their personal physicians resigned from Ocean State. Ocean State would not pay the physician for services rendered to the patient and the patient would have to pay the physician without reimbursement from Ocean State. Ocean State claimed it lost $ 597,016 in profits on enrolled members who dropped Ocean State between November 1986 and August 1987.

Ocean State presented evidence that under the prudent buyer policy, Blue Cross & Blue Shield withheld more than $ 1,900,000 from Ocean State's 1200 participating physicians. The certified class, however included an estimated 900 physicians. During the time between implementation of the prudent buyer policy and the class certification, more than 300 physicians resigned from Ocean State. Those physicians who had prudent buyer withholds but were not participating physicians of Ocean State in April 1987 did not meet the definition of the class **[**26]** certification. The certified class of physicians claimed Blue Cross & Blue Shield withheld $ 1,425,000 from it.

Blue Cross & Blue Shield acknowledged that under the prudent buyer policy between January 1, 1987 and May 30, 1987 it withheld $ 2,058,769.58. During this period, providers requested $ 682,351.36 in refunds. Blue Cross & Blue Shield estimated that the refund payments would be $ 136,470.27 per month. Blue Cross & Blue Shield estimated that it would withhold $ 2,838,199.34 between November 1, 1986 and June 30, 1987. The refund estimates for this eight month period were $ 1,091,762.17. Thus, Blue Cross & Blue Shield's projected prudent buyer savings during this eight month period would be $ 1,746,437.17.

Blue Cross & Blue Shield contended that the prudent buyer policy, adverse selection policy, and the marketing of HealthMate were exercises of good business judgment. Blue Cross & Blue Shield asserted that Ocean State's financial loss were due to both its being a young HMO and mismanagement. **[*62]** There was testimony that all young HMOs lose money in the initial years. Between June and July 1986, Ocean State attempted to reduce financial losses by switching its underwriters to United **[**27]** HealthCare, reducing the management fee, replacing its Chief Executive Officer, and instituting co-payments for office visits. There was conflicting testimony whether those changes were sufficient to put Ocean State in the black. Blue Cross & Blue Shield contended that between June 30, 1986 and September 30, 1986, Ocean State had profits of $ 227,123. It contended that by the end of 1986, Ocean State's profits were $ 698,348. Thus, Blue Cross & Blue Shield claimed that adverse selection, HealthMate, and the prudent buyer policy did not cause Ocean State to lose money. Ocean State, however, asserted that those figures were deceptive and did not accurately reflect the impact of Blue Cross & Blue Shield's actions.

Ocean State claimed that it incurred a $ 809,158 loss involving hospital discounts between January 1984 through May 1986; a $ 597,016 loss of profits on enrolled members who terminated their coverage with Ocean State between November 1986 and August 1987; a $ 117,591 loss of potential profits on possible state employee enrollees who did not contract with Ocean State due to the State of Rhode Island's contract with Blue Cross which offered HealthMate, between June 1986 and June **[**28]** 1988. Ocean State asserted that it lost $ 173,013 from expected profits which failed to materialize because of Blue Cross's actions. Thus, Ocean State claimed it lost a total of $ 1,696,798 due to Blue Cross's anticompetitive actions. The physicians class claimed it lost $ 946,760 between January 1987 and March 1987 due to Ocean State's payments to non-participating physicians and $ 1,900,000 due to the prudent buyer policy. They claimed a total loss of $ 2,846,260. The jury verdicts, however, awarded $ 947,000 to Ocean State and $ 1,746,437 to the Plaintiff class of physicians.

The jury's verdicts in this action are at variance with the proof. On the third try, after the jury had been returned to the jury room twice for reconsideration of its verdict, the jury returned a verdict for Plaintiffs on its *Section 2* Sherman Act claims, but failed to award any damages. The jury awarded damages against Blue Cross & Blue Shield on the claims of intentional interference with advantageous relationships on behalf of Ocean State in the amount of $ 947,000 compensatory damages and $ 250,000 punitive damages and for the class of physicians in the amount of $ 1,746,437 in compensatory damages.

The **[**29]** jury deliberated two days before returning a verdict finding Blue Cross & Blue Shield "Guilty" on both counts, the *Section 2* Sherman Act violation and the common law tort of interference with advantageous relations. Initially, the jury awarded each Plaintiff, Ocean State and the class physicians, compensatory damages of $ 2,693,437 (not coincidentally $ 1,746,437 + 947,000) and punitive damages of $ 250,000. Ocean State and the class of physicians suffered different injuries and damages. It was thus highly unlikely that each Plaintiffs' award for damages would be exactly the same. Recognizing that more than mere coincidence could be a factor, the Court explained the purpose of each verdict form and that the jury must award damages separately for each Plaintiff and for each claim based on the evidence.

After further deliberation, the jury returned the second set of verdict forms. It again found Blue Cross & Blue Shield "Guilty" as to both the antitrust claims and the interference with contractual relationships claims brought by both Ocean State and the class of Physicians. On the verdict form for *Ocean State v. Blue Cross & Blue Shield*, the jury listed compensatory damages of $ 947,000 **[**30]** and punitive damages of $ 250,000. On the verdict form for the class of physicians, the jury listed compensatory damages of $ 1,746,437. Neither of the second set of verdict forms stated whether the award was for damages on the antitrust claim or for interference with contractual relationships claim or both. The jury was then instructed that the verdict must clearly state the specific claims upon which it awarded damages.

[*63] After further deliberation, the jury returned its third set of verdict forms. The total amount of the damage awards equaled the same amount as the second verdict forms. The verdict form for *Ocean State v. Blue Cross & Blue Shield* stated that as to the *Section 2* of Sherman Act claim, Blue Cross & Blue Shield was guilty but awarded no damages. As to the interference with contractual relationships, the jury found Blue Cross & Blue Shield guilty and awarded Ocean State compensatory damages of $ 947,000 and punitive damages of $ 250,000. On the verdict form for the *Class of Physicians v. Blue Cross & Blue Shield*, the jury found Blue Cross & Blue Shield guilty of the *Section 2* of the Sherman Act claim, but awarded no damages. On the interference with contractual relationships **[**31]** claim, the jury found Blue Cross & Blue Shield guilty and awarded the class of physicians compensatory damages of $ 1,746,437.

The Defendant contends that the compensation award to Ocean State is based on the Plaintiffs' Exhibit 776 (for identification) prepared by one of Plaintiffs' damages expert and used by her as a basis for her testimony. In this the Defendant is clearly correct. Exhibit 776 is a three column simulated spreadsheet. The headings for the columns were lost profits, (Ocean State) lost hospital discounts, (Ocean State) and lost payments for the physicians' class. Under the heading lost payment to the physicians' class was a subsection entitled payments by OSPHP to non-participating physicians 1/87 - 3/87. This section reported $ 946,260 payments Ocean State made to non-participating physicians between January 1987 and March 1987. Plaintiffs' evidence is that $ 946,260 represents payments by Ocean State to "Non-Participating Physicians 1/87 - 3/87 $ 946,260." The jury simply rounded to the next nearest thousand the $ 946,260 payment to non-participating physicians to arrive at the $ 947,000 and erroneously awarded it to Ocean State.

The payment Ocean State made to **[**32]** non-participating physicians between January and March 1987, was not a loss to Ocean State. This much the Plaintiffs must concede because they themselves claim this loss for the class of physicians. This money would have been returned to participating physicians. Ocean State budgeted the $ 946,260 to the Speciality Incentive Pools (SIPS's). Ocean State was required to pay the $ 946,260 to either the physicians in the SIPS pools if the Speciality Incentive Pools' costs were less than the amount budgeted or if the Speciality Incentive Pools' costs exceeded Ocean State's estimates, then the $ 946,260 would have been used to reduce the Speciality Incentive Pools' excess costs. Either way, Ocean State itself could not have lost money because of payments to physicians who were not Ocean State participating physicians. The losses due to Ocean State's payments to non-participating physicians was suffered by Ocean State participating physicians. They would have received the $ 946,260, if Ocean State had not had to pay that amount to non-participating physicians.

The Defendant also contends that the compensatory damages award to the certified class of physicians is based on another Plaintiffs' **[**33]** Exhibit, Plaintiffs' Exhibit 563. Exhibit 563 was an in house Blue Cross & Blue Shield document dated June 30, 1987 and entitled projected prudent buyer savings. Blue Cross & Blue Shield estimated that the prudent buyer policy would save a net amount of $ 1,746,437.17 over an eight month period. It appears that the jury rounded the $ 1,746,437.17 by omitting the 17 cents and based its awarded to the class of physicians on the amount of money Blue Cross & Blue Shield intended to save with the prudent buyer policy.

Exhibit 563 is Plaintiffs' evidence of the amount of money Blue Cross & Blue Shield expected to save due to the prudent buyer policy. It, however, does not indicate the damages the certified class of physicians incurred as a result of Blue Cross & Blue Shield's interference with their contractual relationships. The class was composed of physicians who were under contract to Ocean State and were also reimbursed by Blue Cross & Blue Shield. The withheld payments were payments Blue Cross & Blue Shield did not make to Blue Cross & **[*64]** Blue Shield physicians. Ocean State contracted physicians therefore had no right to receive the withheld payments, except if they also participated **[**34]** in Blue Cross & Blue Shield and their payments had been reduced by Blue Cross & Blue Shield. Since Blue Cross & Blue Shield had many more participating physicians than Ocean State, there is no basis to conclude, as the jury did, that the withheld payments belonged to Ocean State physicians who were reimbursed by Blue Cross & Blue Shield. It is inappropriate to conclude that the certified class of physicians must have incurred losses equal to Blue Cross & Blue Shield's prudent buyer savings.

DISCUSSION

Standard of Review

HN1[] In actions which blend claims for both legal relief in terms of monetary damages and equitable relief by way of injunction, a jury shall first determine the issue of damages. *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959)*; *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479, 8 L. Ed. 2d 44, 82 S. Ct. 894 (1962)*; *Wallace Motor Sales v. American Motor Sales Corp., 780 F.2d 1049, 1066 (1st Cir. 1985)*. The effect of a jury's determination as in this instance is significant. Here the jury returned a verdict that the Defendant Blue Cross & Blue Shield was guilty of violating *Section 2* of the Sherman Act (*15 U.S.C. § 2*). The jury declined, after three attempts, to assess monetary damages. Generally **[**35]** speaking, it has been held that since the legal issues are to be heard first in an action under *Section 2* of the Sherman Act (*15 U.S.C. § 2*), findings by the jury in the damages action, also involved in the application for equitable relief, are binding upon the trial court in its later consideration of the facts involved in equitable relief applications. *Florists' Nationwide Tel. Del. Net. v. Florists' Tel. Del.* *Assn, 371 F.2d 263, 271* (7th Cir.) *cert. denied*, *387 U.S. 909, 18 L. Ed. 2d 627, 87 S. Ct. 1686 (1967)*; *Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 690* (9th Cir.), *cert. denied*, *429 U.S. 940, 50 L. Ed. 2d 309, 97 S. Ct. 355 (1976)*.

Indeed, the parties in this action, although in disagreement on almost every issue, seem to be in agreement on this aspect, to the effect that this Court is bound by the jury's determination of the factual issues. Thus, Plaintiffs are able to assert that the jury has concluded that Defendant's business practices of the prudent buyer policy, selective marketing of Healthmate, and its adverse selection policy were anti-competitive and illicit activity contrary to the purpose of the Sherman Act to provide competition, and, that these determinations bind this Court. Of course, Blue Cross & **[**36]** Blue Shield argues that since no damages were awarded, Plaintiffs have failed to prove injury, and therefore, the Sherman Act counts fail. However, before the Court determines to what extent it is bound by the findings of the jury, it will first determine if the jury verdict is supported by the evidence at all.

HN2[] The standard of review in setting aside a jury verdict is narrow. In determining the motion for judgment notwithstanding the verdict, the Court must evaluate the evidence in the light most favorable to Plaintiffs. *Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986, 989 (1st Cir. 1978)*. But the plaintiffs are not entitled to unreasonable inferences based on speculation and conjecture. *See* *Carlson v. American Safety Equip. Corp., 528 F.2d 384 (1st Cir. 1976)*; *Schneider v. Chrysler Motors Corp., 401 F.2d 549, 555 (8th Cir. 1968)*. A motion for judgment notwithstanding the verdict should be granted ". . . when as a matter of law, no conclusion but one can be drawn." *CVD, Inc. v. Raytheon Co., 769 F.2d 842, 849 (1st Cir. 1985)* (citing *United States v. Articles of Drug Consisting of the Following*, *745 F.2d 105, 113 (1st Cir. 1984)*, *cert. denied sub nom*., **[**37]** *470 U.S. 1004, 84 L. Ed. 2d 379, 105 S. Ct. 1358 (1985))*, *cert. denied*, *475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1197 (1986)*. Therefore a motion for judgment notwithstanding the verdict should be denied if after reviewing the evidence in the light most favorable to the plaintiffs and drawing **[*65]** all reasonable inferences in their favor, there is sufficient evidence to support the verdict. *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 9 (1st Cir. 1979)*, *cert. denied*, *446 U.S. 983, 64 L. Ed. 2d 839, 100 S. Ct. 2964 (1980)*; *CVD, Inc., 769 F.2d at 849*. A jury verdict supported by the evidence may not be set aside simply because the judge would have reached a different result. *See* *Coffran v. Hitchcock Clinic, Inc., 683 F.2d 5, 6* (1st Cir.), *cert. denied*, *459 U.S. 1087, 74 L. Ed. 2d 933, 103 S. Ct. 571 (1982)*.

HN3[] The standard of review for granting a new trial is not as stringent as for granting a judgment notwithstanding the verdict. But the trial judge may not set aside a verdict simply because he or she would have reached a different verdict. *Borras v. Sea-Land Serv., Inc., 586 F.2d 881, 887 (1st Cir. 1978)*. In granting a motion for a new trial the judge must find that "the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in **[**38]** a clear miscarriage of justice." *Milone v. Moceri Family, Inc., 847 F.2d 35 (1st Cir. 1988)*; *see* *CVD, Inc., 769 F.2d at 848* (citing *Coffran 683 F.2d at 6*).

The Court will first determine whether there is sufficient evidence to support the jury verdict on the antitrust claims and the claims for the interference with contractual relationships. Then the Court will address the applications for injunctive and declaratory relief.

ANTITRUST CLAIMS

With respect to the Defendant's motion for judgment n.o.v. on the antitrust claims, it asserts two legal theories. First, the Defendant contended that the jury's findings of "no damages" for the antitrust claims indicated that no injury resulted to Plaintiffs' business or property as a result of antitrust violations. Thus, it contends no liability arose for a private damage action under the Clayton Act, Section 4. *15 U.S.C. § 15 (Supp. 1988)*. Noting that the Plaintiffs suffered no injuries as a result of the Defendant's conduct, Defendant concludes that Plaintiffs failed to prove all elements of an antitrust violation requested the Court to enter judgment in its favor on the Sherman Act *Section 2* claims.

Defendant's **[**39]** argument warrants some attention as a ground for granting Defendant's motion for judgment notwithstanding the verdict on the antitrust claims. Plaintiffs filed this action seeking treble damages under Section Fifteen of the Sherman Act, *15 U.S.C. § 15. (Supp. 1988)*. It is a remedial provision of the Sherman Act. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. It frequently has been called the private attorney general provision of the antitrust laws because a private Plaintiff rather than the government may maintain an action for an alleged antitrust violation. *See, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251, 262, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*; *United States v. Borden Co., 347 U.S. 514, 518, 98 L. Ed. 903, 74 S. Ct. 703 (1954)*. ***HN4***[] Section Fifteen of the Sherman Act, more commonly known as Section Four of the Clayton Act, provides that a Plaintiff can recover threefold the damages he sustains and the cost of the suit, including attorney's fees if the Plaintiff shows an injury in his business or property by reason of anything forbidden in the antitrust laws. *See 15 U.S.C. § 15 (Supp. 1988)*. So for Plaintiffs **[**40]** to prevail on their antitrust claims, they must prove ". . . a violation [of the antitrust laws] and additionally show to a reasonable degree of certainty that there has been injury to them by reason of the violation." *See International Travel Arrangers, Inc. v. Western Air Lines, Inc., 623 F.2d 1255, 1270* (8th Cir.), *cert. denied*, *449 U.S. 1063, 66 L. Ed. 2d 605, 101 S. Ct. 787 (1980)*. To establish an antitrust violation, Plaintiffs must show that Blue Cross & Blue Shield engaged in monopolization acts in violation of Section Two of the Sherman Act. ***HN5***[] Section Two of the Sherman Act defines the criminal violation of monopolization and its penalties. *15 U.S.C. § 2 (Supp. 1988)*. But the mere existence of a violation **[*66]** cannot support a private action under Section Four of the Clayton Act. *See Gray v. Shell Oil Co., 469 F.2d 742, 749 (9th Cir. 1972)*, *cert. denied*, *412 U.S. 943, 37 L. Ed. 2d 403, 93 S. Ct. 2773 (1973)*. Plaintiffs must show that they suffered an injury to business or property as a result of the antitrust violation. *See Hawaii, 405 U.S. at 262*. What constitutes an injury to business or property is less than clear. The words "business or property" refer to commercial interest. *See id. at 264*. However, injury to business **[**41]** or property is defined in terms of a tautology. Since Section 4 of the Clayton Act provides a money damages remedy, it must be an injury which the jury is able to quantify in dollars. It is the kind of injury that the antitrust laws were designed to prevent, namely damage as a result of anticompetitive conduct. *See Brunswick Corp., 429 U.S. at 489*. ***HN6***[] Plaintiffs do not have to prove that the antitrust violation was the sole cause of the injury. *See Zenith Radio Corp., 395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562*. But the Plaintiffs must show a causal relationship between the injury and the violation. *See id. at 114 n.9*. Furthermore, the Plaintiffs must prove some indication of the amount of damages. *See, e.g., Construction Aggregate Transport, Inc. v. Fla. Rock Indus., 710 F.2d 752, 782 (11th Cir. 1983)*; *Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 270 (5th Cir. 1979)*; *Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20* (5th Cir.), *cert. denied*, *419 U.S. 987, 42 L. Ed. 2d 260, 95 S. Ct. 246 (1974)*. Thus, "to be 'liable ' under the antitrust laws . . . means that one has to violate the antitrust laws and that violation has resulted in an injury to the business or property of the plaintiff, **[**42]** *i.e.*, there was fact of damage." *Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1320 (5th Cir. 1976)*.

The jury's award of no damages on the antitrust claims indicates that they found that the Plaintiffs were not damaged by an antitrust violation. The Court of Appeals for the District of Columbia confronted a similar situation. *See Association of Western Rys. v. Riss & Co., 112 U.S. App. D.C. 49, 299 F.2d 133, 134-35* (D.C., 1962) *cert. denied*, *370 U.S. 916, 8 L. Ed. 2d 498, 82 S. Ct. 1555 (1962)*. There the jury returned a verdict against the Defendant but did not award any damages. *See id*. The Court of Appeals concluded that the verdict plainly meant that the Defendants conspired but that the conspiracy did not damage the Plaintiff. *See id. at 135*. As a result, the court held that Plaintiff had not proved its claim because it failed to show damages. *See id*.

In this matter, the jury's determination of no damages means exactly that. The Court must conclude that Plaintiffs failed to sustain their burden of showing damages to their business or property as a result of an antitrust violation. With this conclusion in mind, the result is preordained. Thus, Plaintiffs have not proved their treble damage **[**43]** antitrust claims and the Defendant is entitled to a judgment notwithstanding the verdict on those claims.

Defendant's second theory is that it is entitled to entry of judgment in its favor as a matter of law on the remaining antitrust claims. Blue Cross argues that there was insufficient evidence to establish antitrust violations because of the prudent buyer policy, selective marketing of HealthMate, and adverse selection policies. Therefore, the Defendant reasons that the Court is required to enter judgment in its favor as a matter of law. A more in depth analysis of prudent buyer, adverse selection, and the selective marketing of HealthMate is needed before conclusions may be drawn on whether they separately or collectively violate antitrust laws.

First, Blue Cross contends that the McCarron-Ferguson Act, *15 U.S.C. §§ 1011-1015*, exempted adverse selection and the selective marketing of HealthMate from the antitrust laws. The Defendant claims that adverse selection and HealthMate constituted the business of insurance regulated by state law; therefore, those programs were exempt under the Sherman Act. On the other hand, Plaintiffs claim health service corporations are not in the business **[**44]** of insurance so they are not eligible for the McCarron-Ferguson exemption **[*67]** to the antitrust laws. There is substantial support for the Plaintiffs' contention. *See* *Group Life & Health Ins. Co. v. Royal Drug, 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)*. There is respectable authority to the contrary. *See* *Health Care Equalization Comm. v. Iowa Medical Soc'y, 851 F.2d 1020, 1988 U.S. App. LEXIS 13192*, No. 87-1015 (8th Cir. June 24, 1988). However, as it is made clear hereafter there is no need to presently resolve this conflict.

The question is whether or not the prudent buyer policy, adverse selection and the selective marketing of HealthMate violate antitrust laws. ***HN7***[] Plaintiffs must prove the following elements by a preponderance of the evidence:

> First, the Defendant had monopoly power in a relevant market;
>
> Second, that the Defendant willfully acquired or maintained that power through restrictive or exclusionary conduct;
>
> Third, that Defendant's activities occurred in or affected interstate commerce; and
>
> Fourth, that Plaintiff was injured in its business or property because of Defendant's restrictive or exclusionary conduct.

See, e.g., *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *Forro Precision, Inc. v.* ***[**45]*** *Intern. Business Mach. Corp., 673 F.2d 1045, 1058 (9th Cir. 1982)*; *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272-76 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*.

HN8[] The terms "monopoly power" and "market power" are generally used interchangeably. P. Areeda & D. Turner, ***Antitrust Law***, § 529 at 388 (1978). "Monopoly power" is the power to control prices or exclude competition in a relevant market. *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. The relevant market is the "area of effective competition" where the defendant operates. *Standard Oil Co. v. United States, 337 U.S. 293, 299 n.5, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)*. Relevant market is identified by the product and its interchangeability plus the geographic area. *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 336-37, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 399, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. Usually the trier of fact defines the relevant market. *See* *International Boxing Club, Inc. v. United States, 358 U.S. 242, 245, 3 L. Ed. 2d 270, 79* S. Ct. (1959).

Blue Cross contended that as between the class of physicians and Blue Cross they are not in the same relevant market. Physicians were not sellers of **[**46]** health insurance and therefore in reality are not head to head competitors of Blue Cross. Without a relevant market existing between Blue Cross and the class of physicians, Blue Cross claimed it could not engage in anticompetitive acts which could harm the class. The only effect if at all on the class due to Blue Cross's actions, it contends is indirect. In addition, Blue Cross hypothesized that even if it possessed 100% share of the health care financing market, the physician class would not have any antitrust claim because it derives only a small portion of its income from Blue Cross insureds. Noting that physicians are paid from many sources including Medicare, Medicaid, commercial insurance carries, self-insured employers, and patients directly, Blue Cross claims that there was no evidence that Blue Cross represented any more than 30% of the dollar purchase of physician services. Thus, it contends, it could not possess monopoly power and could not have engaged in anticompetitive conduct.

Defendants are confusing relevant market with standing to sue. ***HN9***[] It is not a requirement to an antitrust suit that plaintiff and defendant be in the same relevant market. *See Blue Shield of Va.* ***[**47]*** *v. McCready, 457 U.S. 465, 478-81, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. Plaintiff, however, must meet the standing requirement that it allege that it suffered an injury to its business or property as a result of the Defendant's conduct. *See 15 U.S.C. § 15 (1982)*. The First Circuit requires that the person injured by the alleged antitrust violation **[*68]** be within a target area, which draws a line and excludes persons whose injuries are too remote. *See Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 17-19 (1st Cir. 1979)*.

The class of physicians have asserted an injury to their business or property as a result of the alleged antitrust violation, i.e. the loss of reimbursement from the SIP's pool because of payments to non-participating physicians. Their alleged injury is within the target area. Thus, the class of physicians have standing to sue even though they may not be participants in the same relevant market as Blue Cross & Blue Shield.

Blue Cross & Blue Shield acquired its market share before Ocean State's creation. The undisputed evidence is that Blue Cross & Blue Shield was for years essentially the sole private health care cost insurer in the State of Rhode Island. Not only did Blue Cross **[**48]** & Blue Shield have a better "mousetrap," it had the only "mousetrap" in town. As time went on, the industry changed with the development of health maintenance organizations. Rhode Island Group Health Association (RIGHA) appeared in 1971. Its physicians were employed by RIGHA and a subscriber was required to select a RIGHA physician. This plan had some disadvantage from the point of view of the subscriber, who heretofore, had been accustomed to free selection of his or her own physician. Ocean State was a natural progression of the Health Maintenance format. It entered into contracts with almost half the physicians in the State of Rhode Island, providing patients with a wider choice of their respective physicians. It is obvious that a natural tension would develop between Blue Cross & Blue Shield and Ocean State and that physicians would seek the continuance of both plans in order that they could contract with both plans. It is not without significance that it was not Blue Cross & Blue Shield customers who have complained. The Plaintiffs are Ocean State and some physicians. The market involved is a market which provides means to finance health care. There is no proof that competition **[**49]** for physician services has been affected, or that any payment to which a physician is entitled has been lost. The claim is that purchasers of health insurance have been corralled by Blue Cross & Blue Shield to the competitive disadvantage of its competitors. The genesis of this complaint is the response of Blue Cross & Blue Shield to market conditions and the circumstances extant in the spring, summer and fall of 1986.

Both Blue Cross & Blue Shield and Ocean State were facing difficult financial conditions in the spring of 1986. They were both losing money. The largest single contract involving the employees of the State of Rhode Island was due for competitive bids at the end of June 1986. At that time Ocean State had not been able to return the 20% it had retained from its contracted physicians for the calendar year 1985. Thus, Ocean State physicians, who had also contracted with Blue Cross, charged 20% less to Ocean State than the same physicians had charged Blue Cross for precisely the same services. In this mix, Blue Cross & Blue Shield created its Healthmate plan, originally called "Z Plan", "MAPS PLUS", and "PLAN 100 PLUS". Blue Cross & Blue Shield's market share permitted it **[**50]** to develop both the prudent buyer policy, adverse selection, and HealthMate.

"The connection between market share and market power if far from clear." *See* P. Areeda, *supra* at 328. Size alone does not violate the Sherman Act. *United States v. United States Steel Corp., 251 U.S. 417, 64 L. Ed. 343, 40 S. Ct. 293 (1920)*. ***HN10***[] Courts, however, must consider the market share of the alleged monopolist as an important factor in determining the existence of monopoly power. *See, e.g., United States v. Grinnell Corp., 384*

U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); American Tobacco Co. v. United States, 328 U.S. 781, 797, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945). In unregulated industries, courts measure market power by defining the relevant product and geographic **[*69]** market and compute the defendant's market share. *See* Southern Pacific Communications v. American Tel. & Tel., 238 U.S. App. D.C. 309, 740 F.2d 980, 1000 (D.C. Cir. 1984), (citing (United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)), *cert. denied 470 U.S. 1005, 84 L. Ed. 2d 382, 105 S. Ct. 1361 (1985)*. In a regulated industry, such as health care insurance, a heavy reliance on market share statistics probably would be an inaccurate or misleading **[**51]** indication of monopoly power. *See* Southern Pacific Communications, 740 F.2d at 1000; MCI Communications Corp. v. American Tel. and Tel. Co., 708 F.2d 1081, 1107 (7th Cir.), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*. Thus, the size of a regulated company's market share should be a point of departure in determining the existence of monopoly power. Id. at 1107. Other factors such as size of competitors, degree of barriers to entry, pricing trends and practices and technological superiority may be considered in determining market power. *See, e.g.,* United States v. E. I. du Pont de Nemours & Co., 96 F.T.C. 650, 762 (1980); *International Distrib.* Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786 (2d Cir. 1987); Fishman v. Estate of Wirtz, 807 F.2d 520, 532-39 (7th Cir. 1986). A monopoly power analysis must focus directly on the defendant's ability to control prices or exclude competition. MCI Communications Corp., 708 F.2d at 1107. It is essential to also keep in mind the fact that the antitrust laws were enacted for the protection of competition, not competitors. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (citing Brown **[**52]** Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)).

The evidence established that Blue Cross provides in Rhode Island private nongovernment health care financing for a major market share. It is not contended that because of Blue Cross & Blue Shield's dominant market position, it has charged its customers, the persons insured by Blue Cross & Blue Shield more than they should have been charged. There is no suggestion that Blue Cross & Blue Shield has not obtained the best economic benefit for its subscribers. Indeed, the complaint is at bottom that because of Blue Cross & Blue Shield's market power, it has been able to get a better deal for medical services than Ocean State and that because of its market power, physicians have the awful choice of yielding to its fee schedule or losing their patients who are Blue Cross & Blue Shield subscribers. At the same time the evidence is clear that Blue Cross & Blue Shield face intense competition from Ocean State and RIGHA. Also, insurance companies with national bases are becoming more involved in the Rhode Island market. Large employers have become self insurers. Thus, although Blue Cross & Blue Shield has market power, it is not without **[**53]** limit. There is a competitive market. The argument goes that since so many persons are enrolled in Blue Cross & Blue Shield in the State of Rhode Island what it does must be considered in the context of its market power. So much is true. The question is did it use its obvious market power in an anti-competitive manner? *See, e.g.,* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985); United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951); *see also United States v. United Shoe Mach.* Corp., 110 F. Supp. 295 (D.Mass. 1953), *aff'd*, 347 U.S. 521, 98 L. Ed. 910, 74 S. Ct. 699 (1954).

What is anti-competitive activity is not a matter that has been clearly defined. There are some significant signposts along the way, but the route is not so clearly marked that departures are unavoidable. It is blandly stated that ***HN11***[] "the use of monopoly power, however, lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful under the Sherman Act." 54 Am.Jur.2d § 42, at 692 (citing Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274 (1st Cir. 1982), *cert. denied*, **[**54]** *460 U.S. 1028, 75 L. Ed. 2d 500, 103 S. Ct. 1279* ***[*70]*** *(1983))*. But what is the anticompetitive behavior which must be condemned? Theorists have not done much to illuminate the essential elements. Thus, *Areeda* talks in terms of exclusionary conduct not competitive on the merits and not more restraint than reasonably necessary to maintain competition. P. *Areeda, supra*, para. 655(b) n. at 72-73. Courts have adopted Areeda's definition of ***HN12***[] exclusionary conduct which includes "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *See, e.g.,* Aspen Skiing Co., 472 U.S. at 605 (citing 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 626b at 78 (1978)); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983) (citing 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 626 at 83 (1978)); [Instructional Sys. Dev. Corp. v. Aetna Cas. and Sur. Co., 817 F.2d 639, 649 (10th Cir. 1987)] (citing 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 625b (1978)).

It is crucial to differentiate "between practices which tend to exclude or restrict competition . . . [from practices **[**55]** that result from] the success of a superior product, a well-run business, or luck, on the other [hand].", the very essence of competition. *Aspen Skiing Co., 472 U. S. at 604*. Examples of the effect of competition on the merits are non-exploitative pricing, hioher output, improved product quality, energetic market penetration, successful research and development, and cost-reducing innovations. *See* *Aspen Skiing Co., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847*; *United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)*. Blue Cross & Blue Shield has historically been very successful. On the other hand, Ocean State's penetration of the market has been phenomenal. With these general principles in mind, the specific aspects of Blue Cross & Blue Shield's adverse selection, HealthMate, and prudent buyer policies must be examined.

Adverse selection is criticized because it is claimed that the number of subscribers who it was estimated would leave Blue Cross was too high. The obvious import of this circumstance would be to increase the cost of Blue Cross & Blue Shield. It is a curious argument indeed by a competitor that Blue Cross & Blue Shield was charging too much for its product. Competitors could **[**56]** hardly be injured by an increase in price. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 583, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. What is more significant is that no one disputes that adverse selection was a fact. Healthier persons would tend to enroll in an HMO. If they did so, then without doubt Blue Cross & Blue Shield would be left with more expensive subscribers. The dispute posited by Plaintiffs is that fewer subscribers would leave Blue Cross & Blue Shield than Blue Cross & Blue Shield estimated. This is hardly the basis of an antitrust claim. Certainly, business people have some area of reasonable and responsible legitimate judgment. This is such an instance.

HealthMate is the result of research and development which concluded that HMO's will have a major role in health care financing in the future. Although HealthMate is not an HMO, it was Blue Cross's attempt to provide a health care financing plan comparable to an HMO until Blue Cross could establish an HMO program. Antitrust laws support the introduction of new products, such as HealthMate, because it encourages competition. *See* *Berkey Photo, Inc., 603 F.2d at 263*. If Blue Cross & Blue Shield were foreclosed by the Sherman **[**57]** Act from competing in an HMO format, the Plaintiff Ocean State would then have the major HMO market share in Rhode Island. This use of the Sherman Act would produce obvious anticompetitive effects.

The selective marketing of HealthMate does not negate the policy reason for encouraging HealthMate. Offering HealthMate as an option to subscribers who are eligible for Ocean State, is head to head competition between Ocean State and Blue Cross and that competition benefits consumers by providing them with alternative health care financing options. It is only because of Ocean State's decision not to **[*71]** compete that the product is not offered elsewhere. Ocean State seeks, therefore, to benefit from its lack of competitive effort in areas where for reasons to its advantage it decides not to compete.

With respect to the prudent buyer program, Plaintiffs asserted that there was sufficient evidence to show that the prudent buyer program was exclusionary. They contended that the prudent buyer had the purpose and effect of maintaining the Defendant's monopoly power and was not a legitimate money saving policy. Noting the testimony of Ronald Battista, Senior Vice President of Professional Relations **[**58]** at Blue Cross & Blue Shield, that prudent buyer was not designed to produce savings for Blue Cross, Ocean State concluded that prudent buyer had an anticompetitive purpose. Relying on Blair Suellentrop's, Chief Executive Officer of Ocean State, testimony regarding the decline in Ocean State's enrollment and resignation of participating physicians, Ocean State concluded that the prudent buyer policy was instituted to harm Ocean State. Indeed, it was Ocean State who claimed that the testimony of Ronald Battista, Blair Suellentrop, and Douglas McIntosh, Chief Executive Officer of Blue Cross & Blue Shield, established sufficient evidence to show that the prudent buyer program was anticompetitive.

On the contrary, Mr. Battista's and Mr. McIntosh's testimony indicated that prudent buyer was instituted to assure that Blue Cross's payments to physicians were not more than Ocean State's payments to physicians. There was no evidence that securing comparable fees for physician services resulted in any anticompetitive effect or impaired Ocean State's competitive opportunities. That the policy had the effect of harming Ocean State was inevitable, but was from the point of view of the consumer **[**59]** clearly understandable. The harm that came Ocean State's way was the resignation of some of its physicians, and claimed increased costs. This harm has to do with the market for physicians' services and the election by physicians of a course which they considered most beneficial to their financial point of view. As a naked proposition, it would seem silly to argue that a policy to pay the same amount for the same services is anticompetitive, even on the part of one who has market power. This, it would seem, is what competition should be all about.

Relying on *Kartell v. Blue Shield of Mass*., Defendant claimed that prudent buyer was a legitimate defense under a "most favored nations clause" which was designed to protect Blue Cross from paying more for the same services than competitors. *749 F.2d 922 (1st Cir. 1984)*, *cert. denied*, *471 U.S. 1029, 85 L. Ed. 2d 322, 105 S. Ct. 2040 (1985)*. Blue Cross analogized the prudent buyer policy of this case with the no balance billing policy in *Kartell. See id*. In *Kartell*, the First Circuit held that Blue Cross was a purchaser of health services and as such had the right to require participating physicians not to balance bill patients who are Blue Cross subscribers. **[**60]** *Id*. Blue Cross argued that as a purchaser of health services it has a lawful right to bargain with its suppliers, the physicians, for the best possible price terms. Blue Cross is a purchaser of health services. The more Blue Cross's activities resemble a purchaser the less likely that they are unlawful. *See id. at 925*. As a legitimate buyer, Blue Cross is entitled to use its market power to get the best price for the services it purchases. *See id. at 929*. Therefore, the prudent buyer policy is clearly not anticompetitive and does not violate the antitrust laws.

Indeed, if Plaintiffs are correct in their contention that the prudent buyer policy is anticompetitive, it is impossible not to come to the same conclusion regarding Ocean State's SIPS plan. There is no principle of ***antitrust law*** which would deny a business practice to any entity with market power and permit that practice on the part of the competitor who does not have market power. To hold prudent buyer anticompetitive would have given and would give Ocean State an unfair competitive advantage in the market, a result which is antithetical to the purpose of the Sherman Act and economically detrimental to health care **[**61]** consumers.

[*72] The Defendant's motion for a judgment notwithstanding the verdict is granted on the antitrust claims. The adverse selection programs, prudent buyer program, and the selective marketing of HealthMate are not anticompetitive and do not violate the antitrust laws. There can be no conclusion other than that these programs benefit consumers and represent legitimate responses to competitive conditions.

ADDITUR

The physicians' class seeks a $ 1.9 million dollar additur on the antitrust claim. Relying on the testimony of Thomas Aman and Ronald Battista, Defendant's witnesses, who both testified that Blue Cross retained at least $ 1,900,000 from Ocean State participating physicians, Plaintiffs concluded that there was no valid dispute concerning the Blue Cross withhold. Therefore, the $ 1,900,000 that Blue Cross withheld may be considered as the damage for the antitrust violation. In light of the jury's verdict and the Court's determination of the Defendant's motion for judgment notwithstanding the verdict on the antitrust claim, Plaintiffs' motion for additur must be denied.

INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS

Next, it is necessary to determine whether the prudent buyer, **[**62]** adverse selection, or the selective marketing of HealthMate interfere with the contractual relationships between Ocean State and its participating physicians. Plaintiffs claimed that Ocean State and the class of physicians incurred damages under their contracts due to the Defendant's actions. Ocean State argued that its advertising budget had to be increased beyond what it expected to spend and above the average advertising expenditures for HMO of its size. Ocean State claimed it incurred additional advertising expenses of $ 335,000 due to Blue Cross & Blue Shield's actions and the subsequent negative publicity. In addition, Ocean State claimed that it lost profits of $ 173,013 because prospective members did not enroll due to the Defendant's actions. Ocean State, also, contended that it incurred unbudgeted expenses of up to $ 1,053,740 to retain physicians in certain specialties. The jury did not award any of these claimed damages to Ocean State.

The class of physicians claimed that the money Blue Cross & Blue Shield withheld caused the class to suffer damages. In addition, plaintiffs contended that the class of physicians lost $ 946,760, which represented the additional moneys Ocean **[**63]** State paid to non-participating specialists. These damages were erroneously awarded to Ocean State.

Defendant claimed that it did not interfere with Ocean State's contractual relationships with the class of physicians. It asserted that there was no evidence that any act by Blue Cross & Blue Shield made more difficult the performance of the Ocean State contracts or lessened their value. Blue Cross & Blue Shield, also, contended that the class' contracts were not terminated, breached, or altered in any sense.

The Defendant argued that the jury awards on the interference with contractual relationships were not based on evidence. Furthermore, Defendant claimed that the $ 947,000 the jury awarded Ocean State represented lost payments to the physicians' class and that Ocean State never claimed that amount as its damages. Therefore, the Defendant contended that the evidence does not support an award of $ 947,000 to Ocean State.

Blue Cross & Blue Shield argued that the $ 1,746,437 awarded to the class of physicians represented Blue Cross & Blue Shield's estimated savings through the prudent buyer plan for an eight month period. It did not represent the damages to the class of physicians. **[**64]** The Defendant's contentions have substantial basis. Although the class claims that the $ 1,746,437 equals its damages the class ignores the fact that many physicians who are not in the class were among those from whom full payment **[*73]** was withheld. The Defendant further contends that there was no evidence from which a reasonable jury could award any damages.

The Rhode Island Supreme Court defined the basic elements of a claim for tortious interference with contractual relationships in *Smith Dev. Corp. v. Bilow Enter. Inc., 112 R.I. 203, 211, 308 A.2d 477, 482 (1973)*. Later cases have adopted these elements for a claim of tortious interference with prospective contractual relationships. *See, e.g., Roy v. Woonsocket Inst. for Sav., 525 A.2d 915, 919 (R.I. 1987)*; *Mesolella v. City of Prov., 508 A.2d 661, 670 (R.I. 1986)*; *Federal Auto Body Works, Inc. v. Aetna Cas. & Sur. Co., 447 A.2d 377, 380-81 (R.I. 1982)*. ***HN13***[] Plaintiff must prove by the preponderance of the evidence that a contract existed, that the alleged wrongdoer knew of the contract, that the wrongdoer's interference was intentional, and that damages resulted from it. *Smith Dev. Corp., 112 R.I. at 211, 308 A.2d* ***[**65]*** *at 482*. The Plaintiff must show that the Defendant intended to do harm without justification. *Mesolella, 508 A.2d at 670*. The Defendant has the burden of proving sufficient justification for an interference. *Smith Dev. Corp., 112 R.I. at 211, 308 A.2d at 482*.

The Plaintiffs have met their burden of proving that contracts existed between Ocean State and Ocean State participating physicians and that Blue Cross knew of these contracts. The Plaintiffs, however, have failed to present any evidence that Blue Cross intentionally interfered with the contracts by implementation of the prudent buyer program, adverse selection, and the selective marketing of HealthMate. The only evidence was that some physicians perceived it to be their economic advantage to terminate their relationship with Ocean State in accord with the terms of their agreement with Ocean State because of the prudent buyer policy. Translating this circumstance into an intentional interference by Blue Cross & Blue Shield with a contractual relationship is quite clearly absurd. Blue Cross & Blue Shield announced what it was willing to pay. Some physicians, not willing to give Blue Cross & Blue Shield a discount, resigned **[**66]** from Ocean State as permitted by their contract with Ocean State. There is no evidence of intentional interference with the contracts between the class of physicians and Ocean State. Further, prudent buyer, adverse selection, and the selective marketing of HealthMate were justified courses of action that Blue Cross undertook as appropriate competition so that its subscribers would not be further burdened. Absent these programs, Blue Cross would pay more to the same physicians for their services than Ocean State. Blue Cross & Blue Shield would be subject to additional expense because of healthier subscribers transferring to an HMO because Blue Cross subscribers would lack a program comparable to Ocean State's coverage. It is obvious that Blue Cross acted with justification and therefore, the prudent buyer policy, adverse selection, the selective marketing of HealthMate were without doubt, justified responses to competitive conditions. Defendant's motion for judgment notwithstanding the verdict on the interference of contractual relationships must be and is granted.

Further, the jury verdict that Defendant was liable on the claim of tortious interference with contractual relationships was **[**67]** against the clear weight of the evidence that Blue Cross justifiably instituted the prudent buyer policy, adverse selection, and the selective marketing of HealthMate. Also, the damages awarded by the jury were inappropriate. A new trial is required to prevent injustice. Giving full respect to the jury's determination, the Court is left with the firm conviction that a mistake has been committed in that damage amounts have been awarded to parties who are not entitled to them. Therefore, Defendant's motion for a new trial on the intentional interference with contractual relationships is also granted.

INJUNCTIVE RELIEF

Plaintiffs and Defendant seek injunctive relief. Plaintiffs move to enjoin Blue Cross from continuing the prudent buyer program **[*74]** or implementing a similar program and to restrain the marketing of HealthMate. The Defendant moves to enjoin the Plaintiff-Intervenors from engaging in the illegal practices alleged and to restrain the Physician and Surgeons Association of Rhode Island, Inc. from negotiating or attempting to negotiate collectively physician fees with Blue Cross.

Although Plaintiffs and Defendant seek equitable relief for different purposes, the burdens of proof **[**68]** are the same for each moving party. Congress enacted Section 16 of the Clayton Act to permit private actions for equitable relief. *15 U.S.C. § 26 (Supp. 1988)*. ***HN14***[] Section 16 of the Clayton Act, reads in part: "any person . . . [or] corporation. . . shall be entitled to sue for injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage . . ." *15 U.S.C. § 26*. (Supp. 1988). Injunctive relief is available to private parties when the traditional equity principles are met and there is a demonstration of a threatened injury. *See, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251, 260, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*; *CIA. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., 754 F.2d 404, 407-08 (1st Cir. 1985)*. The traditional elements that a moving party must show for injunctive relief are: 1) irreparable harm to the Plaintiff if the injunction is not granted, 2) inadequacy of a legal remedy, 3) that the public interest will not be adversely affected by granting the **[**69]** injunction; 4) that the harm to Plaintiff outweighs any harm to the Defendant by granting the injunction. But in order to prevail, Plaintiff must "demonstrate a significant threat of injury from an impending violation of the antitrust laws." *See id. at 130*. Plaintiff need only show a threat on injury not an actual injury. *See Zenith Radio Corp., 395 U.S. at 130*; *CIA. Petrolera Caribe, Inc., 754 F.2d at 407-08*.

Plaintiffs have failed to show that adverse selection, the prudent buyer policy, or HealthMate have threatened loss or damage to their business or property because of violations of the antitrust laws for the reasons heretofore stated. Therefore, Plaintiffs' motion for a permanent injunction against prudent buyer policy and HealthMate is denied.

With respect to the Defendant's counterclaim for injunctive relief, it is premature. There is no evidence that the Plaintiff-Intervenors or their officers, directors, agents, or employees engaged in any illegal practice. Furthermore, there is no evidence that the Physicians and Surgeon Association of Rhode Island negotiated or attempted to negotiate collectively with Blue Cross concerning physicians' fees. Thus, Defendant's **[**70]** motion for a permanent injunction against the Plaintiff-Intervenors is denied.

DECLARATORY RELIEF

Plaintiffs also seek a declaratory judgment against the alleged acts which violate the Sherman Act. Defendant seeks a declaratory judgment against the Plaintiff-Intervenors from collectively negotiating fees to be paid by Blue Cross. The nature of the parties' claims is equitable. In light of the Court's previous ruling on the equitable claims, the Court denies declaratory relief to Plaintiffs and Defendant.

CONCLUSION

Defendant's motion for judgment notwithstanding the verdict is granted on both the antitrust claims and the interference with contractual relationships claims. Defendant's motion for a new trial is granted on the claims of intentional interference with contractual relationships. Plaintiffs' motion for additur is denied because there is no antitrust violation. Plaintiffs' motion for a permanent injunction against the prudent buyer program and HealthMate is denied because Plaintiffs' failure to show a prospective injury. The Defendant's counterclaim **[*75]** against the Plaintiff-Intervenors is denied because it is premature.

New York Public Interest Research Group, Inc. v. Insurance Information Institute

Supreme Court of New York, New York County

August 3, 1988

No Number in Original

Reporter
140 Misc. 2d 920 *; 531 N.Y.S.2d 1002 **; 1988 N.Y. Misc. LEXIS 499 ***

New York Public Interest Research Group, Inc., et al., Plaintiffs, v. Insurance Information Institute, Defendant

Core Terms

advertisements, commercial speech, Lawsuit, Crisis, misleading, consumers, pamphlets, advertising campaign, insurance industry, insurance company, deceptive, commercial transaction, false advertising, deceptive act, noncommercial, manufactured, plaintiffs', motivation, practices, conveys, damages, vaccine, awards, polio

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN1[] **Consumer Protection, Deceptive & Unfair Trade Practices**

N.Y. Gen. Bus. Law § 349(a) provides that deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > State Regulation

HN2[] **Consumer Protection, False Advertising**

N.Y. Gen. Bus. Law § 350 provides that false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful. "False advertising" is defined as advertising, including labeling, which is misleading in a material respect. In determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Legal Ethics > Legal Services Marketing > Advertising

HN3[] **Consumer Protection, False Advertising**

N.Y. Gen. Bus. Law § 350-d confers a cause of action under section 350 upon individuals who are injured by false advertising.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Types of Statutes

HN4[] **Legislation, Interpretation**

Remedial statutes require liberal construction and application, to spread their beneficial results as widely as possible.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN5[] **Pretrial Judgments, Judgment on Pleadings**

In considering a motion to dismiss based on pleadings alone, the court must presume that the allegations of the complaint are true.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN6[] **Consumer Protection, Deceptive & Unfair Trade Practices**

N.Y. Gen. Bus. Law § 349(h) provides that in addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN7[] **Consumer Protection, False Advertising**

N.Y. Gen. Bus. Law § 350-d(3) provides that any person who has been injured by reason of any violation of section 350 or section 350-a of this article may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN8[] Class Actions, Prerequisites for Class Action

When legislation proscribes conduct against a class, a bona fide and nationally recognized organization may represent the class of persons who can claim to be aggrieved under that legislation.

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Advertising

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Freedom of Speech > Commercial Speech > General Overview

Constitutional Law > ... > Freedom of Speech > Commercial Speech > Misleading Speech

HN9[] Commercial Speech, Advertising

Commercial speech which is false or misleading can be regulated and restricted.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Freedom of Speech > Commercial Speech > General Overview

HN10[] Fundamental Freedoms, Judicial & Legislative Restraints

Where noncommercial speech is involved, its content may not be suppressed because the speaker is biased or her or his conclusions erroneous or inaccurate.

Constitutional Law > ... > Freedom of Speech > Commercial Speech > General Overview

HN11[] Freedom of Speech, Commercial Speech

If, within a commonsense reading, an advertisement is obviously intended to promote sales, it is commercial speech. If a public message or discussion is incorporated, it is still commercial speech. If, however, the advertisement is a direct comment on a public issue, unrelated to proposing any particular commercial transaction, it is protected.

Headnotes/Summary

Headnotes

[*1] Consumer Protection -- False Advertising -- Insurance Industry Media Campaign**

1. *General Business Law §§ 349* and *350*, which prohibit deceptive practices in the conduct of any business and false advertising, are applicable to advertisements sponsored by an insurance industry communications organization which asserted that the quality of every American's life is threatened by large awards handed down in

personal injury actions arising out of malpractice, negligence and products liability, since *section 349* applies to "deceptive * * * practices in the conduct of any business" and by its own definition, defendant organization's "business" is to provide information about the insurance business; thus any action by defendant in disseminating deceptive information about the insurance industry would violate the statute. Moreover, inasmuch as there is no dispute that the communications in issue constitute "advertising" within the meaning of *section 350*, and given that the allegations of falsity contained in plaintiffs' complaint must be deemed to be true on defendant's motion to dismiss, a cause of action for false advertising has been pleaded pursuant to *section 350*.

Parties -- Standing -- [*2] Action to Restrain False Advertising -- New York Public Interest Research Group -- Plaintiffs in Personal Injury Actions**

2. In an action for money damages and to restrain allegedly false advertising sponsored by an insurance industry communications organization which asserted that the quality of every American's life is threatened by large awards handed down in personal injury actions arising out of malpractice, negligence and products liability, plaintiffs, the New York Public Interest Research Group and individual plaintiffs in personal injury actions, have standing to sue under *General Business Law §§ 349* and *350*, since the Group qualifies as a bona fide organization dedicated to serving the interests of general public welfare, as it is a not-for-profit, tax-exempt organization with tens of thousands of members and *sections 349* and *350* were enacted to protect the general public, which includes members of the Group, from deceptive acts or practices. Moreover, the individual plaintiffs arguably fall within the zone of interest to be protected by the statutes since, if their allegations are deemed true, they either have settled or will settle their cases for amounts less **[***3]** than their actions would otherwise be worth or received or anticipate receiving jury verdicts below their cases' worth as a result of the effect of defendant's advertising on people who would comprise juries in civil actions.

Consumer Protection -- False Advertising -- Protected Speech -- Communication by Insurance Industry

3. Advertisements sponsored by an insurance industry communications organization which asserted that the quality of every American's life is threatened by large awards handed down in personal injury actions arising out of malpractice, negligence and products liability are not primarily commercial speech, and thus are subject to the full protection of the First Amendment, since they do not propose a commercial transaction in that they are generally not directed to potential buyers of the advertiser's product; the advertisements seek to influence the public, as potential voters, to encourage particular legislative action, and, as potential jurors, to award lower verdicts in personal injury cases, and seek to improve the image of the insurance industry. While the purposes of the advertisements clearly inure to the economic benefit of the insurance industry, **[***4]** the primary purpose of the advertisements is not to propose commercial transactions between defendant organization or its constituent insurance companies and the viewers or readers of the advertisements, but to influence a variety of public debates. Accordingly, any regulation of the advertisements based on their alleged falsity is constitutionally impermissible.

Counsel: *Debevoise & Plimpton* for defendant.

Jacob D. Fuchsberg Law Firm for plaintiffs.

Judges: Kristin Booth Glen, J.

Opinion by: GLEN

Opinion

[*921] [1003] OPINION OF THE COURT**

This case presents important questions concerning the scope of *sections 349* and *350 of the General Business Law* (prohibiting deceptive practices and false advertising), standing to sue for violation of those statutes, and the applicability of First Amendment protection to an insurance industry advertising campaign which purports to tie rising insurance costs to "the Lawsuit Crisis." These issues arise on a motion to dismiss the complaint brought by defendant Insurance Information Institute (I.I.I.) pursuant to *CPLR 3211 (a) (7)*.

PARTIES AND BACKGROUND

Defendant describes itself as a "non-profit educational and **[*922]** communications organization dedicated to improving public **[***5]** understanding of the property **[**1004]** and casualty insurance business and to providing information * * * about issues of relevance to the insurance business. I.I.I. is supported by more than 300 insurance companies and has been in existence for over twenty-five years." Plaintiffs consist of New York Public Interest Research Group, Inc. (NYPIRG), and three individuals. As alleged in their amended complaint, NYPIRG "is a not-for-profit membership corporation * * * [whose members] include approximately 30,000 citizens in communities throughout New York State besides 150,000 student members * * *. NYPIRG, in furtherance of its broad concern for the public welfare, among other things, investigates and, as appropriate, addresses problems of common concern before the judicial, legislative and executive branches of our State Government. In particular, NYPIRG conducts research and makes recommendations concerning the interests of the public and of the members of NYPIRG in insurance-related issues and in the proposed changes in the civil justice system advocated by the insurance industry." The individual plaintiffs are all plaintiffs in other, personal injury, lawsuits. [1]

[*6]** In their complaint, plaintiffs plead three causes of action relating to I.I.I.'s multimedia advertising campaign, which I.I.I. refers to as the "Lawsuit Crisis". The magazine and newspaper ads, and the television spots all assert that the quality of every American's life is threatened by the existence of a "Lawsuit Crisis"; that is, that huge numbers of people suing doctors, pharmaceutical companies, municipalities, etc., for personal injuries due to malpractice, negligence, etc., that these personal injury plaintiffs are receiving huge jury awards, that, because of these awards, which are paid, in the final analysis by insurance companies, the insurance companies must raise their premiums for liability insurance, or deny coverage. This "crisis," in turn, according to the ads, causes, among other things, obstetricians to cease delivering babies, pharmaceutical companies to discontinue manufacturing lifesaving **[*923]** drugs (e.g., polio vaccine), and municipalities to close down playgrounds, firehouses, afterschool programs, etc.

Plaintiffs allege that the statements made in defendant's advertisements distort the truth, and conceal material facts. Their three causes of action **[***7]** plead that I.I.I.'s "Lawsuit Crisis" advertising campaign

(1) constitutes a deceptive act or practice within the meaning of *section 349 of New York's General Business Law*;

(2) constitutes false advertising within the meaning of *General Business Law § 350*; and,

(3) by knowingly violating these statutes, seeks to corrupt the legal system by prejudicing prospective jurors against injured victims, thus preventing injured plaintiffs from "obtaining impartial justice."

Plaintiffs specifically allege that they have been injured by defendant's "Lawsuit Crisis" advertising campaign because the ads "have deceived the public, including but not limited to members of NYPIRG * * * [and] have injured NYPIRG [1] by impeding, impairing and defeating NYPIRG's efforts [to educate and advise the public] by forcing NYPIRG to [expend] additional time and money to counteract defendant's deception; and [2] by damaging NYPIRG's recruitment of new members." With regard to the individual plaintiffs, the amended complaint alleges that defendant's advertisements "have deceived the jury pool, with the result that the eventual [juries in the individual

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[1] Jeanne King, as administratrix of Anna Katz's estate, is involved in a medical malpractice action against the hospital in whose emergency room Anna Katz died; James Carroll, as guardian ad litem for his son, has commenced a negligence action against the drunk driver who allegedly caused Kevin's permanent, totally disabling injuries; and Denise Hostettler has brought an action charging medical malpractice and hospital negligence for the injuries sustained at birth by her son, who is blind, deaf, and totally helpless.

plaintiffs' respective personal injury actions] will compensate **[***8]** [their injuries] inadequately or not at all." Plaintiffs seek injunctive relief and money damages for each statutory violation.

[1005]** I.I.I. predicates its motion to dismiss [2] on three grounds: (1) the statutes do not apply to lobbying efforts such as defendant's; (2) plaintiffs lack standing under the statutes; and (3) the "Lawsuit Crisis" advertising campaign constitutes non-commercial, protected speech under the First Amendment.

THE STATUTES

Defendant relies upon *Genesco Entertainment v Koch (593 F Supp 743, 752* [SD NY 1984]) for the proposition that *sections 349* and *350* should be construed narrowly to apply only to **[*924]** "an ordinary or recurring consumer transaction." Defendant's reliance is misplaced. *Genesco* concerned a dispute over the renting of Shea Stadium by **[***9]** Genesco for a country and western music concert. The District Court Judge found that the concert was a "'single shot transaction' * * * not of a recurring nature [and] without ramifications for the public at large". *(Supra, at 752*.) This is clearly distinguishable from the case at bar: I.I.I.'s advertisements were broadcast and published numerous times and were focused on the "public at large." Moreover, the *Genesco* court acknowledged that it was construing the statutes without any guidance from New York State courts. Not only is *Genesco* distinguishable on its facts, the statutes themselves clearly require a different result in this case.

HN1[] *Section 349 (a) of the General Business Law* provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

HN2[] *Section 350 of the General Business Law* provides: "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." "False advertising" is defined as "[Advertising], including labeling, which is misleading in a material respect; and in determining **[***10]** whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, *but also the extent to which the advertising fails to reveal facts material in the light of such representations* with respect to the commodity to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." (*General Business Law § 350 [a]*; emphasis supplied.)

Until the enactment of *section 350-d of the General Business Law*, in 1984, only the New York State Attorney-General had the right to bring suit for the violation of *section 350*. ***HN3***[] *General Business Law § 350-d* confers a cause of action under *section 350* upon individuals who are injured by false advertising. In amending the act to provide private rights of action, the Legislature created new substantive rights by providing relief for conduct which was not unlawful under the common law or statute. *(See, Freschi v Grand Coal Venture*, SD NY, May 28, 1982 [No. 81 Cir 4331 (RSW)], slip opn, at 5 ["By eliminating the element of intent, enabling prospective enjoinment, **[*925]** **[***11]** creating a private right of action for individual consumers and allowing the court to award treble damages in cases of willful violations, *§ 349* substantively redefines the meaning of consumer fraud actions, alters the proof required to make out a successful claim, and thereby creates liabilities, penalties and forfeitures that 'would not exist but for (the) statute'"]; *Ludmer v Franklin Career Search Intl*., NYLJ, Dec. 8, 1981, at 12, col 6 [Sup Ct, Kings County, Nov. 19, 1981]; *Geismar v Abraham & Strauss, 109 Misc 2d 495, 498-499* [Dist Ct, Suffolk County 1981].)

I.I.I.'s main argument against the applicability of the General Business Law to the **[**1006]** instant media campaign is that these statutes have never before been applied to a situation like the one presented here. While that may be true, that fact alone does not prevent article 22-A of the General Business Law from applying here. General rules of

[2] Plaintiffs filed their original complaint on June 18, 1986, which I.I.I. answered on August 7, 1986. Plaintiffs filed their amended complaint on September 16, 1986, to which I.I.I. responded by serving the instant motion.

statutory construction and the particular legislative history [3] of these statutes support and indeed require an expansive reading which would clearly encompass the instant case.

[*12]** Both *General Business Law §§ 350* and *349* qualify as remedial statutes: they "[givee] a mode of remedy for a wrong where an injured person had none or an ineffective remedy under the prior system of law." (McKinney's Cons Laws of NY, Book 1, Statutes § 35; *see also*, McKinney's Cons Laws of NY, Book 1, Statutes §§ 321, 342.) ***HN4***[] Remedial statutes such as these require liberal construction and application, "to spread their beneficial results as widely as possible". (McKinney's Cons Laws of NY, Book 1, Statutes § 54 [a].) In addition, the court must "consider the mischief sought to be remedied and should favor the construction which will suppress the evil and advance the remedy". *(Matter of Metropolitan Life Ins. Co. v **[*926]** State Tax Commn., 80 AD2d 675, 677* [3d Dept], *affd* *55 NY2d 758* [1981]; McKinney's Cons Laws of NY, Book 1, Statutes §§ 54, 95.)

The Legislature specifically chose to word these statutes broadly. "As stated by the Act's drafting committee, the Act was designed to include 'all economic activity' within the ambit of its statutory phrase 'business, trade or commerce or the furnishing of any service.'" (Note, *New York* **[***13]** *Creates a Private Right of Action to Combat Consumer Fraud; Caveat Venditor*, 48 Brooklyn L Rev 509, 543 [1982].) Thus, the Act was envisioned "as a mechanism to protect the public from 'all' deceptive acts and practices." *(Caveat Venditor, op. cit*., at 544; *see, Beslity v Manhattan Honda, 120 Misc 2d 848* [1st Dept 1983]; Governor's mem on approval of L 1970, ch 43, 1970 NY Legis Ann, at 472; mem of Attorney-General, 1970 NY Legis Ann, at 92.)

Section 349 applies to "[deceptive] acts or practices in the conduct of *any* business". (*General Business Law § 349 [a]*; emphasis added.) By its own definition, defendant's "business" is "to [provide] information * * * about * * * the insurance business." Any action by defendant in disseminating information about the insurance business that is deceptive would thus violate *section 349*. *(See, Sulner v General Acc. Fire & Life Assur. Corp., 122 Misc 2d 597, 599-601* [Sup Ct, NY County 1984] [Baer, J.].) *General Business Law § 349* thus applies to defendant's advertisements.

There is no dispute that the communications at issue here constitute "advertising" within the meaning of **[***14]** *General Business Law § 350*. If defendant's advertising "is misleading in a material respect * * * [or] fails to reveal facts material" to the subject matter of the advertisements (*General Business Law § 350-a*), then it violates *General Business Law § 350*.

HN5[] In considering a motion to dismiss based on pleadings alone, the court must presume that the allegations of the complaint are true. *(See, O'Henry's Film Works v Nabisco, Inc., 112 AD2d 825* [1st Dept 1985].)

Plaintiff's allegations, if true, include that defendant is the mouthpiece of the insurance industry, that defendant is deliberately deceiving the public, through its advertising campaign, about the nature and **[**1007]** cause of the current "insurance crisis" (that is, the high cost and unavailability of liability insurance); that the purported "Lawsuit Crisis" is a "myth manufactured by the insurance industry" to "prejudice * * * juries **[*927]** and judges, subvert our judicial system and * * * undermine the right to a jury trial."

Plaintiffs contend that the entire "Lawsuit Crisis" campaign is predicated on a falsehood. While defendant's ads convey the distinct impression that the American judicial system is choked **[***15]** with personal injury litigation,

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[3] For the legislative history, see especially Note, *New York Creates a Private Right of Action To Combat Consumer Fraud: Caveat Venditor* (48 Brooklyn L Rev 509, 559 [1982] *[Caveat Venditor]*, citing Report of the Committee on New York State ***AntiTrust Law*** of the ***AntiTrust Law*** Section of the New York State Bar Association: A Proposed New State Law Making Deceptive Acts or Practices Unlawful, 1968 NYSBA AntiTrust L Symposium 114, 129 [CCH ed]). *Caveat Venditor* contains a lengthy and detailed analysis of the Act, including all relevant legislative history and a comprehensive analysis of similar and identical statutes throughout the United States. The article points out that because the Act provides no internal guidance with respect to the meaning of its terms, and that few cases have been decided interpreting the Act, that interpretive guidance must be sought from the Act's legislative history, New York Rules of Construction, and analogous statutes and the case law decided under them. *(Caveat Venditor, op. cit*., at 519-525.)

plaintiffs observe that, according to the National Center for State Courts, while total civil filings did actually increase from 1978 to 1981, the total actually *decreased* from 1981 to 1984. In addition, plaintiffs argue, defendant's advertisements are aimed at the average person who lacks sophisticated legal knowledge, and defendant exploits this ignorance by carefully concealing the distinction between claims filed and actual damage awards. If plaintiffs' claims are true, defendant's ads are "misleading in a material respect", and violate *General Business Law § 350*. (*General Business Law § 350-a*.)

In addition to the defendant's alleged deception of the general public about the existence of a "Lawsuit Crisis", plaintiffs discuss various individual advertisements and all of which, they argue, contain numerous misleading statements and false impressions. One of I.I.I.'s advertisements claims that obstetricians, driven by fear of malpractice claims, have stopped delivering babies; that, as a result, women have difficulty finding a doctor. Plaintiffs report that, in fact, according to the Statistical Abstract of the United States, the number **[***16]** of obstetricians/gynecologists in the United States *increased* by more than 50% from 1970 to 1982.

Another advertisement conveys the frightening idea that some members of the clergy have stopped counseling their parishioners because they are afraid of lawsuits. Petitioners contend, and defendant does not dispute that, in fact, no member of the clergy has ever been held liable for clerical malpractice.

Another of defendant's advertisements states that "Only one [company] still makes the vaccine for polio * * *. It's a symptom of the lawsuit crisis." This ad conveys the idea that there had once been many manufacturers of polio vaccine, that all but one have since withdrawn from the market because of huge jury awards, and that there currently is, or will presently be, a shortage of polio vaccine. According to plaintiffs, defendant carefully omits the information that while only one company was making polio vaccine in 1974, there are now two, and a third, moreover, is actively seeking **[*928]** to enter the market and has a license application pending. If true, this would constitute an omission of facts material to the subject of the advertisement.

If these and plaintiffs' other **[***17]** allegations are deemed true, which they must be for the purposes of the instant motion, plaintiffs' complaint states a cause of action under *General Business Law §§ 349* and *350* and is legally sufficient in this respect. *(Guggenheimer v Ginzburg, 43 NY2d 268, 275* [1977]; *General Business Law §§ 349*, *350*, *350-a*.)

STANDING

In addition, I.I.I. moves to dismiss the complaint on the ground that plaintiffs lack standing. This branch of its motion must also be denied.

HN6[] *Section 349 (h) of the General Business Law* provides, in pertinent part: "In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his **[**1008]** own name to enjoin such unlawful act or practice, **[***18]** an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions."

HN7[] *Section 350-d (3) of the General Business Law*, as well, provides, in pertinent part: "Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions."

Defendant argues that plaintiffs do not constitute a "person who has been injured" within the meaning of these statutes. The Court of Appeals has held, however, that ***HN8***[] when "legislation proscribes conduct against a class," a "bona fide and nationally recognized organization" may represent the class of persons who can "'[claim] to be aggrieved'" under that legislation. *(National Org. for Women v State Div. of Human Rights, 34 NY2d 416, 419-420* [1974].) NYPIRG qualifies as a bona fide organization dedicated to serving the interests of general public welfare as it is a not-for-profit, tax-exempt organization with tens of thousands of members. Article 22-A of the General Business Law, moreover, exists to protect the general public (which includes members of NYPIRG) from deceptive acts or practices.

In addition, the individual plaintiffs arguably fall "within **[*929]** the zone of interest to be protected by the statute", and can be found to have standing to sue. [4] *(Matter of Fritz v Huntington Hosp., 39 NY2d 339, 346* [1976]; *see also, Matter of District Attorney of Suffolk County, 58 NY2d 436, 442* **[***19]** [1983] ["the contemporary rule is that a party has standing to enforce a statutory right if its abuse will cause him injury and it may fall within the 'zone of interest' protected by the legislation"].)

Accordingly, plaintiffs have standing to maintain this action.

FIRST AMENDMENT ISSUES

The most critical issue raised by defendant is whether enforcement of the statutes would impermissibly burden I.I.I.'s speech and violate the First Amendment. The threshold determination is whether I.I.I.'s advertisements constitute commercial or noncommercial speech. ***HN9***[] Commercial speech which is false or misleading can be regulated and restricted *(e.g., Central Hudson Gas & Elec. v Public Serv. Commn., 447 U.S. 557, 563* [1980]), while the government is powerless **[***20]** to regulate noncommercial speech based on its truth or falsity.

HN10[] Where noncommercial speech is involved, our long-standing First Amendment jurisprudence provides that its content may not be suppressed because the speaker is biased or her/his conclusions erroneous or inaccurate, since "the people in our democracy are entrusted with the responsibility of judging and evaluating the relative merits of conflicting arguments" *(First Natl. Bank of Boston v Bellotti, 435 U.S. 765, 791* [1978]). The lesser protection for "commercial" speech is the result of more than a decade of Supreme Court jurisprudence which has simultaneously brought commercial speech within the ambit of the First Amendment and defined and described the levels of protection such speech should be accorded.

Protection of Commercial Speech.

Prior to its decision in *Virginia Pharmacy Bd. v Virginia Consumer Counsel (425 U.S. 748* [1976]) the court had held that commercial speech was exempt from the protection of the First Amendment based on the commercial motivation of the speech rather than its content *(e.g., Valentine v Chrestensen, 316 U.S. 52, 54* [1942] [purely **[***21]** commercial advertising is merely **[*930]** the pursuit of "gainful occupation"]). This focus on the profit motive as rendering commercial speech unworthy of protection began to be replaced with an increasing scrutiny of content *(e.g., New York Times Co. v Sullivan, 376 U.S. 254* **[**1009]** [1964]; *Pittsburgh Press Co. v Human Relations Commn., 413 U.S. 376* [1973]). [5] The final reversal came in *Virginia Pharmacy* where the court held that purely commercial speech, when truthful, is entitled to First Amendment protection because of its value to individual consumers and the general public. It was thus not the motivation of the speaker or, as the court later held in *First Natl. Bank (supra)*, the identity of the speaker, but the fact that the information conveyed, although doing no more than "'[proposing] a commercial transaction'" added to the sum total of ideas and information employed by the citizenry in making economic, as well as political choices. *(Virginia Pharmacy Bd. v Virginia Consumer Counsel, supra, at 762*.)

[*22]** The underlying bases of the speaker/content distinction are fully debated in the several opinions which constitute the decision in *First Natl. Bank (supra)*, holding that the State may not regulate speech simply because the speaker is a corporation. The differing and sometimes conflicting values which the First Amendment serves

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[4] If their allegations are deemed true, they either have settled or will settle for amounts less than their actions would otherwise be "worth", or received or anticipate receiving jury verdicts below their cases' "worth" as a result of defendants campaign.

[5] In *Pittsburgh Press Co. v Human Relations Commn. (413 U.S. 376*), the court considered an ordinance which generally prohibited a newspaper from carrying help wanted ads in gender-designated columns. The court distinguished purely commercial advertisements merely "[proposing] a commercial transaction" from advertisements expressing an editorial position on matters of social or political concern. *(Supra, at 385*.) In making this distinction, the court signaled its shift from the economic motivation of the speaker to the content of the speech. *(Supra, at 386-387*.)

were also explicitly considered in that case. Three major purposes of the First Amendment's guarantee of freedom of speech have been identified. These are:

1) furtherance of the individual's ability of self-expression and thought *(see, e.g., Whitney v California, 274 U.S. 357, 375* [1927] [Brandeis and Holmes, JJ., concurring]);

2) furtherance of an open marketplace of ideas *(see, e.g., Abrams v United States, 250 U.S. 616, 630* [1919] [Holmes and Brandeis, JJ., dissenting]; Milton, Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England [1644]); and

3) furtherance of intelligent, self-government in a democratic **[*931]** system *(see, e.g*., Meiklejohn, Political Freedom [1960]; Emerson, The System of Freedom of Expression, at 7 [1970]).

Obviously, as Justice **[***23]** White's dissent pointed out, the first of these interests is not implicated where corporate (or commercial) speech is involved *(supra, at 804-805*). The majority opinion, written by Justice Powell, stressed the second, noting "[the] inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual" *(supra, at 777*).

The majority drew an analogy to the commercial speech cases, writing that "They illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information'" *(supra, at 783*).

This analysis also explains why nontruthful commercial speech is *not* protected -- because it does not increase the amount of information which consumers may employ in making their economic decisions. Unlike political speech of questionable **[***24]** accuracy [6] commercial speech is protected precisely because it increases the truthful information available to consumers *(see,* **[**1010]** *Central Hudson Gas & Elec. v Public Serv. Commn., 447 U.S. 557, 563* [1980], *supra* ["(t)he First Amendment's concern for commercial speech is based on the informational function of advertising * * * (c)onsequently, there can be no constitutional objection to the suppression of * * * messages that do not accurately inform the public"]).

The court in *Virginia Pharmacy (supra)* expressly recognized that the First Amendment did not interfere **[***25]** with a "State's dealing effectively" with the problem of "deceptive or misleading" commercial speech, even when it is "not provably false, or even wholly false". *(Supra, at 771*.) The State may constitutionally insure "that the stream of commercial information [flows] cleanly as well as freely" *(supra, at 772*).

[*932] This position was restated and amplified in *Bates v State Bar of Ariz. (433 U.S. 350, 383* [1977], *supra)* where the court wrote: "Advertising that is false, deceptive, or misleading of course is subject to restraint * * *. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech * * *. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." **[***26]** *(See also, Linmark Assocs. v Willingboro, 431 U.S. 85, 97* [1977].)

This discussion of the reasons for the protection and regulation of commercial speech is necessary because of the lack of any "bright line" test in determining what is or is not commercial speech *(e.g., Zauderer v Office of*

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[6] It is precisely in this political area, as Justice Powell wrote, that "'the state has a special incentive to repress opposition and often wields a more effective power of suppression'" *(First Natl. Bank of Boston v Bellotti, 435 U.S. 765, 777, n 11*, quoting Emerson, Toward a General Theory of the First Amendment, at 9, and citing Meiklejohn, Free Speech and Its Relation to Self-Government, at 24-26).

Disciplinary Counsel, 471 U.S. 626, 637 [1985] ["More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech"]). Such determination can finally be made only by reference to the underlying principles and analyses of the court's commercial and corporate speech decisions.

Determination of whether Speech is Commercial.

Beside its notion of commonsense difference, the Supreme Court has generally looked at the primary purpose of the expression *(see, e.g.,* Friedman v Rogers, 440 U.S. 1, 11-13, and at 12, n 11 [1979]), finding it commercial if it predominantly invites a commercial transaction *(e.g.,* Central Hudson Gas & Elec. v Public Serv. Commn., supra, at 561; Virginia Pharmacy Bd. v Virginia Consumer Counsel, supra, at 771, n 24). The **[***27]** fact that otherwise commercial speech includes information on an opinion concerning a matter of public concern or an ongoing debate does not remove its primary commercial character or entitle it to greater protection than it might otherwise have. *(* Central Hudson Gas & Elec., supra, at 563, n 5.) [7]

[*933] [*28] [**1011]** In Bolger v Youngs Drug Prods. Corp. (463 U.S. 60 [1983]) the court attempted to enumerate some of the characteristics to be considered in determining whether speech was commercial or noncommercial. At issue there were pamphlets on the use of contraception and the prevention of venereal disease which were circulated by the manufacturer of Trojan-brand condoms, who was identified on each of the pamphlets. The court held that

1) the mere fact that the pamphlets were conceded to be advertisements -- that they were paid for by the advertiser -- was insufficient to compel a conclusion that they were commercial speech;

2) the reference to specific products manufactured by the advertiser did not, in and of itself, render the pamphlets commercial speech; [8] and

[*29]** 3) an economic motivation for mailing the pamphlets was not sufficient to turn them into commercial speech.

The presence of all *three* factors, however, compelled the court's conclusion that the pamphlets were commercial speech. *(*Supra, at 67-68.) Specific language in the pamphlets which informed potential consumers where condoms could be purchased and gave detailed descriptions of various Trojan-brand condoms persuaded the court that the company was not engaged in the type of "direct comment * * * on public issues" deserving of the "full panoply" of constitutional protections. *(*Supra, at 68.) The primary purpose of the pamphlets was to sell condoms to their recipients; the discussion of related issues of public interest was insufficient to change their character for purposes of First Amendment analysis.

[*934] The dividing line is thus clear. ***HN11***[] If, within a commonsense reading, an advertisement is obviously intended to promote sales, it is commercial speech. If a public message or discussion is incorporated, it is still

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[7] The court there ruled on a Public Service Commission ban of advertising promoting the use of electricity, but considered whether a different result would occur if the promotional advertising included discussion of environmental concerns or other "'questions frequently discussed and debated by our political leaders.'" *(* Central Hudson Gas & Elec. v Public Serv. Commn., 447 U.S. 557, 563, n 5.) It held that advertising which "links a product to a current public debate" does not thereby become entitled to constitutional protection afforded noncommercial speech. *(*Supra, at 563, n 5.) It wrote "[Advertisers] enjoy the full panoply of First Amendment protections for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions" *(*supra, at 563, n 5).

[8] To be categorized as commercial, speech does not have to refer to a specific brand or manufacturer; "a trade association may make statements about a product without reference to specific brand names", and this can constitute commercial speech. *(* Bolger v Young Drug Prods., 463 U.S. 60, 67, n 13, citing ***National Commn. on Egg Nutrition v Federal Trade Commn., 570 F2d 157*** [7th Cir 1977], *cert denied* ***439 U.S. 821*** [1978].) In the latter case the Seventh Circuit upheld regulation of commercials promoting the sale of eggs by attempting to defuse fear of health hazards due to their high concentration of cholesterol.

commercial speech. If, however, the advertisement is a direct comment on a public issue, unrelated to proposing any particular commercial transaction, **[***30]** it is protected. This analysis must now be applied to the advertisements at issue on this motion.

THE ADVERTISEMENTS

The materials dissemninated by I.I.I. consist of various print advertisements and television commercials which, according to I.I.I., seek to "focus public attention on problems created by our current civil litigation system and to initiate and advance discussion of tort reform * * *. Each advertisement asks the reader or viewer to become informed about the civil justice system and possibilities for its improvement." Each advertisement conveys effectively that a "Lawsuit Crisis" exists, that the high cost or unavailability of liability insurance is due solely to an explosion of lawsuits, and that insurance companies have no responsibility for rising premiums or the unavailability of insurance. As described by defendant, "[each] advertisement offers the reader or viewer a free report, which describes reform proposals and provides the names and addresses of various involved organizations." These are two examples of voice-over scripts for the television commercials:

"The future of high school sports is unclear.

"Today, schools are thinking about canceling football **[***31]** and other major sports.

"What are the reasons? Lawsuits are costing more and more. Insurance costs are rising. Some officials think it just isn't worth it.

"What can be done? Call for this free report.

[1012]** "Learn how to protect your rights.

"Learn how to stop paying the price.

"Our cities are in a bind.

"Money needed for fire fighters, police and other services is being used to pay the price of The Lawsuit Crisis.

"New York City says lawsuits may soon cost as much as the fire department.

"Some California cities face an estimated two hundred **[*935]** million dollars in lawsuits. The money has to come from somewhere.

"Call for this free report. [9] Learn how to protect your rights and help fight The Lawsuit Crisis.

" **[***32]** Learn how you can stop paying the price."

DISCUSSION

When analyzed for the factors set forth in *Bolger (supra)* and the justification for limiting the protection of commercial speech to truthful communication, it becomes clear that the advertisements at issue here are not primarily commercial speech within the meaning of existing case law. Most critically, the advertisements do not "propose a commercial transaction" since they are generally not directed to potential buyers of the advertiser's product. The ads address issues of malpractice, product and municipal liability insurance which undoubtedly affect the prices readers ultimately pay for various services (medical care paid to health care providers, governmental

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[9] The "free report" referred to is a slickly done, nine-page pamphlet with the name and logo of the Insurance Information Institute, "A nonprofit action and information center", at the top of the cover. Page 1 contains a message from the president of I.I.I. which includes the following: "America's insurance companies are deeply concerned about the lawsuit crisis. The high cost of lawsuits leads to higher insurance premiums, which leads to higher taxes, and disruptions to our daily lives and businesses."

services financed by taxes, etc.) but they do not, except incidentally, [10] reach the direct consumers of those insurance products.

[*33]** The purpose of the advertisements is complex, but reflects at least three major aims. One is to influence the public, as potential voters, to encourage legislative action (such as the bills which have been pending in our Legislature relating to caps on judgments, etc.) [11] which will decrease payments made by the insurance companies. A second purpose may well be to encourage readers and viewers, as potential jurors, to decrease plaintiffs' recoveries by awarding lower verdicts. [12] A third is to **[*936]** generally improve the image of the insurance industry which is under criticism for many reasons unrelated to payments made as part of the litigation process. [13]

[*34]** All of these purposes clearly inure to the economic benefit of the insurance industry, but as the earlier discussion demonstrates, it is not economic motivation, but commercial content which deprives potentially untruthful speech of full First Amendment protection. [14]

[*35]** Because the primary purpose or purposes of the ads are not the proposal of a commercial transaction between the defendant **[**1013]** (or its constituent insurance companies) and the viewers or readers of the ads, and because their primary purpose is to influence a variety of public debates (whether or not truthfully), I find that they are not commercial speech and are thus **[*937]** subject to the full protection of the First Amendment. [15] Any regulation based on their alleged falsity [16] is thus constitutionally impermissible. Accordingly, defendant's motion to dismiss is granted.

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[10] Doctors, CEOs of drug manufacturers, and governmental officials may be among the readers and viewers, but they are presumably an extremely small percentage and the ads are obviously not directed to them in their "consumer" capacity.

[11] For a discussion of recent and pending legislation relating to malpractice rates, *see, e.g*., Kramer and Moore, *Medical Malpractice -- Comment on New Legislation*, NJLJ, Aug. 1, 1988, at 3, col 1.

[12] Voir dire of jurors in civil cases now frequently includes questions directed to this advertising campaign, and a large number of potential jurors indicate both that they are aware of and influenced by the advertisements.

[13] For example, in March of this year the Attorneys General of seven States, including New York, filed a mammoth antitrust suit against numerous insurance companies alleging conspiracy to restrain competition and manipulate the cost of commercial general-liability insurance during the so-called "insurance crisis" *(An Avalanche of Lawsuits Descends on Insurers*, Business Week, Apr. 11, 1988, at 60). Rather than spiraling jury awards, as the insurance industry claims, the Attorneys General attribute the "crisis" to "boycotts, threats, intimidation, and other coercive conduct" by the defendants. *(Op. cit*., at 61.)

[14] A strong argument can be made the other way, and has indeed been expressed in concurring or dissenting opinions in some of the major Supreme Court cases. Looking to the First Amendment interest which involves maximizing speech and speakers, for example, Justice White has pointed out that the sheer market power of some speakers can, in this technologically dominated age, effectively monopolize debate to the end of actually decreasing available speech. Thus, he argues, since corporations are the creatures of the state whose special treatment has allowed them to amass "economic power which may * * * dominate not only the economy but also the very heart of our democracy, the electoral process" their speech should be subject to regulation to avoid their "threatening the role of the First Amendment as a guarantor of a free marketplace of ideas" *(First Natl.* *Bank of Boston v Bellotti, 435 U.S. 765, 809-810* [White, J., dissenting]). One model for regulation of corporate speech which might alleviate this problem involves corporate subsidization of alternate viewpoint *(see, e.g*., Richards, *The Jurisprudential Sin of Treating Differents Alike: Emergence of Full First Amendment Protection for Corporate Speakers*, 17 Mem St U L Rev 173, 177 [1987]) but the Supreme Court's sharply divided decision in *Pacific Gas & Elec. Co. v Public Utils. Commn. (475 U.S. 1*, *reh denied* ***475 U.S. 1133*** [1986]) has dashed hopes for any immediate approval of such speech-enhancing regulation. The choices about commercial and corporate speech made by the current Supreme Court majority are, however, binding on this and other courts, and must be followed here.

[15] Indeed, these "debate-influencing" advertisements would seem to be precisely the sort the court anticipated as entitled to protection in *Central Hudson Gas & Elec. v Public Serv. Commn. (447 U.S. 557, 565, n 7*).

[16] Other courts which have been confronted with similar insurance industry campaigns have upheld claims of First Amendment privilege *(Quinn v Aetna Life & Cas. Co., 616 F2d 38* [2d Cir 1980] [Per Curiam], *affg* *482 F Supp 22* [ED NY 1979] [dismissing

[*36]**

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action to enjoin insurance company from running ads claiming that tort claims resulted in excessive jury awards]; *but see, Quinn v Aetna Life & Cas. Co., 96 Misc 2d 545* [Sup Ct, Queens County 1978] [same parties in State court; court held First Amendment would not protect advertisement to the extent it might contain misleading advertising contravening plaintiffs' rights to an impartial jury]; *cf., Rutledge v Liability Ins. Indus., 487 F Supp 5* [WD La 1979]).

Odishelidze v. Aetna Life & Casualty Co.

United States Court of Appeals for the First Circuit

August 3, 1988

No. 87-1901

Reporter

853 F.2d 21 *; 1988 U.S. App. LEXIS 10209 **; 1988-2 Trade Cas. (CCH) P68,167; 11 Fed. R. Serv. 3d (Callaghan) 1410

ALEXANDER ODISHELIDZE, Plaintiff, Appellant, v. AETNA LIFE & CASUALTY CO., ET AL., Defendants, Appellees

Prior History: [1]** Appeal from the United States District Court for the District of Puerto Rico, Hon. Jose Antonio Fuste, U.S. District Judge.

Core Terms

diversity jurisdiction, enterprise, employees, vacate, principal place of business, reconsideration motion, allegations, antitrust, district court, racketeering, subsidiaries

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

For purposes of *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, the activities of a corporation and its wholly owned subsidiaries are viewed as that of a single enterprise. Because unilateral action is not prohibited by *§ 1* of the Sherman Act, the actions of a parent corporation, its subsidiaries or sister corporations, and its employees cannot be considered concerted action. This rule applies to sister corporations owned by a third entity and to officers or employees of those corporations.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Torts > Vicarious Liability > Corporations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN2[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Under *18 U.S.C.S. § 1962(c)* the "person" alleged to be engaged in a racketeering activity (the defendant, that is) must be an entity distinct from the "enterprise." Under *§ 1962(c)* the enterprise is not liable. It is only a person, or one associated with an enterprise, not the enterprise itself, who can violate the provisions of the section.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > Business Entities

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] **Citizenship, Business Entities**

Fed. R. Civ. P. 8(a)(1) requires a complaint to set forth a short and plain statement of the grounds upon which the court's jurisdiction depends. In a properly pleaded diversity action against a corporate defendant, plaintiff will advert to both factors set out in *28 U.S.C.S. § 1332(c)*, the place of incorporation and principal place of business.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4[] **Pleadings, Amendment of Pleadings**

Although *Fed. R. Civ. P. 12(h)(3)* states that whenever it appears that the court lacks jurisdiction of the subject matter, the court shall dismiss the action, courts should heed the admonition of *Fed. R. Civ. P. 15* to allow amendments "freely" if it appears possible that plaintiff can correct the jurisdictional defect.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN5[] **Pleadings, Amendment of Pleadings**

Amendment to show that diversity jurisdiction actually exists, although defectively pleaded, is specifically allowed by *28 U.S.C.S. § 1653* which provides that defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts. This statute is normally construed liberally so as to avoid dismissals of complaints on technical grounds. Thus, such technical defects in jurisdictional pleadings usually are not fatal.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN6[] **Relief From Judgments, Altering & Amending Judgments**

Although a final judgment has already been entered dismissing the complaint, plaintiff is not barred from seeking to cure defective jurisdictional allegations where a motion for reconsideration and to vacate judgment was timely motion under *Fed. R. Civ. P. 60(b)*.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN7[] **Relief From Judgments, Altering & Amending Judgments**

A motion for relief from a final judgment pursuant to *Fed. R. Civ. P. 60(b)* is addressed to the discretion of the district court, may be granted only under exceptional circumstances, and may be reviewed only for abuse of discretion. In light of *28 U.S.C.S. § 1653*, amendment should be permitted, rather than dismissal, whenever it appears that a basis for federal jurisdiction can be stated. Where a motion for reconsideration and to vacate judgment includes the amendments necessary to correctly allege jurisdiction under *28 U.S.C.S. § 1332(c)*, and there unquestionably is diversity jurisdiction, it is an abuse of discretion for the district court to deny the motion for reconsideration and to vacate judgment.

Counsel: Harry Anduze Montano on brief for Appellant.

David P. Freedman, Edgar Cartagena-Santiago, Jorge I. Peirats, and O'Neill & Borges on brief, for Appellees.

Judges: Campbell, Chief Judge, Coffin and Selya, Circuit Judges.

Opinion by: PER CURIAM

Opinion

[*22] Appellant, Alexander Odishelidze, commenced an action in the district court for the District of Puerto Rico on November 18, 1985. He asserted jurisdiction pursuant to *28 U.S.C. §§ 1331* (federal question) and 1332 (diversity). He alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. § 1962(c)*, the Sherman Antitrust Act, *15 U.S.C. § 1*, and various state law claims. Odishelidze also asserted pendent jurisdiction regarding the state law claims. As defendants, Odishelidze named Aetna Life & Casualty Co., and its subsidiaries Aetna Variable Annuity Life Insurance Compana [sic] a.k.a. and/or d.b.a. Aetna Life Insurance and Annuity Company, Aetna Financial Services, Inc. and Aetna Life Insurance Company; in addition, he named as individual defendants William O. Bailey, Dean E. Wolcott, James **[**2]** R. Bailey, Thomas L. West and Stanley W. Thompson -- all officers or employees of the above corporations.

BACKGROUND

Odishelidze, a resident of Puerto Rico, was an exclusive general agent for Aetna in Puerto Rico from 1971 to 1976 and from 1978 until 1982. In 1981, as part of a reorganization of its operations, Aetna decided to close all of its general agencies throughout the country. As a result, Aetna, in 1982, terminated Odishelidze's general agency and offered him a position as the manager of a newly created office within Aetna -- the Puerto Rico Personal Financial Security Division Marketing Office. In this position, Odishelidze was an employee of Aetna. In 1984, Aetna decided to close the Puerto Rico marketing office. According to Aetna, it offered Odishelidze a position in Florida, but Odishelidze turned it down and was discharged. However, Odishelidze alleges that his employment was terminated in 1984 after he unsuccessfully attempted to secure adequate conditions for his San Juan office.

Basically, Odishelidze claims that Aetna accomplished the termination of the general agencies by fraudulent misrepresentations and inducements concerning salary and other benefits he would **[**3]** receive as an employee. He alleges that defendants conspired to deprive him of his "vested interests, property and contractual rights" as an exclusive agent. *See* Complaint, para. 14. This "concerted activity" allegedly was in restraint of trade because general agents were frozen out or boycotted while Aetna gained more control of the market. Odishelidze also claimed that this same behavior violated RICO because the fraudulent representations were "racketeering activities" carried out through use of the wires and mail, *see* *18 U.S.C. § 1961(1)(B)*, and harmed him in his business. *See id.* § 1964(c).

On May 8, 1986, Aetna moved to dismiss the complaint for, among other reasons not relevant here, failure to state a claim upon which relief could be granted. *See* *Fed.R.Civ.P. 12(b)(6)*. Aetna addressed both the state and federal claims in its *Rule 12(b)(6)* motion. On August 26, 1987, the district court dismissed the complaint. *Odishelidze v. Aetna Life & Casualty Co., 668 F. Supp. 94 (D.P.R. 1987)*. It found that Odishelidze had failed to state both a cognizable antitrust claim and an actionable civil RICO cause of action. It also found that diversity jurisdiction was lacking **[**4]** due to the averment in Odishelidze's complaint that "Aetna Life and Casualty Co. is a corporation organized and existing under the laws of the State of Connecticut, with its principal *place of business in Puerto Rico*." See *668 F. Supp. at 96 n. 2* (emphasis in **[*23]** original). [1] The court, therefore, did not consider the merits of the state law claims, dismissing them for lack of pendent jurisdiction. *Id. at 95, 99*. It also ordered the complaint dismissed "for failure to plead a cognizable claim under federal jurisdiction" and noted that the dismissal was "without prejudice of Odishelidze filing another action in the proper *local forum*." *Id. at 99* (emphasis added).

On September 15, 1987, Odishelidze filed a motion for reconsideration and to vacate judgment. In addition to rearguing his antitrust and RICO claims, he argued that diversity jurisdiction did in fact exist. He stated that the information in paragraph 3 of his complaint that Aetna Life & Casualty Co. had its principal place of business in "Puerto Rico" was a typographical error and that the paragraph was meant to read that **[**5]** the principal place of business of Aetna Life & Casualty Co., as with all the other corporate defendants, was in *Connecticut*, thereby creating proper diversity jurisdiction. The court denied this motion, without opinion, on September 23, 1987. On September 23, Odishelidze filed a timely notice of appeal both from the original dismissal of his complaint and the denial of his motion for reconsideration.

DISCUSSION

1. *The Federal Claims*

We affirm the dismissal of Odishelidze's antitrust and RICO claims. As for the antitrust claim, Odishelidze's failure to state a "contract, combination. . . or conspiracy" is obvious and fatal to his *§ 1* claim. [2] *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. *Copperweld* clearly rejected the

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[1] All the subsidiaries were noted to be citizens of Connecticut. *See* Complaint, paras. 3-6.

[2] *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. 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. . . .

intra-enterprise conspiracy doctrine. That is, ***HN1***[] for *§ 1* purposes, the activities of a corporation and its wholly owned subsidiaries are viewed as that of a single enterprise. *Id. at 771*. Because unilateral action is not prohibited by *§ 1* of the Sherman Act, *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, the actions of a parent corporation, its subsidiaries or sister corporations, and its **[**6]** employees cannot be considered concerted action. *See VII* P. Areeda, ***Antitrust Law*** paras. 1464(f), 1470 (1986) (*Copperweld* holding applies to sister corporations owned by a third entity and to officers or employees of those corporations, citing cases).

As for Odishelidze's RICO claim, it is clear that ***HN2***[] under *§ 1962(c)* [3] the "person" alleged to be engaged in a racketeering activity (the defendant, that is) must be an entity distinct from the "enterprise;" under *§ 1962(c)* the enterprise is not liable. *Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 29-30 (1st Cir. 1986)*. That is, the Aetna companies and their officers or employees (the named defendants) cannot be the entity that conducts its own affairs through a pattern of racketeering activity. *Id. at 30*. Throughout **[**7]** his brief and pleadings below, Odishelidze has continued to characterize the enterprise as Aetna and its subsidiaries and employees without specifically identifying a defendant, distinct from the enterprise, which conducted the enterprise's activities through a pattern of racketeering activity. For example, in paragraph 28 of his complaint, Odishelidze states:

> The defendant corporation and its named subsidiaries, its officers, directors, and employees, to wit: Aetna **[*24]** Life and Casualty Company; Aetna Variable Annuity Life Insurance Company; Aetna Financial Services, Inc.; Aetna Life Insurance Company; William O. Bailey; Dean E. Wolcott; James R. Bailey, Thomas L. West; Edward F. Dwight; Stanley W. Thompson and other [sic] agreed and entered as employees and agents of the defendant enterprise into a pattern of activities directed to defraud plaintiff. . . ."

As the court in *Schofield* stated, "'It is only a person, or one associated with an enterprise, not the enterprise itself, who can violate the provisions of the section.'" *Id. at 30* (quoting *Van Schaick v. Church of Scientology of California, 535 F. Supp. 1125, 1136 (D.Mass. 1982))*.

[8]** 2. *Diversity Jurisdiction*

HN3[] *Fed.R.Civ.P. 8(a)(1)* requires a complaint to set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." Under this standard, Odishelidze's complaint technically is defective because it erroneously designates the principal place of business of Aetna Life & Casualty Co. as Puerto Rico instead of Connecticut. [4] *See* *28 U.S.C. § 1332(c)*; *District of Columbia v. Transamerica Insurance Co., 254 U.S. App. D.C. 374, 797 F.2d 1041, 1043-44 (D.C. Cir. 1986)* (in a properly pleaded diversity action against a corporate defendant, plaintiff will advert to both factors set out in *§ 1332(c)* -- place of incorporation and principal place of business). ***HN4***[] Although *Fed.R.Civ.P. 12(h)(3)* states that "whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action," courts should heed the admonition of *Fed.R.Civ.P. 15* to allow amendments "freely" if it appears possible that plaintiff can correct the jurisdictional defect. *See* 3 J. Moore, *Moore's Federal Practice* para. 15.10 (2d ed. 1985) (footnote omitted).

[9]** Indeed, ***HN5***[] amendment to show that diversity jurisdiction actually exists, although defectively pleaded, is specifically allowed by *28 U.S.C. § 1653* which provides that "defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." *See Moore, supra*, para. 15.09, at 15-102. This statute is

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[3] *18 U.S.C. § 1962(c)* provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[4] Although not raised by the district court, the complaint also is defective as to the subsidiaries because Odishelidze states only that they are "citizens" of Connecticut and does not say where they are incorporated. *See* *28 U.S.C. § 1332(c)*.

normally construed liberally so as to avoid dismissals of complaints on technical grounds. *Topp v. CompAir, Inc., 814 F.2d 830, 832 n. 2 (1st Cir. 1987)* (citation omitted). Thus, such technical defects in jurisdictional pleadings usually are not fatal. *Id.*

HN6[] Even though a final judgment had already been entered dismissing Odishelidze's complaint, he is not barred from seeking to cure the defective jurisdictional allegations. *See Moore, supra*, para. 15.10. His motion for reconsideration and to vacate judgment was a timely motion under *Fed.R.Civ.P. 60(b)*. Although not designated as such, and although no formal request to amend was included in his motion, we will treat Odishelidze as having requested the court to vacate its judgment to allow him to cure the jurisdictional defects in his original complaint.

HN7[] "A motion for relief from a final judgment **[**10]** pursuant to *Rule 60(b)* is addressed to the discretion of the district court, *Dankese v. Defense Logistics Agency, 693 F.2d 13, 15 (1st Cir. 1982)*, may be granted only under exceptional circumstances, *Lepore v. Vidockler, 792 F.2d 272, 274 (1st Cir. 1986)*, and may be reviewed only for abuse of discretion, *Browder v. Illinois Department of Correction*, 434 U.S. [257, 263 n. 7, *98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)]*. . . ." *Rivera v. M/T Fossarina, 840 F.2d 152, 156 (1st Cir. 1988)*. In this situation, the *Rule 60(b)* motion must be considered in light of *28 U.S.C. § 1653*. *Averbach v. Rival Manufacturing Co., 809 F.2d 1016, 1019* (3d Cir.), *cert. denied*, *482 U.S. 915, 107 S. Ct. 3187, 96 L. Ed. 2d 675, 484 U.S. 822, 108 S. Ct. 83, 98 L. Ed. 2d 45 (1987)*. Indeed, amendment should be permitted, rather than dismissal, whenever it appears that a basis for federal jurisdiction can be stated by plaintiff. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1214 (1969).

[*25] Odishelidze's motion for reconsideration and to vacate judgment includes the amendments necessary to correctly allege jurisdiction under *§ 1332(c)*. He states in the motion that all the corporate defendants were incorporated in the state of Connecticut and have their principal **[**11]** places of business there. Moreover, defendants do not contest the amended jurisdictional allegations and have never argued that diversity jurisdiction does not exist in this case. Because there unquestionably is diversity jurisdiction, we find that it was an abuse of discretion for the district court to deny Odishelidze's motion for reconsideration and to vacate judgment. *Cf.* Moore, *supra*, para. 15.10, at 15-104 n. 2 (abuse of discretion to deny leave to amend on granting dismissal when plaintiff could have stated a claim, and cases cited).

Indeed, we find that a formal amendment of the complaint is not necessary at this stage. *See Wright & Miller, supra*, § 1214 (when court can readily recognize existence of diversity jurisdiction, amendment of complaint not always required) (footnote omitted). We therefore vacate both the district court's order denying Odishelidze's motion to reconsider the diversity issue and the judgment dismissing the complaint for failure to plead diversity jurisdiction. We affirm, however, the court's refusal to reconsider and vacate its judgment of dismissal of the antitrust and RICO claims. [5] The case is remanded to the district court with instructions to **[**12]** treat the defective allegations of diversity jurisdiction as cured and to consider the remaining state law claims.

So ordered.

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[5] Because of the view we take of the antitrust claim, *see* text *supra*, we need not address the district court's intimation, *668 F. Supp. at 97 n. 4*, concerning the scope of the "business of insurance" for McCarran-Ferguson Act purposes. We take no view of whether or not that term embraces matters germane to insurer-agent relationships. *See Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 224-25, 59 L. Ed. 2d 261, 99 S. Ct. 1067 n. 32 (1979)* (leaving question open); *Thompson v. New York Life Ins. Co., 644 F.2d 439, 443 (5th Cir. 1981)* (similar).

[Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.]

United States Court of Appeals for the Sixth Circuit

December 17, 1987, Argued ; August 4, 1988, Decided ; August 4, 1988, Filed

No. 87-3030

Reporter

854 F.2d 802 *; 1988 U.S. App. LEXIS 10579 **; 1988-2 Trade Cas. (CCH) P68,166

CRANE & SHOVEL SALES CORPORATION, Plaintiff-Appellant, v. BUCYRUS-ERIE CO., BUCYRUS CONSTRUCTION PRODUCTS, NORTHWEST ENGINEERING CO., JERRY A. MOSS, CHARLES SANFORD, GPS EQUIPMENT, Defendants-Appellees

Prior History: [1]** On Appeal from the United States District Court for the Northern District of Ohio.

Core Terms

distributor, manufacturer, Anti-Trust, restraint of trade, conspiracy, distributorship, anticompetitive, vertical, elimination, interbrand, intrabrand, machinery, terminated, substitution, allegations, district court, horizontal, rule of reason, supplier, anti trust law, jilted, competitor, illegality, exclusive distributor, distributing, territorial, conspired, products, rights, Beer

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

See the Sherman Anti-Trust Act, *§ 1*, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN2[] **Sherman Act, Claims**

To establish a claim under the Sherman Anti-Trust Act, *§ 1*, *15 U.S.C.S. § 1*, a plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3[] **Private Actions, Remedies**

The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's *Fed. R. Civ. P. 12(b)(6)* motion.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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 > Vertical Restraints > General Overview

HN4[] **Cartels & Horizontal Restraints, Price Fixing**

Horizontal conspiracies involve agreements among competitors at the same level of competition to restrain trade, such as agreements among manufacturers to fix prices for a given product and geographic market, or among distributors to fix prices for a given market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Vertical conspiracies, on the other hand, involve agreements between competitors at different levels of competition to restrain trade, such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] Price Fixing & Restraints of Trade, Vertical Restraints

Vertical distribution restraints are to be tested under the rule of reason, and are no longer barred under a per se rule.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN7[] Price Fixing & Restraints of Trade, Vertical Restraints

A manufacturer's substitution of one distributor for another has been classified as a vertical restraint of trade case.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN8[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Interbrand competition is the competition among the manufacturers of the same generic product -- television sets in this case -- and is the primary concern of ***antitrust law***. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors -- wholesale or retail -- of the product of a particular manufacturer.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN9[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

A complaint which does no more than state commercial disappointment at losing a distribution contract with a manufacturer fails to allege restraint of trade.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

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

HN10[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A complaint charging restraint of trade based on a manufacturer's substitution of one distributor for another must allege anticompetitive effect at the inter-brand level to survive a *Fed. R. Civ. P. 12(b)(6)* motion for failure to state a violation of the Sherman Anti-Trust Act, *§ 1*, *15 U.S.C.S. § 1*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN11[] **Motions to Dismiss, Failure to State Claim**

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

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**

Per se rules of illegality are appropriate only when they relate to 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.

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Edward C. Schmidt, Bucyrus-Eric Co., Roy A. Powell, Rose, Schmidt, Chapman, Duff & Hasley, Pittsburgh, Pennsylvania, Paul Michael Pohl (Bucyrus-Erie) Jones, Day, Reavis & Pogue, Cleveland, Ohio, Eric M. Oakley, Frances Floriano Goins, Squire, Sanders & Dempsey, Cleveland, Ohio, Attorneys for Appellees.

Judges: Jones, Wellford, and Boggs, Circuit Judges. Boggs, Circuit Judge, delivered the opinion of the court, in which Jones, Circuit Judge, joined. Wellford, Circuit Judge, (pp. 18-20) delivered a separate concurring opinion.

Opinion by: BOGGS

Opinion

[*803] BOGGS, Circuit Judge.

Plaintiff-appellant Crane & Shovel Sales Corporation (Crane) appeals the district court judgment granting dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)* of its complaint alleging that defendants-appellants Bucyrus-Erie Co. (B-E), Bucyrus Construction Products (BCP), Northwest Engineering Co., Jerry A. Moss (Moss), Charles Sanford (Sanford), and GPS Equipment Corporation (GPS) restrained trade in violation of *Section 1* of the Sherman Anti-Trust **[**2]** Act, and Chapter 1331 of the Ohio Revised Code (analogous state ***antitrust law***.) [1] This case presents

[1] Crane also filed claims under the Organized Crime Control Act of 1970 (otherwise known as the Racketeer Influenced and Corrupt Organizations Act (RICO)), *18 U.S.C. § 1964*, and state law theories of unfair competition, breach of fiduciary duty and

intriguing questions concerning the legal sufficiency of an antitrust complaint. For the reasons set forth below, we affirm.

I

On May 16, 1986, Crane filed a complaint in district court essentially alleging that the defendants violated the Sherman Anti-Trust Act, and analogous state ***antitrust law***, by conspiring to effect its termination as the distributor of BCP construction machinery parts, and the termination of all other similarly situated distributors for the Ohio and West Virginia area, and in causing an exclusive territorial distributorship for those parts to be given to GPS, a corporation **[**3]** formed shortly after Crane was terminated as a BCP distributor. While the defendants dispute certain facts in the complaint, we, for the purpose of reviewing a granted 12(b)(6) motion to dismiss, assume those facts to be true.

As the complaint states, in March 1984 plaintiff Crane, an Ohio corporation engaged in the business of selling parts for and making repairs to cranes and other construction equipment, was the distributor of construction machinery parts produced by defendant B-E. B-E was a manufacturer of construction equipment and other industrial products with its principal place of business in South Milwaukee, Wisconsin. On March 15, 1985, BCP, a manufacturer of construction equipment and other products with its principal place of business in Green Bay, Wisconsin, bought the construction machinery division of B-E, and permitted Crane to continue distributing the construction machinery parts made by its newly acquired division. Defendant BCP is a division of defendant-appellee Northwest Engineering Company, which is not alleged to have been an active participant in any conspiracy to restrain trade.

[*804] Sometime before February 20, 1986, defendant Moss ceased employment with B-E, **[**4]** and began employment with BCP as its Chief Operating Officer. On February 20, 1986, Moss, on behalf of BCP, orally advised Crane that after April 15, 1986 it could no longer distribute BCP construction machinery parts. This oral advice was confirmed by letter dated February 26, 1986. Crane alleged that it had distributed BCP parts without written contract, and without problem, for about one year before BCP indicated that Crane could no longer sell those parts for it. Crane further alleged that it had invested considerable time and money in the distribution of these parts in reliance on oral assurances from BCP that it would continue to use Crane as its distributor. Moss, an employee of B-E in its construction machinery division before B-E sold that division to BCP, Crane alleged, followed the product line to its new owner. Only thereafter, Crane stated in the complaint, was it terminated as a distributor of BCP construction machinery parts.

In March 1986, GPS was formed. Moss was both a substantial shareholder and an officer of GPS. Defendant Sanford was also a substantial shareholder and officer of GPS, and, from the complaint, it appears had no interest in or employment with B-E, **[**5]** BCP, or Northwest Engineering. In March 1986, GPS was made the exclusive distributor of BCP construction machinery parts for the states of Ohio and West Virginia. Crane specifically alleged that BCP and the other defendants conspired to terminate Crane's distributorship rights "so that a new distributorship, with whom defendant Moss has an economic interest, could take over plaintiff (Crane's) business." After April 15, 1986, Crane's distributorship rights were permanently terminated. According to Crane's complaint, all of these actions were "entered into with the purpose and effect of eliminating plaintiff as a competitor and to destroy the business of plaintiff."

II

On June 10, 1986, B-E filed a *Rule 12(b)(6)* motion to dismiss for failure to state a claim upon which relief could be granted on the federal and state antitrust claims. On August 5, 1986, Northwest Engineering Company, Moss, Sanford, and GPS filed similar motions. Each defendant argued, *inter alia*, that Crane had failed to state a cause of action under the Sherman Anti-Trust Act and analogous state law regarding their actions as alleged in the complaint.

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trust, misrepresentation, breach of good faith, and promissory estoppel. The district court ruled against Crane on the RICO claim, and Crane failed to appeal that ruling to this court. We express no view as to the validity of any of these claims.

On December 8, 1986, the district court granted all of the **[**6]** motions to dismiss. In the district court's view, Crane had simply failed to allege sufficient facts to establish a conspiracy *to restrain trade* under the Sherman Anti-Trust Act. Regarding B-E, it stated that "there is no inference that this court can find to include B-E in an alleged conspiracy." The district court concluded that "the sole fact that defendant Moss had been a B-E employee in the construction machinery division before B-E sold it to BCP does not indicate any present interest B-E has in the distribution of BCP product," nor does it indicate any violation of the Sherman Anti-Trust Act on Moss's part.

The district court held that Crane's allegations that BCP conspired with Moss and Sanford to exclude Crane from distributing construction machinery parts were too general to state a conspiracy in restraint of trade under the Sherman Anti-Trust Act. In the district court's view, "the substitution of one distributor for a product with another distributor does not in itself restrain trade within the meaning of the [Sherman Anti-Trust] statute." It stated that "[a] refusal to deal does not become illegal under the Sherman Act unless 'it produces an unreasonable restraint of **[**7]** trade, such as price fixing, elimination of competition or the creation of a monopoly,'" quoting from *Ace Beer Distributors, Inc. v. Kohn, 318 F.2d 283, 287* (6th Cir.), *cert. denied*, *375 U.S. 922, 11 L. Ed. 2d 166, 84 S. Ct. 267 (1963)*. The fact that Moss, a former employee of B-E and at the time Chief Operating Officer of BCP, was interested in GPS which was awarded an exclusive distributorship of BCP construction machinery parts, did not, in the district **[*805]** court's view, distinguish Crane's case from a classic "jilted distributor" case for which no recovery under *Section 1* of the Sherman Act is available. As to GPS, the district court found it was not in existence at the time the decision was made by Moss to terminate Crane as a distributor of BCP construction machinery parts, and so could not have been part of a conspiracy to restrain trade. We are in essential agreement with the district court's analysis and conclusions, and accordingly assess that complaint in terms of its allegations of restraint of trade.

III

Section 1 of the Sherman Anti-Trust Act states 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 **[**8]** with foreign states, is declared to be illegal." *15 U.S.C. § 1*. In *Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1195-96 (6th Cir. 1982)*, we held that ***HN2***[] "to establish a claim under *section 1*, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy." (citation omitted).

HN3[] The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion. *Hohensee v. Akron Beacon Journal Publishing Co., 174 F. Supp. 450, 452 (N.D. Ohio 1959)*, *aff'd*, *277 F.2d 359* (6th Cir.), *cert. denied*, *364 U.S. 914, 5 L. Ed. 2d 227, 81 S. Ct. 277 (1960)*. Since either conspiracy or restraint of trade is an essential element of a *Section 1* Sherman Anti-Trust claim, failure to allege either one justifies dismissal of an antitrust claim. *Havoco of America, Ltd. v. Shell Oil Company, 626 F.2d **[**9]** 549, 557 (7th Cir. 1980)* (insufficient allegations of anticompetitive effect); *Stewart v. Hevelone, 283 F. Supp. 842, 845 (D.C. Neb. 1968)* (insufficient allegations of conspiracy).

Courts have discerned two major types of antitrust conspiracies to restrain trade: horizontal and vertical. ***HN4***[] Horizontal conspiracies involve agreements among competitors at the same level of competition to restrain trade, such as agreements among manufacturers to fix prices for a given product and geographic market, or among distributors to fix prices for a given market. ***HN5***[] Vertical conspiracies, on the other hand, involve agreements between competitors at different levels of competition to restrain trade, such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market.

In *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, the Supreme Court held that ***HN6***[] vertical distribution restraints are to be tested under the rule of reason, and would no longer be barred under a *per se* rule. In *Com-Tel, Inc. v. Dukane Corp., 669 F.2d 404, 408 (6th Cir. 1982)*, we recognized that the Supreme Court in *Sylvania* "reinstated the rule **[**10]** of reason for vertical distribution restraints."

In *Oreck Corporation v. Whirlpool Corporation, 579 F.2d 126, 131* (2d Cir.), *cert. denied*, *439 U.S. 946, 58 L. Ed. 2d 338, 99 S. Ct. 340 (1978)*, the Second Circuit, in essential agreement with our analysis, stated the following:

> It is important to distinguish between "horizontal" restraints, i.e. agreements 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. Horizontal restraints alone have been characterized as 'naked restraints of trade with no purpose except stifling competition,' . . . and, therefore, *per se* violations of the Sherman Act. On the other hand, while vertical restrictions may reduce intrabrand competition by limiting the number of sellers of a particular product, competing for a given **[*806]** group of buyers, they also promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products. . . . They are, therefore, to be examined under the *rule of reason* standard. (citations omitted)

Since different antitrust principles apply depending **[**11]** on whether a given restraint of trade is either horizontal or vertical, classification is thus critically important. ***HN7***[] A manufacturer's substitution of one distributor for another has been classified by this Circuit as a vertical restraint of trade case, and, pursuant to Supreme Court command, has tested such a case under the rule of reason.

We have consistently held that a complaint which simply alleges that a manufacturer substituted one distributor for another fails to state a violation of the rule of reason, *unless* it also alleges anticompetitive effect at the interbrand level. In *Sylvania*, 433 U.S. at 523 n.19, the Supreme Court explained the distinction between interbrand competition and intrabrand competition:

> ***HN8***[] Interbrand competition is the competition among the manufacturers of the same generic product -- television sets in this case -- and is the primary concern of ***antitrust law***. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors -- wholesale or retail -- of the product of a particular manufacturer.

In *Dunn & Mavis, Inc. v. Nu-Car **[**12]** Driveaway, 691 F.2d 241, 243-44 (6th Cir. 1982)*, we held that ***HN9***[] a complaint which does no more than state commercial disappointment at losing a distribution contract with a manufacturer fails to allege restraint of trade. Specifically, we stated that "since the complaint does not allege facts suggesting that Chrysler's refusal to deal had any significant anti-competitive effect on the market, there is no rule of reason case alleged." *691 F.2d at 245*.

Similarly, in *Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283* (6th Cir.), *cert. denied*, *375 U.S. 922, 11 L. Ed. 2d 166, 84 S. Ct. 267 (1963)*, we held that a complaint which essentially alleged that a brewery substituted one territorially exclusive distributor for another territorially exclusive distributor was insufficient to state a violation of *Section 1* of the Sherman Anti-Trust Act. In explaining the insufficiency of the complaint, we stated that "there is no allegation or contention that the beer of *other* breweries was not just as available in that area after the change in distributors as it was before." *318 F.2d at 287* (emphasis supplied).

In *Fray Chevrolet Sales, Inc. v. General Motors Corp.*, we upheld the district court's dismissal **[**13]** of an antitrust claim on a summary judgment motion "because the substitution of one distributor . . . for another . . . does not eliminate or materially diminish the existing competition . . . and, in our opinion, is not an unreasonable restraint of trade." *536 F.2d 683, 686* (quoting *Ace Beer, 318 F.2d at 287*). The *Fray* court's reliance on *Ace Beer* suggests that the substitution of one distributor for another has no necessary effect on competition at the interbrand level. In *Fray*, we also quoted from *B & B Oil & Chemical Co. v. Franklin Oil Corp., 293 F. Supp. 1313, 1317 (E.D. Mich. 1968)* in which the district court said that the "'opinions have been unanimous . . . in holding that a manufacturer's changes in his distribution system, vertical realignments, or transfers, do not offend anti-trust laws.'" *Ibid.*

Other Circuits have adopted similar principles. In *Oreck*, the Second Circuit held that an agreement between a manufacturer and a distributor "becomes violative of *§ 1* of the Sherman Act only if it is *anticompetitive in purpose or effect* -- in sum, it must be tested by the rule of reason." *579 F.2d at 133*. The Fifth Circuit held that even if a conspiracy between **[**14]** a supplier and its distributor to eliminate another distributor were proven, the supplier would not have violated the antitrust laws. *H & B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978)*. The Fifth Circuit has stated that "a supplier's termination of a distributor or dealer is not **[*807]** a violation of the antitrust laws as long as interbrand competition acts as a 'significant check on the exploitation of intrabrand market power.'" *Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 297 (5th Cir. 1981)* (quoting *Continental T.V., 433 U.S. 36, 52 n. 19, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)* (other citations omitted). The Tenth Circuit held that "the evil to be avoided is . . . not the reduction of *intrabrand* competition." *Westman Commission Co. v. Hobart International, 796 F.2d 1216, 1229 (10th Cir. 1986)*.

Thus, Sixth Circuit precedent, supported by ***antitrust law*** in other Circuits, makes clear that ***HN10***[] a complaint charging restraint of trade based on a manufacturer's substitution of one distributor for another must allege anticompetitive effect at the interbrand level to survive a *Rule 12(b)(6)* motion for failure to state a violation of *Section 1* of the Sherman Anti-Trust Act.

IV

Under **[**15]** *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 525, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, we must assume the truth of the allegations in a complaint when assessing its legal sufficiency. We are also bound by the principle set forth in *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*, that "in appraising the sufficiency of the complaint we follow, of course, the accepted rule that ***HN11***[] 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."

At the outset, we state our agreement with the district court that B-E's involvement in any conspiracy to restrain trade is far too remote as alleged in the complaint to warrant serious treatment. The mere fact that Moss had once been a B-E employee does not, as the district court held, mean that B-E played any role in the alleged restraint of trade.

Crane initially maintains on appeal that its complaint stated that BCP and other defendants eliminated all distributors of BCP construction machinery parts, and therefore sufficiently alleged an illegal restraint of trade under **[**16]** *Section 1* of the Sherman Anti-Trust Act. However, as we read it, the complaint implies that Crane was the only distributor of BCP construction machinery parts, before being replaced by GPS. (*See* Complaint, 5-6, para. 19 ("new exclusive distributor for the states of Ohio and West Virginia.")) Indeed, the name of no other distributor appears anywhere in the complaint. The Fifth Circuit has stated that "the law is clear that merely changing from one exclusive distributor to another is permitted." *Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1117 (5th Cir. 1979)*.

Crane contends, however, that it had met this Circuit's standard for stating a *Section 1* Sherman Anti-Trust Act violation because its complaint alleged the elimination of "all intrabrand competition in [a] two state area." Crane attempts to distinguish the "jilted distributor" precedent of this Circuit by suggesting that its situation involves the elimination of an entire set of distributors, whereas precedent involves the substitution of one distributor for another. Crane essentially suggests that its case involves the elimination of all intrabrand competition, whereas in the other cases the level of intrabrand **[**17]** competition remained the same as before the dealer substitution, since one distributor is simply being substituted for another. However, even if we assume the complaint to state the elimination of a plurality of distributors, and therefore the elimination of intrabrand competition, we hold that the complaint nevertheless fails to allege restraint of trade under *Section 1* of the Sherman Anti-Trust Act.

By suggesting that alleging the elimination of all intrabrand competition is tantamount to stating anticompetitive effect, Crane implicitly suggests that this Circuit adopt a *per se* test of illegality under *Section 1* of the Sherman Anti-Trust Act for the situation in which a manufacturer "jilts" all of its distributors, and subsequently awards an exclusive distributorship **[*808]** for a given product and geographic market to another distributor.

Crane fails to recognize, however, that the Supreme Court has admonished that

> ***HN12***[] *per se* rules of illegality are appropriate only when they relate to 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 **[**18]** 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."

> Continental T.V., Inc., 433 U.S. at 49-50 (quoting Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958) (footnote omitted)).

We believe that even the manufacturer's elimination of all distributors with the subsequent awarding of an exclusive distributorship to another distributor falls below the "manifestly anticompetitive" standard enunciated by the Supreme Court, and so accordingly decline Crane's implicit invitation to adopt a *per se* test of illegality regarding this kind of vertical restraint of trade. We find the "jilted distributor" cases sufficiently broad to accommodate the situation of a manufacturer's elimination of all intrabrand competition on the facts of the case at bar.

Were a *per se* test of illegality necessarily applied to elimination of all intrabrand competition by a manufacturer, we fear that procompetitive vertical restraints may be seriously deterred. *E.g., see* Bork, *Vertical Restraints: Schwinn Overruled*, 1977 Sup.Ct.Rev. 171, 181-82; *see also* Posner, The Next Step in **[**19]** the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U.Chi.L.Rev. 6, 23-26 (1981) (vertical restrictions on intrabrand competition generally should be legal *per se*). As a result of the exclusive distributorship arrangement with GPS, BCP may be able to increase its ability to compete with other brands of construction machinery parts. Nothing to the contrary is stated, or implied in the complaint.

In *Davis-Watkins, 686 F.2d at 1196*, we stated that "restraints imposed by a manufacturer or supplier upon its distributors or retailers, so-called 'vertical' restraints, are generally found to be potentially beneficial to interbrand competition." To be sure, the consequence of the establishment of an exclusive distributorship is that a consumer in Ohio and West Virginia must deal with defendant GPS Equipment or not deal at all. However, we do not agree that an exclusive territorial distributorship of the kind alleged in the complaint is necessarily inimical to consumers, or violative of the antitrust laws. *See* Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 140-53 (1984) (restricting dealerships may increase competitive ability). **[**20]** *See also* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 1519, 99 L. Ed. 2d 808 (1988) ("the scope of *per se* illegality should be narrow in the context of vertical restraints.")

Second, Crane vigorously argued on appeal that since "Moss holds an independent personal stake in destroying plaintiff's distributorship as it would profit GPS and him personally and eliminate competition," the decision to terminate Crane had a horizontal element, and thus differed from the classic jilted distributor case which is tested under the rule of reason. In its main brief and supplemental brief, Crane argued that its case was not a jilted distributor case since it involved "a one-half owner and officer of an exclusive territorial distributorship, who is also a high level management official of the manufacturer and franchiser."

In *Tunis Brothers Company, Inc. v. Ford Motor Company (Tunis I), 763 F.2d 1482, 1498 (3rd Cir. 1985)* [2] the Third Circuit **[*809]** stated that the duality of position or interest of a manufacturer's employee(s) with its distributor or distributors benefiting from the manufacturer's refusal to deal, may create a situation which is neither purely vertical nor purely horizontal. **[**21]** *Tunis I* suggested that the Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)* recognized a critical difference "between accepted

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[2] This case was vacated by the Supreme Court in light of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. *See Ford Motor Company v. Tunis Brothers Co., Inc., 475 U.S. 1105, 89 L. Ed. 2d 909, 106 S. Ct. 1509 (1986)*. *Tunis I* was therefore not available to the district court in the instant case as guidance or authority in ruling on the 12(b)(6) motion to dismiss. In *Tunis Brothers Company, Inc. v. Ford Motor Company, 823 F.2d 49 (3rd Cir. 1987)* (*Tunis II*), the court held that *Matsushita* did not require a different result and reaffirmed its original 1985 decision. However, we remain unconvinced that either *Tunis I* or *Tunis II* requires a *per se* test to be applied to the facts as alleged in Crane's complaint.

supplier actions such as pursuing market strategies, whereby a supplier seeks to compete with other manufacturers by imposing 'reasonable' vertical restraints, and those actions of a supplier taken at the direction of its distributor." *763 F.2d at 1497*. The Third Circuit went on to explain that "in the latter situation, the restraint becomes primarily horizontal in nature in that one distributor is seeking to suppress its competition by utilizing the power of a common supplier." *Ibid.*

[22]** However, we do not agree that we are required to adopt a *per se* test of illegality for the situation alleged in Crane's complaint. The mere fact that a manufacturer's employee has an interest in a corporation which, subsequent to elimination of an entire set of distributors, is awarded an exclusive distributorship by the manufacturer, does not necessarily mean that the actions of the manufacturer "were taken at the directions of its distributor," nor does it necessarily mean that the "distributor is seeking to suppress its competition by utilizing the power of a common supplier." Indeed, nothing in Crane's complaint suggests that the decision made by BCP and Moss to terminate Crane's distributorship rights, or any other distributor's rights, and subsequently to award an exclusive distributorship to the newly formed GPS corporation, was anything other than a legitimate business decision made for BCP's economic benefit. The fact that Crane's distributorship rights were permanently terminated by that decision, and that consequentially economic injury occurred to Crane, does not necessarily make a violation of *Section 1* of the Sherman Anti-Trust Act, even if Moss participated in that **[**23]** decision.

Crane's unsupported allegation that "defendants (sic) actions had no economic justification and were based on a course of self-dealing to eliminate plaintiff as a competitor" (Complaint, 8, para. 30) is insufficient to allege any illicit objective under *Section 1* of the Sherman Anti-Trust Act in any alleged activity among BCP, Moss, Sanford and GPS. While "inherent conflicts of interest and self-dealing [may] permeate the actions undertaken by defendant, Moss," they do not amount to illicit objectives under the Sherman Anti-Trust Act, and are remediable by shareholder derivative suits, or other means. In our view, this does not necessarily mean that Moss's actions had anticompetitive effect or purpose, and should therefore be measured under a *per se* test. Therefore, despite Moss's duality of interest in BCP and GPS, Crane's case should be governed by the rule of reason case principles articulated in previous cases, which require a further allegation of anticompetitive purpose or effect at the interbrand level to state a violation of *Section 1* of the Sherman Anti-Trust Act.

Indeed, if illegality of this distributorship arrangement could be made out by alleging that **[**24]** it was not in the manufacturer's best interest, it would seem that every such arrangement could be challenged on the same ground. Courts have no expertise to make such judgments, and certainly antitrust liability cannot be premised on improvident business decisions.

In our view, Crane's complaint does nothing more than suggest the possibility of incidental economic benefit to Moss and Sanford stemming from their ownership interest in GPS. For example, Crane argued on appeal that "all competition concerning **[*810]** the retail sale of these products was eliminated in Ohio and West Virginia by the chief operating officer of the manufacturer for his own personal gain." Crane, however, overlooks the possibility that the decision to award GPS exclusive distributorship rights may increase BCP's ability to compete with other brands of construction machinery parts, and thus, far from violating the Sherman Anti-Trust Act, would indeed further one of its major purposes, the promotion of interbrand competition to the ultimate benefit of consumers. *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. "Even though refusals to deal limit intrabrand competition, they are likely **[**25]** to benefit consumers by increasing interbrand rivalry." *Hobart International, 796 F.2d at 1227*.

What seems obvious from Crane's complaint, and argument on appeal, is that elimination of intrabrand competition by a manufacturer is its sole concern. In our view, the complaint merely alleges that *plaintiff* as distributor, and for the sake of argument, any other similarly situated distributors, were injured when terminated by BCP from distributing BCP construction machinery parts. Because the complaint neither necessarily alleges anticompetitive effect at the interbrand level, in addition to, or in connection with the elimination of all distributors at the intrabrand level, nor any anticompetitive purpose with respect thereto, it is, in our opinion, indistinguishable from the classic "jilted distributor" case set out in *Dunn & Mavis, Ace Beer*, and *Fray Chevrolet*, despite Crane's vigorous argument to the contrary.

The complaint states that "plaintiff has been injured in its business and has already suffered and will suffer substantial damages including the destruction of a majority of its business." The complaint states that "the conspiracy . . . [was] entered into with **[**26]** the purpose and effect of eliminating plaintiff as a competitor and to destroy the business of plaintiff." Absent an allegation of anticompetitive purpose or effect at the interbrand level, we hold that this states nothing more than "commercial disappointment" of the eliminated distributors under *Dunn & Mavis*. Without an allegation of anticompetitive purpose or effect on the interbrand level, Crane's situation is analogous to *Fray Chevrolet* where one car dealership was substituted for another, or *Ace Beer* where one beer distributor was substituted for another. Every distribution choice by a manufacturer could be either a good or bad decision from a business standpoint, but the antitrust laws have never been intended to police such a choice, absent any allegation that such choice is part of a scheme to create monopoly market power by the manufacturer, [3] or which is based on, or causes, anticompetitive effect at the interbrand level.

While Crane relies on paragraph 26 of its complaint, which states that the defendants "engaged in **[**27]** an unlawful combination and conspiracy to restrain and monopolize interstate trade and commerce in violation of *15 U.S.C. Section 1*," to support its contention on appeal that it had sufficiently stated the restraint of trade element, we regard that as an unsupported conclusory allegation. "Legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." 2A Moore's Federal Practice para. 12.07 [2.-5] (2d ed. 1987).

Therefore, the judgment of the district court is AFFIRMED.

Concur by: WELLFORD

Concur

WELLFORD, Circuit Judge, concurring.

I concur in the result reached and with much of what is said by Judge Boggs. At oral argument, appellant conceded its case was weakest against Bucyrus-Erie ("B-E"), which appeared to be sued because its former employee, appellee Moss, was the alleged principal actor in the conspiracy or scheme to do away with appellant as a distributor. The allegations against B-E otherwise are very vague and general with **[*811]** respect to its part in the alleged conspiracy. The complaint itself concedes that B-E's association with appellant and with the products which it distributed ended almost a year before appellant was advised that its **[**28]** distributorship was terminated. There is simply an insufficient allegation that B-E engaged in the alleged antitrust conspiracy and there was no error in granting B-E a judgment on the pleadings. *Havoco of America Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)*.

With respect to GPS Equipment ("GPS"), it is conceded that this defendant corporation did not come into existence until after the termination of Crane. GPS was simply a successor distributor in due course in the territory previously served by appellant, and it was alleged to be an exclusive distributor. In appellant's brief at pages 16 and 17, it is stated with regard to GPS:

> Nowhere in the complaint is it alleged that GPS was formed by defendant BCP. The only allegations in the complaint are that defendant Moss, an employee of BCP and Charles Sanford, not an employee of BCP, are the two shareholders of defendant GPS Equipment . . . . the thrust of plaintiff's complaint is that GPS was not a division or wholly owned subsidiary of BCP, but rather a separate entity set up by defendant Moss and Sanford as part and parcel of the conspiracy to restrain trade.

As a separate and unformed entity at the time of appellant's **[**29]** termination, with no ownership connection with BCP, Northwest, or B-E, there is an insufficient allegation to state a cause of action for antitrust violation against

[3] *See* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U.Chi.L.Rev. 6, 16 (1981).

GPS. The case was therefore properly dismissed as to GPS which had no being or existence so that it could then conspire with anyone.

This is a case of an alleged reshuffling of a vertical type by substitution of one form of distribution of one particular brand for another form of distribution. The complaint does not allege, even conclusorily, any decrease in intrabrand competition. This issue is raised for the first time in Crane's appellate brief. We need not consider or decide this contention, then, and I see no need to discuss it. Furthermore, appellant did not adequately allege any anticompetitive effect of the substitution of another distribution at the interbrand level. Its allegations state an effect only upon itself as a competitor. Therefore, with respect to the remainder of the defendants, the only element of this controversy that could separate it from the typical "jilted distributorship" kind of case is the injection of Moss into the picture. Unless somehow the existence of Moss converts the alleged restraint **[**30]** of trade into a horizontal type thus rendering it perhaps anticompetitive *per se*, there is nothing but cursory conclusions of anti-competitive conduct here asserted, and the case must fail. *See* *Ace Beer Distributors v. Kohn, Inc., 318 F.2d 283, 287* (6th Cir.), *cert. denied*, *375 U.S. 922, 11 L. Ed. 2d 166, 84 S. Ct. 267 (1963)*, and *Rutman Wine Co. v. E & J Gallo Winery, 829 F.2d 729 (9th Cir. 1987)*.

Judge Boggs' analysis of this case under the rule of reason approach seems to me correct and appropriate. *See* *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Moss held positions with both B-E and GPS, and at the pertinent time before termination of appellant, had not yet formed GSP. There is no sufficient factual allegation made by appellant that he or any of the defendants acted for reasons apart from economic justification or for illicit horizontal objectives. There was no allegation about illegal price constraints. Appellant's reliance upon *Tunis v. Ford Motor Co., 823 F.2d 49 (3d Cir. 1987)*, *cert. denied*, *484 U.S. 1060, 108 S. Ct. 1013, 98 L. Ed. 2d 979 (1988)*, based upon Moss' alleged "independent personal stake" seems insufficient particularly in light of *Business Electronics Corp. v. Sharp Electronics* ***[**31]*** *Corp., 485 U.S. 717, 108 S. Ct. 1515, 56 U.S.L.W. 4387, 99 L. Ed. 2d 808 (1988)*, and the general rule that a corporation and its own officers cannot legally conspire.

I, accordingly, join in the affirmance of the dismissal of this action.

End of Document

Bolt v. Halifax Hosp. Medical Ctr.

United States Court of Appeals for the Eleventh Circuit

August 8, 1988

Nos. 84-3256, 84-3603

Reporter
851 F.2d 1273 *; 1988 U.S. App. LEXIS 10795 **; 1988-2 Trade Cas. (CCH) P68,174; 26 Fed. R. Evid. Serv. (Callaghan) 780

Richard A. BOLT and Richard A. Bolt, M.D., Plaintiffs-Appellants, v. HALIFAX HOSPITAL MEDICAL CENTER, et al., Defendants-Appellees

Subsequent History: Vacated December 1, 1988. Rehearing and Rehearing in Banc Granted December 1, 1988.

Prior History: **[**1]** Appeals from the United States District Court for the Middle District of Florida.

Disposition: Affirmed in part, Reversed in part, and Remanded.

Core Terms

conspiracy, medical staff, executive committee, district court, exemption, credentials, privileges, decisions, staff privileges, revoke, directed verdict, supervision, antitrust, grounds, courts, judicial review, recommendation, reappointment, involvement, staff member, peer review, state action, community-wide, conspiring, elevation, Sherman Act, regulation, voted, concerted action, medical society

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

In order to answer affirmatively the question of whether a contract, combination, or conspiracy existed, there must be evidence that tends to exclude the possibility that the defendants were acting independently.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

A hospital and the members of its medical staff are all legally capable of conspiring with one another.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act does not prohibit states from imposing restraints on competition. This interpretation of the Sherman Act is what is known as the state action doctrine.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

To ensure that the state action doctrine is used to immunize only those activities that are truly the product of state regulation, a rigorous two-prong test is applied when a private party claims entitlement to the exemption. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy. Second, the conduct in question must be "actively supervised" by the state itself.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Revocation & Suspension

HN6[] **Business Administration & Organization, Hospital Privileges**

See Fla. Stat. ch. 395.065(1) (1981).

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Personnel Licensing

HN7[] **Business Administration & Organization, Hospital Privileges**

Fla. Stat. § 395.0653(3) (1981) requires every licensed hospital to set standards and procedures to be applied by the hospital and its medical staff in considering and acting upon applications for staff membership or professional privileges.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN8[] **Business Administration & Organization, Hospital Privileges**

Fla. Admin. Code r. 10D-28.56(f) (1981) expressly states that no action shall be taken by the hospital's governing board without prior referral to the medical staff for their recommendation.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN9[] **Antitrust & Trade Law, Sherman Act**

The state does not actively supervise the termination of hospital staff privileges unless a state official has and exercises ultimate authority over private privilege determinations. A state official has this kind of authority only if he or she has power to review private peer-review decisions and overturn a decision that fails to accord with state policy.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN10[] **Business Administration & Organization, Peer Review**

Fla. Stat. § 458.337(1)(b) (1981) requires notification of the Florida Board of Medical Examiners (Board), a state agency, whenever a physician has been disciplined by a licensed hospital or medical staff of said hospital. Nothing in this provision, however, indicates that the Board has power to overturn a peer review decision.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

It is irrelevant that the state of Florida may exercise some form of supervision over the kind of procedures used in conducting peer review; the relevant question is whether the state has authority to overturn the privileges determination itself.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

Judicial review may constitute active state supervision for purposes of the state action exemption.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Antitrust & Trade Law, Sherman Act

Judicial review cannot constitute active state supervision unless it is available on an established basis and is of a sufficiently probing nature. To be sufficiently probing, the scope of judicial review must first of all encompass the fairness of the procedures used in reaching the decision. Furthermore, it must involve consideration of whether the criteria used by the decisionmakers were consistent with state policy and whether the decision had a sufficient basis in fact.

Contracts Law > Remedies > Equitable Relief > Injunctions

Healthcare Law > Business Administration & Organization > Hospital Privileges > Restrictions

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN14[] Equitable Relief, Injunctions

A physician whose staff privileges at a hospital have been revoked has a cause of action for injunctive relief. In articulating the basis for this cause of action, the courts have relied on a contract theory.

Evidence > Privileges > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN15[] Evidence, Privileges

Hospital bylaws are deemed to constitute a promise that termination of staff privileges will be based on fair procedures, valid criteria, and sufficient evidence -- a promise that is enforceable by way of a cause of action for injunctive relief against the hospital.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN16[] Business Administration & Organization, Hospital Privileges

See Fla. Stat. ch. 395.0653(3) (1981).

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN17[] Business Administration & Organization, Hospital Privileges

The Florida Administrative Code provides that the governing authority in fulfilling its responsibility shall be organized under approved written bylaws, rules, and regulations which shall provide for the appointment, reappointment, or dismissal of members of the medical staff, and a procedure for hearing and appeal. Fla. Admin. Code r. 10D-28.56(1)(f) (1981).

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Antitrust & Trade Law, Sherman Act**

Evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that each defendant that engaged in the parallel action acted contrary to its economic self-interest. What this means is that the plaintiff must establish with respect to each defendant that it would have been unreasonable in a business sense for that defendant to engage in the challenged conduct unless it had assurances from the other defendants that they would take the same action.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN19[] **Antitrust & Trade Law, Sherman Act**

The mere opportunity to conspire among antitrust defendants is insufficient to permit the inference of conspiracy.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN20[] **Standards of Review, Abuse of Discretion**

Under *Fed. R. Evid. 403*, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of issues or misleading the jury. A trial court's ruling pursuant to *rule 403* will not be disturbed absent an abuse of discretion.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN21[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

The availability of other means of proof should be considered in determining whether evidence should be excluded under *Fed. Evid. R. 403*. *Fed. Evid. R. 403*, advisory committee's note.

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William E. Loucks, Atty., Daytona Beach, Florida, for Volusia County.

G. Bruce Hill, Janet W. Adams, Adams & Hill, Orlando, Florida, for Ormond Beach Hospt.

Judges: Tjoflat and Kravitch, Circuit Judges, and Tuttle, Senior Circuit Judge.

Opinion by: TJOFLAT

Opinion

[*1275] TJOFLAT, Circuit Judge:

In this case, a physician whose medical staff privileges were revoked at each of three hospitals brought suit against the hospitals, members of their medical **[**2]** staffs, and a local medical society, alleging violations of the federal antitrust laws. The **[*1276]** district court entered directed verdicts for all the defendants, and the physician now appeals. We affirm in part and reverse in part.

I.

In 1979, Dr. Richard A. Bolt arrived in Daytona Beach, Florida, intending to practice surgery there. Upon his arrival, he applied for staff privileges at three area hospitals, Daytona Community Hospital (DCH), Halifax Hospital Medical Center (HHMC), and Ormond Beach Memorial Hospital (OBMH). DCH is a subsidiary of Humana, Inc., which owns and operates several hospitals throughout the United States. HHMC is operated and funded through a special taxing district of the state of Florida. OBMH is operated as a private, nonprofit organization.

With respect to staff privileges, each hospital's bylaws were essentially the same. Only a physician who had been granted staff privileges could use the hospital's facilities. A physician would receive privileges upon obtaining an "appointment." An appointment lasted for one year; at the end of the year, the physician would be considered for "reappointment" for another one-year term. During the first two appointment terms, **[**3]** the physician would be a probationary member of the medical staff. Then, at the end of the two years, he or she could apply for elevation to active staff membership. When the physician applied for elevation, three outcomes were possible: reappointment and elevation, reappointment for another year without elevation (in which case the physician could apply again for elevation the following year), or denial of reappointment.

The bylaws delineated a specific process for decisions affecting staff privileges, including decisions concerning reappointment and elevation to active staff membership. First, a credentials committee, composed of active staff members, would make a recommendation based on the physician's medical charts and other pertinent information. That recommendation would be taken up by an executive committee, also composed of active staff members. The executive committee would conduct a more extensive investigation and then reach a decision. If the executive committee reached a decision adverse to the physician under consideration, the physician could appeal to a judicial review committee, which had the discretion to conduct its own investigation; like the credentials and executive **[**4]** committees, the judicial review committee would be composed of active staff members. The recommendations that emerged from the various committees would in every case ultimately be considered by the hospital's governing board, which was responsible for reaching the final decision.

In the fall of 1979, DCH, HHMC, and OBMH each granted Dr. Bolt an initial appointment. Dr. Bolt understood that, pursuant to the bylaws of each hospital, he would remain on probationary status until the fall of 1981, at which time he would be considered for elevation to active staff membership. In the fall of 1979, Dr. Bolt also applied for and was granted provisional membership in the Volusia County Medical Society (VCMS), a local professional organization for physicians.

On September 10, 1981, the DCH credentials committee met to consider whether Dr. Bolt should be reappointed and elevated to active staff membership. In its report to the executive committee, the credentials committee recommended that Dr. Bolt's reappointment be conditioned on his agreement to seek psychiatric counseling through the Impaired Physicians Program, a program operated by the Florida Medical Association. On September 22, the executive **[**5]** committee sustained the credentials committee's recommendation, and notified Dr. Bolt that his name had been forwarded to the Impaired Physicians Program. Dr. Bolt immediately responded that he would not participate in the program, and the executive committee thereafter voted to deny reappointment. [1]

[*1277] The day after the DCH executive committee notified Dr. Bolt of its decision to forward his name to the Impaired Physicians Program, the OBMH credentials committee met and voted to recommend that Dr. Bolt be denied reappointment. The OBMH executive committee sustained the credential committee's recommendation on October 27. [2]

[6]** Meanwhile, sometime in September, [3] the HHMC credentials committee met and voted to recommend that Dr. Bolt be denied reappointment. The executive committee subsequently voted to sustain the recommendation, and notified Dr. Bolt of its decision on October 13.

Thus, during the months of September and October of 1981, the executive committees at all three hospitals took action against Dr. Bolt. Over the following several months, Dr. Bolt prosecuted appeals at all three hospitals. At HHMC, the judicial review committee found no reason to disagree with the executive committee's decision, and the board of trustees subsequently voted to ratify that decision. At DCH, the judicial review committee did disagree with the executive committee's decision; in fact, it voted to reappoint Dr. Bolt unconditionally. The board of trustees rejected the judicial review committee's decision, however, and ratified the executive committee's decision. Finally, at OBMH, the proceedings before the judicial review committee were still pending at the time Dr. Bolt instituted this suit, and Dr. Bolt has not pursued those proceedings to their conclusion.

In March **[**7]** 1982, Dr. Bolt filed a complaint in the district court containing federal antitrust claims, federal constitutional claims, federal contract claims, and a variety of pendent state law claims. Named as defendants were DCH, [4] **[**8]** HHMC, OBMH, the Volusia County Medical Society, and five physicians: Dr. Richard Boye, Dr. Ralph Marino, Dr. Alvin Smith, Dr. Shedrick Roberson, and Dr. Willis Stose. [5] Each of the individual defendants had played some official role in the privileges decision at one of the hospitals. Dr. Boye, chief of staff at DCH, had served on DCH's credentials and executive committees; he had also served on DCH's board of trustees. Dr. Marino, chief of surgery at DCH, had served on DCH's credentials and executive committees. Dr. Smith, chief of staff at HHMC, had served on HHMC's credentials and executive committees. Dr. Roberson, chief of surgery at HHMC, had served on HHMC's executive committee. Finally, Dr. Stose, chief of surgery at OBMH, had served on OBMH's credentials and executive committees.

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[1] Apparently, Dr. Bolt's existing appointment was not yet due to expire, and he therefore continued to admit patients to DCH for some time after the executive committee's decision. Subsequently, however, the executive committee voted to suspend Dr. Bolt's privileges for the remainder of the term of his existing appointment.

[2] At the time of the decision, Dr. Bolt's existing appointment at OBMH was apparently not yet due to expire. In addition to denying reappointment, the executive committee summarily suspended Dr. Bolt's privileges for the remainder of the term of his existing appointment.

[3] The record does not reveal the precise date.

[4] Also named as a defendant was Humana, Inc., DCH's parent corporation. When we refer in this opinion to DCH in its capacity as a defendant, we mean both DCH and Humana, Inc.

[5] Also named as defendants were Dr. C.R. DeArmas, Jr. and Dr. Thurman Gillespy, Jr. The district court dismissed Drs. DeArmas and Gillespy before trial, and Dr. Bolt does not challenge that ruling in this appeal.

This appeal concerns only Dr. Bolt's federal antitrust claims; we relegate our discussion of his other claims to the margin. [6] **[**9] [*1278]** As to the antitrust claims, Dr. Bolt alleged that the defendants had conspired, along with unnamed coconspirators, to restrain competition in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1 (1982)*. [7] Specifically, Dr. Bolt alleged the existence of three separate conspiracies: one involving DCH and the members of its medical staff who took part in the DCH peer review decision to revoke his privileges, one involving HHMC and the members of its medical staff who took part in the peer review decision there, and one involving DCH, HHMC, OBMH, [8] the members of their staffs who took part in their peer review decisions, and VCMS.

Before trial, the district court convened a hearing to resolve several pending motions. One of these was a motion by the defendants concerning the order of proof at trial. Noting that a claim under *section 1* of the Sherman Act requires proof of (1) a contract, combination, or conspiracy, and (2) restraint on competition, [9] the

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[6] The federal antitrust claims were contained in count I of the complaint. Count II contained claims under *42 U.S.C. § 1983 (1982)*. Citing several defects in the procedures the defendants used in reaching their decisions to revoke his staff privileges, Dr. Bolt alleged in count II that the defendants had deprived him of his *fourteenth amendment* rights to due process and equal protection of the laws.

Count III was styled "federal contractual claims." In that count, Dr. Bolt alleged that the three hospitals, as participants in the federal Medicare program, had a contractual obligation to the United States government to comply with certain federal regulations pertaining to peer review procedures. Dr. Bolt alleged that the three hospitals had failed to comply with these regulations and had therefore breached their contractual obligation to the United States government, and that he, as a third party beneficiary, had suffered an actionable harm.

Counts IV through X contained a variety of state law claims. In count IV, Dr. Bolt alleged that when he was first granted probationary privileges by the three hospitals, each hospital implicitly promised that his privileges would be terminated according to the procedures set out in the hospital's bylaws. Each hospital, Dr. Bolt alleged, had breached that promise, and Dr. Bolt requested the court to enter an injunction requiring the hospitals to reinstate his privileges. Count V contained claims for interference with prospective economic advantage. Count VI contained claims under Florida antitrust laws. Count VII contained claims for intentional infliction of emotional distress. Count VIII contained a claim for slander, and counts IX and X each contained a separate claim for libel.

After the parties joined issue, the defendants moved the district court, pursuant to *Fed.R.Civ.P. 56*, to enter summary judgment on all counts. The court denied summary judgment on the federal antitrust claims and the state law claims. It granted summary judgment on the *section 1983* claims, but only insofar as those claims pertained to DCH, VCMS, Dr. Boye, Dr. Marino, and Dr. Stose. As to those defendants, the court held that the requisite state action was missing. As to the *section 1983* claims against the remaining defendants -- HHMC, Dr. Smith, and Dr. Roberson -- the court indicated that it would defer ruling on the motion for summary judgment, and would sever the claims so that the parties could proceed to trial on the federal antitrust and state law claims.

The parties thus proceeded to trial. As explained in the text, the district court ordered Dr. Bolt to present his evidence of conspiracy first. After he had done so, the defendants moved the district court for directed verdicts on the federal antitrust claims, and the court granted the motions. The court thereafter granted the pending motions by HHMC, Dr. Smith, and Dr. Roberson for summary judgment on the *section 1983* claims. Having thus disposed of all the federal claims, the court dismissed the state law claims without prejudice.

[7] Dr. Bolt also alleged that the defendants had conspired to engage in a monopoly in violation of *15 U.S.C. § 2 (1982)*. Our discussion of the conspiracy aspect of Dr. Bolt's *section 1* claims applies equally to the conspiracy aspect of his *section 2* claims.

[8] Although the complaint alleges a conspiracy involving HHMC and members of it medical staff, and another conspiracy involving DCH and members of its medical staff, it does not allege yet another separate conspiracy involving OBMH and members of its medical staff. This may be because the OBMH governing board had not taken final action against Dr. Bolt at the time he instituted this lawsuit. In any event, the OBMH defendants, OBMH and Dr. Stose, are identified in the complaint only as taking part in the larger conspiracy involving all three hospitals, members of their medical staffs, and VCMS.

[9] *Section 1* provides as follows:

defendants **[**10]** requested the district court to require Dr. Bolt to present his evidence regarding the "contract, combination, or conspiracy" element first. The defendants urged that this course would be an efficient one; if Dr. Bolt's evidence of concerted action proved insufficient to go to the jury, the district court could enter directed verdicts for the defendants at the close of that evidence, thus saving Dr. Bolt from presenting unnecessarily his evidence of restraint on competition. The district court agreed that this would be an efficient way to proceed, and accordingly ruled that Dr. Bolt would be required to present his evidence of concerted action first.

The defendants also moved the district court to rule prior to trial that any evidence attacking the merits of the staff privileges decisions at the three hospitals would be inadmissible. Dr. Bolt proposed to show, through the testimony of Dr. Edward R. **[*1279]** Woodward, chairman of the department **[**11]** of surgery at the University of Florida Medical School, that at least some of the hospitals' stated grounds for their actions against him were pretextual. Specifically, Dr. Bolt wished to attack as pretextual those grounds that pertained to specific medical cases in which he had been involved; he informed the court that Dr. Woodward had reviewed the medical files for those cases and was prepared to testify that no legitimate basis existed for the charges leveled against Dr. Bolt. The district court rejected the proffer, ruling that the Woodward testimony would not be admitted.

The case proceeded to trial before a jury. Dr. Bolt put on his evidence of conspiracy first, as required by the district court's pretrial ruling. At the close of this evidence, the defendants moved the court to enter directed verdicts pursuant to *Fed.R.Civ.P. 50(a)*. The court granted the motions, ruling that Dr. Bolt had failed to adduce evidence of a "contract, combination, or conspiracy," within the meaning of *section 1* of the Sherman Act, sufficient to take the case to the jury. Dr. Bolt now appeals, attacking the district court's evaluation of the sufficiency of the admitted evidence as well as its exclusion **[**12]** of the proffered Woodward testimony.

II.

In this appeal, we are concerned only with the "contract, combination, or conspiracy" element of Dr. Bolt's *section 1* claims; as explained above, the district court based the directed verdicts solely on the perceived deficiency of Dr. Bolt's evidence in that regard. Due to the ordering of proof mandated by the district court, Dr. Bolt had no opportunity to present evidence pertaining to how the defendants' actions restrained competition. Our focus on appeal is therefore a narrow one: With respect to the "contract, combination, or conspiracy" element of Dr. Bolt's *section 1* claims, was the evidence -- that which was admitted and that which should have been admitted -- sufficient to take the case to the jury? ***HN2***[] In order for us to answer that question affirmatively, "there must be evidence that tends to exclude the possibility that [the defendants] were acting independently." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775 (1984)*.

As we have already noted, Dr. Bolt alleged the existence of three separate conspiracies: (1) a conspiracy involving DCH and members of its medical staff, (2) a conspiracy **[**13]** involving HHMC and members of its medical staff, and (3) a conspiracy involving DCH, HHMC, OBMH, members of their medical staffs, and VCMS. For the sake of convenience, we will refer to these alleged conspiracies as the DCH conspiracy, the HHMC conspiracy, and the community-wide conspiracy. In its memorandum order, the district court discussed only the community-wide conspiracy. Since the court entered directed verdicts in favor of all defendants on all of Dr. Bolt's antitrust claims, however, we must assume that the court found the evidence wanting with respect to each of the conspiracies alleged in the complaint. Our task in this appeal, then, is to determine if the evidence regarding any of the three alleged conspiracies was sufficient to allow the case to go to the jury.

After oral argument, we requested the parties to brief an issue they had not addressed in their original briefs: whether the defendants were exempt from federal antitrust liability under the state action doctrine of *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. The parties responded to our request, and we are now

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HN1[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C. § 1 (1982).

prepared to address that issue. [10] Thus, we organize our analysis as follows. **[**14]** We treat each of the alleged conspiracies separately, and ask first whether the defendants identified as coconspirators in the **[*1280]** particular conspiracy are exempt from antitrust liability under the state action doctrine. If the defendants are not exempt, we proceed to evaluate the evidence pertinent to the conspiracy to determine whether it was sufficient to withstand the motions for directed verdict. We begin with the DCH conspiracy.

A.

The alleged coconspirators in the DCH conspiracy were DCH and the members of its medical staff who took part in the DCH peer review decision to revoke Dr. Bolt's privileges. [11] Preliminarily, we note that the directed verdicts would certainly have been proper if, as a matter of law, the DCH defendants were **[**15]** legally incapable of concerted action within the meaning of *section 1* of the Sherman Act. We perceive no basis, however, for holding that the members of a medical staff are legally incapable of conspiring with one another. Each such member practices medicine in his individual capacity; each is a separate economic entity potentially in competition with other physicians. *See Weiss v. York Hosp., 745 F.2d 786, 814 (3d Cir. 1984)*, *cert. denied*, *470 U.S. 1060, 105 S. Ct. 1777, 84 L. Ed. 2d 836 (1985)*; *Cooper v. Forsyth County Hosp. Auth. Inc., 789 F.2d 278, 282* (4th Cir.) (Motz, J., concurring), *cert. denied*, *479 U.S. 972, 107 S. Ct. 474, 93 L. Ed. 2d 418 (1986)*. Additionally, we perceive no basis for holding that a hospital is legally incapable of conspiring with the members of its medical staff. Relying on the rule that a corporation cannot conspire with its officers and directors, *see, e.g., Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451, 455 & n. 7 (9th Cir. 1979)*, some courts have held that a hospital likewise cannot conspire with its medical staff for purposes of *section 1* liability. *See, e.g., Weiss, 745 F.2d at 815-17*; *Buckner v. Lower Florida **[**16]** Keys Hosp. Dist., 403 So.2d 1025, 1029 (Fla.Dist.Ct.App. 1981)*. We find this analogy faulty, and we decline to embrace it. The traditional rule regarding corporations is based on considerations unique to the corporate context. Theoretically, a "conspiracy" involving a corporation and one of its agents would occur every time the agent performs some act in the course of his agency, for such an act is deemed by the law to be an act of the corporation. Thus, the rule that a corporation is incapable of conspiring with its agents is necessary to prevent erosion of the principle that *section 1* does not reach unilateral acts. A hospital and the members of its medical staff, in contrast to a corporation and its agents, are legally separate entities, and consequently there is no similar danger that what is in fact unilateral activity will be bootstrapped into a "conspiracy." In sum, then, we hold that ***HN3***[] a hospital and the members of its medical staff are all legally capable of conspiring with one another.

[17]** We therefore turn to the question whether the DCH defendants are exempt from antitrust liability under the state action doctrine. DCH is a private hospital. The state action exemption, in its inception, applied only in suits against state officers. *See Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. The Supreme Court, however, has come to recognize that the exemption may apply in suits against private parties under some circumstances.

In *Parker*, a raisin producer filed an action against a California state official to enjoin enforcement of the state's Agricultural Prorate Act, which created a program "to restrict competition among the growers [of raisins] and maintain prices in the distribution of their commodities to packers." *Id. at 346, 63 S. Ct. at 311*. Recognizing that the state's program was anticompetitive, the Supreme Court nevertheless found no violation of federal ***antitrust law***, concluding that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers from activities directed by its legislature." *Id. at 350-51, 63 S. Ct. at 313*. Thus, the Court **[*1281]** interpreted ***HN4***[] the Sherman Act **[**18]** as not prohibiting states from imposing restraints on competition. This interpretation of the Sherman Act is what has become known as the state action doctrine.

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[10] HHMC raised the state action defense in the district court, but the court deferred ruling on HHMC's motion for summary judgment on that point. We address the issue here in keeping with the principle that we may affirm a district court's ruling on a ground upon which the district court did not rely. The applicability of the state action exemption is a purely legal question. We take judicial notice of the applicable Florida statutes and case law.

[11] Of the DCH staff members who participated in the peer review decision, two are named as defendants in this case: Dr. Boye and Dr. Marino. In this opinion, we sometimes refer to these defendants and DCH collectively as "the DCH defendants."

Although *Parker* involved a suit against a state official, the Supreme Court subsequently recognized that the state action exemption may also apply in a suit against a private party. *See, e.g.,* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 58-59, 105 S. Ct. 1721, 1727, 85 L. Ed. 2d 36 (1985). Since state economic regulation obviously entails regulation of private conduct, the Court has reasoned that the state action exemption would lose much of its force if the federal government or a private litigant could always enforce the Sherman Act against the regulated private parties. At the same time, the Court has recognized that extending the state action doctrine to private parties creates the danger that private parties, by merely invoking "a gauzy cloak of state involvement," California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 106, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233 (1980), will attempt to use the doctrine to immunize what are essentially private restraints on competition. ***HN5***[] **[**19]** To ensure that the state action doctrine is used to immunize only those activities that are truly the product of state regulation, the Court has developed a rigorous two-prong test to be applied when a private party claims entitlement to the exemption. First, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.'" California Retail Liquor Dealers Ass'n, 445 U.S. at 105, 100 S. Ct. at 943 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S. Ct. 1123, 1135, 55 L. Ed. 2d 364 (1978)). Second, the conduct in question "must be 'actively supervised' by the State itself." *Id.* It is this two-prong test that the DCH defendants must satisfy if their involvement in the DCH conspiracy is to be deemed immune from antitrust liability.

We have little difficulty concluding that Florida law expressed [12] a clearly articulated policy sanctioning the kind of peer review DCH used in reaching its decision to revoke Dr. Bolt's privileges. Fla.Stat. § 395.065(1) (1981) provided that "***HN6***[] the medical staff of any [licensed hospital] is authorized to suspend, deny, revoke, or curtail the staff privileges of any staff member **[**20]** for good cause." ***HN7***[] Fla.Stat. § 395.0653(3) (1981) required every licensed hospital to "set standards and procedures to be applied by the hospital *and its medical staff* in considering and acting upon applications for staff membership or professional privileges." (Emphasis added.) ***HN8***[] Fla.Admin.Code Ann. r. 10D-28.56(f) (1981) expressly stated that "no action shall be taken [by the hospital's governing board] without prior referral to the medical staff for their recommendation."

The question whether Florida actively supervised peer review determinations is a somewhat more difficult one. In Patrick v. Burget, 486 U.S. 94, 108 S. Ct. 1658, 1664, 100 L. Ed. 2d 83 (1988), the Supreme Court held that "***HN9***[] the State does not actively supervise [the termination of hospital staff privileges] unless a state official has and exercises ultimate authority over private privilege determinations." A state official has this kind of authority only if he or she has "power **[**21]** to review private peer-review decisions and overturn a decision that fails to accord with state policy." *Id.* In support of their assertion that Florida actively supervised peer review determinations, the DCH defendants cite ***HN10***[] Fla.Stat. § 458.337(1)(b) (1981), which required notification of the Florida Board of Medical Examiners, a state agency, whenever a physician "has been disciplined . . . by a licensed hospital or medical staff of said hospital." Nothing in this provision, however, indicates that the Board has power to overturn a peer review decision. The apparent purpose of the notification requirement is to enable the Board to take further **[*1282]** disciplinary action if it deems such further action appropriate. We have no reason to believe that the Board has ever purported to overturn a private peer review decision. [13] Thus, we must look elsewhere for active state supervision.

[22]** A possible supervisory authority is the state judiciary. To date, the Supreme Court has found active state supervision only in cases involving supervision by a state agency, *see, e.g., Southern Motor Carriers*, or by a state supreme court charged with regulating the professional conduct of the members of its bar. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977). The Court has left open the question whether

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[12] The state law relevant to our inquiry is that which was in effect when the defendants engaged in the challenged conduct. *See* Tambone v. Memorial Hosp. for McHenry County, Inc., 825 F.2d 1132, 1134-35 (7th Cir. 1987).

[13] ***HN11***[] It is irrelevant that the state of Florida may have exercised some form of supervision over the kind of procedures DCH used in conducting its peer review; the relevant question is whether the state has authority to overturn the privileges determination itself. *Patrick*, __ U.S. at __, 108 S. Ct. at 1663.

judicial review in the context of a traditional lawsuit may constitute active state supervision. *Patrick*, __ U.S. at __, 108 S. Ct. at 1664-65.

We perceive no principled basis for distinguishing traditional judicial review from agency review, however. The purpose of the active state supervision requirement is to ensure that the conduct in question is in fact the product of state regulation. A state may choose to regulate private economic activity through a state agency; it may just as readily choose to regulate such activity through its courts. Indeed, regulation through the judiciary may be more likely to ensure accurate implementation of the state's policy, for courts are especially well suited to divine, interpret, and enforce **[**23]** legislative policy.

To be sure, agency review and judicial review do differ in some respects. For instance, agency review is a creature of express statutory authorization, whereas judicial review may or may not be. Additionally, agency review, unlike traditional judicial review, may be automatic in the sense that the agency may be statutorily obligated to review every decision within its jurisdiction, regardless of whether an aggrieved party has actually lodged a complaint.

Noting these differences, however, does not detract from our conclusion that ***HN12***[] judicial review may constitute active state supervision for purposes of the state action exemption. That judicial review may be provided without express legislative authorization does not make that review any less a form of regulation by the state. It is sufficient if the legislature clearly articulates a policy and then acquiesces in the courts' implementation of that policy. Legislatures undoubtedly presume that courts will enforce the policy they articulate without express direction to do so. Further, that judicial review is not automatic in the sense that it must be triggered by the affirmative act of an aggrieved party does not make **[**24]** the state's supervision any less effective. A legislature may conclude that the most efficient way for the state to achieve its regulatory goals is to review only those cases in which a complaint has been lodged; it may quite legitimately presume that parties who believe they have been injured by conduct inconsistent with state policy will act on their self interest and seek redress for the wrong that has been worked against them. In terms of the state achieving its regulatory goals, then, the global result will likely closely approximate the result that would be reached if the state reviewed each decision as a matter of course.

Of course, ***HN13***[] judicial review cannot constitute active state supervision unless it is available on an established basis and is of a sufficiently probing nature. To be sufficiently probing, the scope of judicial review must first of all encompass the fairness of the procedures used in reaching the decision. Furthermore, it must involve consideration of whether the criteria used by the decisionmakers were consistent with state policy and whether the decision had a sufficient basis in fact. Our review of the Florida case law convinces us that such review is available **[**25]** in the Florida courts.

[*1283] Florida courts have recognized that ***HN14***[] a physician whose staff privileges at a hospital have been revoked has a cause of action for injunctive relief. In articulating the basis for this cause of action, the courts have relied on a contract theory. Florida courts have reasoned that when a physician forms a professional relationship with a hospital, the hospital promises that the relationship will not be terminated unless certain conditions are satisfied, those conditions being expressed, either explicitly or implicitly, in the hospital's bylaws. *See, e.g., Margolin v. Morton F. Plant Hosp. Ass'n, 348 So.2d 57, 57 (Fla.Dist.Ct.App. 1977)*; *see also Lawler v. Eugene Wuesthoff Memorial Hosp. Ass'n, 497 So.2d 1261, 1263-64 (Fla.Dist.Ct.App. 1986)*; *Palm Beach-Martin County Medical Center, Inc. v. Panaro, 431 So.2d 1023, 1024-25 (Fla.Dist.Ct.App. 1983)*. At the time pertinent to our inquiry, DCH's bylaws established, as required by Florida law, [14] procedures for the termination of staff privileges. ***HN15***[] Such bylaws, the case law indicates, are deemed to constitute a promise that termination of staff privileges will be based on fair procedures, valid criteria, and sufficient **[**26]** evidence -- a promise that is enforceable by way of the cause

[14] Fla.Stat. § 395.0653(3) (1981) provided that "***HN16***[] the governing body of every hospital shall set standards and procedures to be applied by the hospital and its medical staff in considering and acting upon applications for staff membership or professional privileges." ***HN17***[] The Florida Administrative Code provided that "the governing authority in fulfilling its responsibility shall be organized under approved written bylaws, rules and regulations which shall . . . provide for the appointment, reappointment, or dismissal of members of the medical staff, and a procedure for hearing and appeal." Fla.Admin.Code Ann. r. 10D-28.56(1)(f) (1981).

of action for injunctive relief against the hospital. [15] **[**28]** Courts have, for instance, frequently reviewed staff privileges decisions to ascertain whether they were reached by way of fair procedures. *See, e.g., Dance v. North Broward Hosp. Dist., 420 So.2d 315 (Fla.Dist.Ct.App. 1982)*. They have also reviewed the criteria used in reaching the decisions to determine whether those criteria are consistent with state policy. *See, e.g., Sarasota County Public Hosp. Bd. v. Shahawy, 408 So.2d 644 (Fla.Dist.Ct.App. 1981)*; *cf. Hackett v. Metropolitan Gen. Hosp., 422 So.2d 986 (Fla.Dist.Ct.App. 1982)* (physician's complaint, which alleged that hospital had taken action in violation of statute pertaining to medical staff privileges, stated cause of action). Finally, courts have reviewed the sufficiency of the evidence relied upon by the decisionmakers. *See, e.g., North Broward Hosp. Dist. v. Mizell, 148 So.2d 1, 5 (Fla. 1962)* (remanding for finding as "proof of facts reasonably requiring suspension"); *Horgan v. South Broward Hosp. Dist., 477 So.2d 617, 617 (Fla.Dist.Ct.App. 1985)* ("We have reviewed the record and find that **[**27]** it contains competent, substantial evidence to support the administrative action taken."); *Dance, 420 So.2d at 316* ("There was adequate evidence upon which to base the permanent suspension."); *Shahawy, 408 So.2d at 647* (remanding for finding as to whether the privileges termination decision "was supported **[*1284]** by competent substantial evidence"). [16]

In sum, we find that Florida courts provide judicial review of staff privileges decisions that is sufficiently probing to constitute active state supervision: the courts will review the fairness of the procedures, the validity of the criteria used, and the sufficiency of the evidence. [17] Because the DCH defendants have therefore established both prongs of the state action exemption test, we affirm the directed verdicts for these defendants with respect to their involvement in the DCH conspiracy.

[29]** B.

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[15] Florida courts have recognized this cause of action for injunctive relief even though Fla.Stat. § 395.065(2) (1981) provides that "there shall be no liability on the part of, and no cause of action of any nature shall arise against, any hospital . . . for any action taken in good faith and without malice [in conducting peer review pursuant to Florida law]." One Florida court has explained this apparent inconsistency in the following way:

> Section 395.065(2) expressly concerns itself with "liability," which we construe to mean responsibility for damages proximately resulting from a tort. We also construe the subsequent phrase in the same subsection, "cause of action of any nature," as referring to and limited by the word "liability." Were we to construe this subsection as completely eliminating any cause of action of any nature against a hospital which gave such inadequate notice of the reasons reappointment was not being recommended, but without malice, then any determinative hearing could be held by the hospital with complete immunity, notwithstanding the physician's substantial inability to prepare therefor. Similarly, any arbitrary and capricious, but not malicious action taken upon an application for reappointment would go totally unanswered. *Article I, section 21, Florida Constitution*, will not tolerate that happening, as it provides: "The courts shall be open to every person for redress of any injury. . . ."

Carida v. Holy Cross Hosp., Inc., 427 So.2d 803, 806 n. 6 (Fla.Dist.Ct.App. 1983).

[16] The standards for reviewing staff privileges decisions are the same for public and private hospitals. *Carida v. Holy Cross Hosp., Inc., 427 So.2d 803, 805 (Fla.Dist.Ct.App. 1983)*; *see also* ***Lawler v. Eugene Wuesthoff Memorial Hosp. Ass'n, 497 So.2d 1261, 1264 (Fla.Dist.Ct.App. 1986)***.

[17] We are confident that this form of review was available at the time Dr. Bolt's privileges were revoked. We acknowledge that some of the Florida cases we have cited were decided after the events in this case occurred. Those cases, however, reinforce or elaborate upon the principles stated in the earlier cases; they do not represent departures from prior law. We note that Dr. Bolt was obviously aware when he filed his complaint in the district court that the cause of action for injunctive relief was cognizable under Florida law. The pendent state claim alleged in count IV of his complaint, *see supra* note 6, is based on that cause of action.

The HHMC conspiracy is of the same nature as the DCH conspiracy. The alleged coconspirators are HHMC and the members of its staff who participated in the HHMC peer review decision to revoke Dr. Bolt's privileges. [18] The state action exemption applies here for the same reasons that it applies with respect to the DCH defendants' involvement in the DCH conspiracy. [19] Accordingly, we affirm the directed verdicts for the HHMC defendants with respect to their role in this conspiracy.

[30]** C.

Finally, we come to the alleged community-wide conspiracy. The alleged coconspirators here are DCH, HHMC, OBMH, the members of their medical staffs who participated in the decisions to revoke Dr. Bolt's staff privileges, and VCMS. Dr. Bolt's allegation is that these defendants conspired to drive him out of the Daytona Beach medical community. Again, we begin with the state action exemption question. VCMS makes no claim to the exemption. We concluded above that the exemption is available to the DCH defendants with respect to their role in the DCH conspiracy, and to the HHMC defendants with respect to their role in the HHMC conspiracy. We reach a different conclusion, however, as to the involvement of these defendants in the community-wide conspiracy. We reach that conclusion based on the defendants' patent inability to establish the first prong of the state action exemption test: clearly, Florida has articulated no policy favoring participation by any of the DCH or HHMC defendants in a multi-hospital scheme to rid a medical community of a particular physician. This reasoning applies equally to the OBMH defendants.

Having concluded that the state action exemption cannot be claimed **[**31]** by any of the defendants with respect to the community-wide **[*1285]** conspiracy, we turn to the question whether the district court erred in concluding that the evidence of concerted action was insufficient to send the case to the jury. We divide our discussion of the evidence into two parts. First, we discuss the evidence that relates to the alleged involvement of the three hospitals and members of their medical staffs. We then examine separately the evidence that relates to the alleged involvement of VCMS.

1.

a.

The admitted evidence relating to the alleged involvement of the three hospitals and members of their medical staffs can be broken down into three categories: (1) evidence of parallel action, (2) evidence of inter-hospital communication, and (3) direct evidence that the decisionmakers at the three hospitals agreed among themselves to take concerted action to drive Dr. Bolt out of the Daytona Beach medical community.

We have already described the evidence of parallel action. To repeat, during the months of September and October of 1981, the executive committee at each of the three hospitals voted to recommend that Dr. Bolt be denied both elevation to active staff membership and reappointment.

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[18] Of those members of the HHMC staff who participated in the peer review decision, two are named as defendants in this case: Dr. Smith and Dr. Roberson. In this opinion, we sometimes refer to these defendants and HHMC collectively as "the HHMC defendants."

[19] HHMC is not a private hospital like DCH; rather, it is a "special district" created by the Florida legislature. *See* 1979 Fla.Laws 577. As such, HHMC may be more akin to a municipality than a private person for purposes of state action exemption analysis. In *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*, the Supreme Court held that it is sufficient for a municipality to establish that it acted pursuant to a clearly articulated state policy; unlike a private person, a municipality need not also establish active state supervision. *Id. at 46-47, 105 S. Ct. at 1720*. Because we conclude that both clear articulation and active state supervision are present in this case, we do not decide whether HHMC should be treated as a municipality rather than a private person. *Cf.* ***Hospital Dev. & Serv. Corp. v. North Broward Hosp. Dist., 619 F. Supp. 535 (S.D.Fla. 1985)*** (Florida special district treated as municipality for purposes of state action exemption analysis).

[32]** The evidence of inter-hospital communication logically falls into three subcategories. First, there was evidence that the individual defendants had ample opportunity to communicate among themselves about Dr. Bolt. Each of the individual defendants held staff privileges at more than one of the three hospitals; most of them held staff privileges at all three. Second, there was evidence of actual inter-hospital conversations about Dr. Bolt. For example, Dr. Smith, chief of staff at HHMC, approached Dr. Boye, chief of staff at DCH, in January 1981 and suggested to Dr. Boye that he encourage Dr. Bolt to seek counseling through the Impaired Physicians Program. [20] Third, there was evidence that each hospital's executive committee based its decision, at least in part, on alleged misconduct by Dr. Bolt that occurred at one of the other two hospitals. For example, after the HHMC executive committee voted to revoke Dr. Bolt's privileges, it sent him a letter listing eight grounds for its decision; three of those grounds pertained to incidents that occurred at DCH. And Dr. France, chief of staff at OBMH, told Dr. Bolt that the OBMH executive committee had based its decision solely on incidents **[**33]** that occurred at DCH and HHMC.

Dr. Bolt's testimony was the only evidence offered as direct evidence that the decisionmakers at the three hospitals had agreed among themselves to drive Dr. Bolt out of the Daytona Beach medical community. Dr. Bolt testified that Dr. Marino, chief of surgery at DCH, told him that he, Dr. Marino, had told the DCH credentials committee that Dr. Stose, chief of surgery at OBMH, had told him that "They're going to get rid of [Dr. Bolt] at [HHMC]; therefore, we got to talk about getting rid of him at [OBMH]." Dr. Bolt also testified that Dr. Marino told him that he, Dr. Marino, had told the DCH Credentials Committee "Listen, here's the plan. They're going to get rid of him at [HHMC]. That means we're going to get rid of him at [OBMH] and I think because other **[**34]** two hospitals are going to get rid of him, we've got to seriously think of getting rid of him at [DCH]."

We conclude that this body of admitted evidence was not sufficiently probative of conspiracy to withstand the motions for directed verdicts. With regard to the evidence of conscious parallelism, the rule in this circuit is that ***HN18***[🡅] such evidence does not permit an inference of conspiracy unless the plaintiff establishes that each defendant that engaged in the parallel action acted contrary to its economic self-interest. **[*1286]** *See Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 559 (5th Cir. 1980)*, *cert. denied*, *454 U.S. 927, 102 S. Ct. 427, 70 L. Ed. 2d 236 (1981)*. [21] What this means is that the plaintiff must establish with respect to each defendant that it would have been unreasonable in a business sense for that defendant to engage in the challenged conduct unless it had assurances from the other defendants that they would take the same action. This record, in its present state, does not contain evidence of this nature.

[35]** The evidence of inter-hospital communication is also insufficient to permit an inference of conspiracy. It is well settled that ***HN19***[🡅] the mere opportunity to conspire among antitrust defendants is insufficient to permit the inference of conspiracy. *Cooper v. Forsyth County Hosp. Auth. Inc., 789 F.2d 278, 281* (4th Cir.), *cert. denied*, *479 U.S. 972, 107 S. Ct. 474, 93 L. Ed. 2d 418 (1986)*; *see also Feldman v. Jackson Memorial Hosp., 571 F. Supp. 1000, 1008 (S.D.Fla. 1983)*, *aff'd*, *752 F.2d 647* (11th Cir.), *cert. denied*, *472 U.S. 1029, 105 S. Ct. 3504, 87 L. Ed. 2d 635 (1985)*; *Oreck Corp. v. Whirlpool Corp., 639 F.2d 75, 79 (2d Cir. 1980)*, *cert. denied*, *454 U.S. 1083, 102 S. Ct. 639, 70 L. Ed. 2d 618 (1981)*. That the defendants may have talked among themselves about Dr. Bolt's difficulties at the various hospitals is also insufficient to permit an inference of conspiracy. *Cf. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-64, 104 S. Ct. 1464, 1470-71, 79 L. Ed. 2d 775 (1984)*; *Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 45 S. Ct. 578, 69 L. Ed. 1093 (1925)*; *Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 45 S. Ct. 586, 69 L. Ed.* ***[**36]*** *1104 (1925)*. The same is true with regard to the evidence that the executive committees may have based their decisions on Dr. Bolt's misconduct at the other hospitals. Such evidence does not permit an inference of conspiracy unless there is some indication that the

[20] Additionally, in December 1981, Dr. Boye appeared in proceedings before the HHMC judicial review committee in connection with its review of the HHMC executive committee's decision to revoke Dr. Bolt's privileges. Dr. Marino, chief of surgery at DCH, also appeared at the proceedings. Dr. Patel, chief of staff at OBMH, testified at the September 10, 1981 meeting of the DCH credentials committee.

[21] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

defendants' actions were attributable to reasons other than legitimate, independent business reasons. [22] The evidence admitted at trial contains no such indication.

Finally, the out-of-court statements by Dr. Marino fail to evidence the kind of multi-hospital conspiracy that Dr. Bolt alleges. The statements were properly **[**37]** admitted against Dr. Marino as an admission by a party-opponent. *See* *Fed.R.Evid. 801(d)(2)*. The statements merely established, however, that Dr. Marino told the DCH credentials committee (1) that he was aware that the OBMH executive committee was considering revoking Dr. Bolt's privileges based on what had occurred at HHMC, and (2) that since the other two hospitals were considering revoking or had already revoked Dr. Bolt's privileges, DCH should consider doing the same. At most, these statements evidence that the DCH credentials committee had knowledge of Dr. Bolt's difficulties at the other hospitals and that it may have based its own recommendation at least in part on that information. [23]

In sum, none of the evidence admitted at trial permits an inference of a multi-hospital conspiracy. Viewed in a light most favorable to Dr. Bolt, the evidence merely establishes that decisionmakers at each one of the three hospitals based their decisions at least in part on matters that occurred **[**38]** at the other two hospitals. As we have explained, such evidence by itself does not **[*1287]** permit an inference of conspiracy. Thus, unless the district court erroneously excluded admissible evidence that is probative of conspiracy, we must affirm the directed verdicts.

b.

Dr. Bolt contends that the district court erred in forbidding him from introducing the testimony of his expert witness, Dr. Woodward. As already noted, Dr. Bolt proposed to use Dr. Woodward's testimony to attack as pretextual some of the grounds upon which the defendants had based their respective decisions. Dr. Bolt's proffer to the district court was as follows. First, he indicated that the evidence showed that all three hospitals had based their individual decisions in part on two incidents, both occurring at DCH, in which Dr. Bolt's medical or professional judgment had been called into question. [24] **[**40]** Dr. Bolt proposed to show that the medical staff at DCH had investigated the incidents and had made certain findings upon which it then based its decision to revoke Dr. Bolt's privileges. He proposed to show that the results of the DCH investigations were subsequently used by the medical staffs at HHMC and OBMH as bases for **[**39]** their own decisions to revoke Dr. Bolt's privileges. Dr. Woodward was prepared to testify that he had reviewed the facts underlying the DCH investigations and had concluded that no reasonable medical practitioner would have reached the conclusions that the DCH investigators reached. [25] By showing that

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[22] A hospital might have a number of legitimate independent business reasons for disciplining a staff physician based on his or her misconduct at another hospital. For example, a hospital may, under some circumstances, incur tort liability for its failure to screen carefully its professional staff. *See, e.g.,* *Elam v. College Park Hosp., 132 Cal.App.3d 332, 340-47, 183 Cal.Rptr. 156, 161-65 (1982)*. That a hospital failed to take action against a staff member when it knew or should have known of that member's misconduct at another hospital might very well be relevant to this species of liability.

[23] Dr. Bolt places unwarranted emphasis on Dr. Marino's use of the word "plan." Placed in context, the reference is to a proposed course of action at DCH, not to some multi-hospital scheme.

[24] It is not clear whether all three executive committees drew up formal lists of charges; if they did, Dr. Bolt did not introduce those documents into evidence. He did introduce a letter he received from the HHMC executive committee in which the committee cited the two DCH incidents as grounds for its own decision. As to the OBMH executive committee, the evidence shows only that it relied on unspecified incidents that occurred at DCH; no evidence was introduced showing that the OBMH executive committee relied specifically on the two DCH incidents in question. Nonetheless, we think that the jury could infer from the evidence before it that the OBMH executive committee did rely on those incidents; the evidence does show that an administrator at OBMH contacted an administrator at DCH and requested information from Dr. Bolt's DCH disciplinary file. Of course, the OBMH defendants will have the opportunity to show, on remand, that they did not rely on DCH incidents, or that the DCH incidents upon which they did rely did not include the two incidents to which Dr. Woodward's testimony pertains.

[25] The first of the two cases involved a patient at DCH named Maribelle Winn. Mrs. Winn died at DCH while under the care of Dr. Smith, Dr. Bolt, and Dr. Smith's medical partner, Dr. Ruben. Soon after Mrs. Winn's death, Dr. Bolt telephoned her surviving daughters and told them that their mother would not have died but for the negligent care she received from Drs. Smith and

the findings of the DCH investigations were entirely baseless, and by showing that the decisionmakers at all three hospitals **[*1288]** had relied on those findings, Dr. Bolt hoped to establish the existence of a conspiracy among the three hospitals and members of their medical staffs.

[41]** The defendants objected to the proffered testimony on two grounds. First, they objected on relevancy grounds. They argued that the proffered evidence failed, as a matter of law, to raise an inference of conspiracy. Second, they argued that even if the evidence were relevant, it should be excluded because it would unnecessarily confuse the jurors, who would be forced to consider a cumbersome body of facts pertaining to medical cases lacking a direct relationship to the subject matter of the antitrust litigation. The district court apparently found both these arguments persuasive. [26]

[42]** We conclude that the district court erred to the extent its exclusion of the Woodward testimony was based on relevancy grounds. As we explained above, the fact that the defendants relied on reports emanating from the other hospitals, standing alone, does not permit an inference of conspiracy. Reliance on such reports may be supported by entirely legitimate, independent business reasons. [27] An altogether different case is presented, however, if conclusions contained in the reports were so baseless that no reasonable medical practitioner, considering the same set of facts, would have reached those conclusions. In such a case, the party who relied on the reports can no longer readily point to any legitimate, independent business reason for doing so, and a factfinder may infer that the party, along with other parties who similarly relied on the same baseless conclusions, were engaged in a scheme to use the conclusions to achieve a common illicit end. In other words, such evidence would

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Ruben. This action by Dr. Bolt apparently enraged Dr. Smith; in his deposition, Dr. Smith remarked that he could have "pinned [Dr. Bolt's] ass to the front door with [his] fist."

Some time later, Dr. Schildecker, a pathologist at DCH and a member of the DCH executive committee, conducted an investigation of the Winn death. Dr. Schildecker's conclusion was that Drs. Smith and Ruben had engaged in no wrongdoing. It appeared, therefore, that Dr. Bolt had acted maliciously and unprofessionally when he called the Winn daughters and told them that their mother had died because of negligent treatment by Drs. Smith and Ruben. Dr. Bolt's behavior in connection with the Winn case was apparently used by the executive committee at each hospital (including the executive committee at HHMC, where Dr. Smith was chief of staff) as a ground for revoking Dr. Bolt's privileges. *See supra* note 24.

Dr. Woodward was prepared to testify, based on his review of the Winn medical file, that the treatment Mrs. Winn received from Drs. Smith and Ruben was in fact so grossly inadequate as to amount to negligent homicide. From this testimony, a factfinder could conclude that the charge leveled against Dr. Bolt in connection with the Winn matter -- that he had acted maliciously and unprofessionally when he telephoned the Winn daughters -- was without foundation.

The second case involved another DCH patient, one Harold Schmidt. Some time after undergoing abdominal surgery, Mr. Schmidt's surgical incision burst open. Alerted to the problem, Dr. Bolt went directly to Mr. Schmidt's room and proceeded to pass retention sutures through the wound, without first giving Mr. Schmidt any form of anesthesia. The Schmidt incident, like the incident involving the Winn death, was apparently used by all three executive committees as a ground for revoking Dr. Bolt's privileges. *See supra* note 24. Dr. Woodward was prepared to testify, based on his review of the Schmidt medical file, that Dr. Bolt's actions were entirely proper in light of the patient's condition.

[26] The district court apparently believed moreover that Dr. Bolt was precluded, as a matter of law, from attacking the factual basis of any of the grounds upon which the hospitals relied. In the court's view, this would constitute a form of forbidden "de novo review." We are frankly at a loss as to the legal basis for this particular concern. In its memorandum opinion, the court cited *Sosa v. Board of Managers of Val Verde Memorial Hosp., 437 F.2d 173 (5th Cir. 1971)*, as support for its views concerning "de novo review." *Sosa* involved a physician who sued the board of a state hospital, claiming that the board had violated the due process and *equal protection clauses of the fourteenth amendment* in denying his application for staff privileges. Reduced to its essentials, the case involved two issues: whether the criteria the board used to judge the plaintiff's application was arbitrary and capricious, and whether the plaintiff had been afforded procedural due process, i.e., notice and a hearing. In the context of this antitrust case, Dr. Bolt is attacking neither the hospitals' procedures nor the substance of the criteria they purported to apply. *Sosa* is plainly inapposite.

[27] *See supra* note 22.

"tend[] to exclude the possibility that [the defendants] were acting independently." *Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471*.

That the hospitals additionally relied **[**43]** on other, unrelated grounds for their decisions does not change our analysis. The inference of concerted action remains. It might well be expected that coconspirators would take steps to obscure the direct outlines of their complicity; one way to do that would be for each to supplement the pretextual grounds upon which all relied with other, unrelated grounds. Indeed, if Dr. Bolt can establish that the common grounds were pretextual, evidence that the other, unrelated grounds were themselves baseless may also be probative of conspiracy. [28]

We recognize that the trial court may have based its exclusion of the Woodward testimony on the alternative ground that the testimony would unnecessarily confuse the jurors. ***HN20***[] Under *Fed.R.Evid. 403*, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of issues[] or misleading the jury." A trial court's ruling pursuant to *Rule 403* **[**44]** will not be disturbed absent an abuse of discretion. *See* *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1501 (11th Cir. 1985)*. Assuming that the district court relied on *Rule 403* as **[*1289]** a basis for its ruling, we find such an abuse here.

First, as the preceding discussion shows, the trial judge misunderstood the legal import of the proffered evidence; in his mind, the evidence had no probative value as a matter of law. Laboring under this misapprehension, the judge obviously could not have made a sound judgment whether the probative value of the evidence was substantially outweighed by the danger of jury confusion.

Even if the judge had appreciated the legal import of the evidence, we would still conclude that exclusion under *Rule 403* was improper. The advisory committee notes to *Rule 403* suggest that ***HN21***[] the "availability of other means of proof" should be considered in determining whether evidence should be excluded under the rule. It is highly unlikely that Dr. Bolt can prove pretext, and thus conspiracy, other than by way of the route he proposes; antitrust conspiracies are nearly always proved through circumstantial evidence. Other courts have found an abuse of discretion where **[**45]** the probative value of the excluded evidence is high and no other evidence is reasonably available to prove an essential element of a claim or defense. *See, e.g.,* *Breidor v. Sears, Roebuck & Co., 722 F.2d 1134, 1140-41 (3d Cir. 1983)*. We similarly find an abuse of discretion here. We are confident that any danger of jury confusion can be avoided by proper limiting instructions. *See* *Fed.R.Evid. 105*.

2.

The evidence relating to the alleged involvement of the Volusia County Medical Society in the community-wide conspiracy was as follows. VCMS was a local professional organization which published a periodical known as *The Stethoscope*. The December 1981 edition of this periodical contained an article, authored by the society's president, entitled "The Problem Physician." The article mentioned no particular physician by name, but discussed generally the problems associated with physicians whose abrasive personalities disrupt the delivery of medical care in the hospital context.

In his brief, Dr. Bolt describes the *Stethoscope* article as a clarion call to all physicians to band together to drive him out of the Daytona Beach medical community. Thus, the Volusia County Medical **[**46]** Society, through its publication, allegedly became an active ringleader in the community-wide conspiracy.

We agree with the district court that this evidence is insufficient to permit the inference that the Volusia County Medical Society engaged in concerted action with the other defendants. First, Dr. Bolt's evidence failed to show that the article was directed at him in particular; his conclusion that the author wrote the article with him in mind is pure speculation. More importantly, the supposed "clarion call" was published in December of 1981 -- *after* the executive

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[28] We note that the OBMH governing board has apparently yet to take final action against Dr. Bolt. On remand, evidence that no such action has been taken at OBMH would be probative of whether the OBMH defendants participated in the community-wide conspiracy.

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committees at the three hospitals had already taken action against Dr. Bolt. The evidence of that the Volusia County Medical Society played any part in the community-wide conspiracy was plainly insufficient to withstand the motion for directed verdict.

III.

To summarize, we affirm the directed verdicts in favor of the DCH defendants with respect to their involvement in the DCH conspiracy, and in favor of the HHMC defendants with respect to their involvement in the HHMC conspiracy. We hold, however, that the district court erred in directing verdicts in favor of the DCH defendants, the HHMC defendants, and the OBMH **[**47]** defendants with respect to their involvement in the community-wide conspiracy. We affirm the directed verdict in favor of VCMS.

We do not hesitate to say that the district court's handling of this case was unfortunate. The better course would have been to defer ruling on the motions for directed verdicts until after Dr. Bolt had presented his entire *section 1* case. In their briefs, the defendants vigorously argue that Dr. Bolt must prove, as part of his *section 1* case, that their actions actually **[*1290]** restrained competition; they contend that the directed verdicts were proper because the evidence adduced at trial is wholly deficient in this regard. Whatever the theoretical merits of their legal arguments, the fact remains that the district court entered the directed verdicts before Dr. Bolt reached that part of his case involving restraint on competition. We reiterate that our focus in this appeal has been a narrow one: whether Dr. Bolt's evidence with respect to the "contract, combination, or conspiracy" element of his *section 1* claims was sufficient to withstand the motion for directed verdicts. Other potential legal issues in this case are better left for resolution on the basis of **[**48]** a more fully developed record.

AFFIRMED in part, REVERSED in part, and REMANDED.

Colonial Penn Group, Inc. v. American Asso. of Retired Persons

United States District Court for the Eastern District of Pennsylvania

August 8, 1988, Decided ; August 8, 1988, Filed

Civil Action No. 83-4911

Reporter

698 F. Supp. 69 *; 1988 U.S. Dist. LEXIS 8745 **; 1988-2 Trade Cas. (CCH) P68,354

COLONIAL PENN GROUP, INC., Plaintiff, v. AMERICAN ASSOCIATION OF RETIRED PERSONS and OLSON-TRAVELWORLD, LTD., Defendants

Core Terms

advertising, relevant market, anticompetitive, competitor, alleges, products, travel, compete, antitrust, endorsed, essential facilities doctrine, monopolization, homeowners

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

A *§ 1* Sherman Act, *15 U.S.C.S. § 1*, action requires proof of four elements: (1) an unlawful, (2) contract, combination, or conspiracy, (3) that produces adverse, anticompetitive effects within the relevant market, and (4) that proximately causes plaintiff's injuries. Generally, plaintiff must prove the challenged activity has an anticompetitive effect; however, certain categories of conduct that unjustifiably restrict competition are per se unlawful. The most obvious example is price fixing. The Supreme Court has cautioned against a knee-jerk announcement of a per se rule prohibiting an activity in favor of a threshold determination of whether the challenged activity is likely to have anticompetitive effects.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

Under the so-called "essential facilities doctrine," plaintiff must prove four elements: (1) existence of a facility whose use is essential to market entry; (2) duplication of the facility is not practicable; (3) access to the facility can be provided without interfering with the use by plaintiff's competitor and (4) existence of an agreement between the facility owner and plaintiff's competitor that prevents equitable sharing.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

HN3[] **Sherman Act, Claims**

For a *§ 1* Sherman Act claim, there must be proof of a conspiracy to restrain trade; a unilateral decision to deny access does not violate *§ 1*. This is necessarily so since a monopolist may deal with whomever it pleases provided it has no purpose to restrain trade or further its own interests in the relevant market, and even where it has an interest, it may establish a business justification for its actions.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

A facility is only essential where it is vital to competitive viability, i.e., competitors can not effectively compete in the relevant market without it.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

An owner of an essential facility normally has an unfettered right to refuse to deal with anyone except when it has an economic interest in the relevant market or otherwise limits access for anticompetitive reasons and it has little business justification for its conduct.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

It is the impact upon competition, not a particular competitor that the antitrust laws are designed to protect.

Counsel: [1]** Patrick T. Ryan, Esq., John Chesney, Esq., Philadelphia, Pennsylvania, Mary E. Kohart, Esq., for Plaintiff.

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For Olson-Travelworld, Ltd., By: Deborah F. Cohen, Esq., Philadelphia, Pennsylvania, Frank R. Krok, Esq., Oak Brook, Illinois.

Judges: J. William Ditter, Jr., United States District Judge.

Opinion by: DITTER, JR.

Opinion

[*71] MEMORANDUM AND ORDER

J. WILLIAM DITTER, JR., UNITED STATES DISTRICT JUDGE

In this case, the publisher of several magazines targeted to older persons has refused to accept plaintiff's advertising and, instead, has accepted advertising by plaintiff's rivals. This antitrust action against the publisher and plaintiff's rivals followed.

With the parties consent, I am treating the motion of defendant-publisher, American Association of Retired Persons ("AARP"), for sanctions (document #10) as a motion to dismiss plaintiff's antitrust claims. In response to the motion, plaintiff, Colonial Penn Group, Inc., has identified its antitrust claims as being for: (1) a concerted refusal to deal under *section 1* of the Sherman Act, *15 U.S.C. § 1*; (2) an attempted monopolization in violation of *section 2* of the Sherman **[**2]** Act, *15 U.S.C. § 2*; and *(3)* monopolization in violation of *section 2*.

Accepting as true the allegations in the complaint, I conclude that plaintiff's antitrust claims as pleaded are sufficient to survive the motion to dismiss. As I will explain more fully, however, a critical inquiry central to each claim is whether advertising in the AARP publications is essential to competition in the relevant markets for plaintiff's products [1] and whether AARP's alleged refusal to permit plaintiff to advertise in its publications has an anticompetitive effect in these markets. These questions require a determination of the relevant markets, defendants' actual or prospective power in the relevant markets, and whether advertising in the AARP publications is vital to competition in a particular market as contrasted with being merely advantageous to plaintiff's business. While plaintiff has *alleged* the proper elements, I am skeptical of its ability to make a *prima facie* evidentiary showing to support these allegations. Accordingly, I will order the parties to complete discovery on the issues identified in this opinion. If appropriate, defendant may then move for summary judgment.

[3]** Colonial Penn alleges that AARP, Olson-Travelworld, Inc., and Hartford Insurance Company have conspired to restrain competition for travel services and homeowners and automobile insurance in the relevant markets in this way: AARP publishes three magazines or newsletters ("AARP publications") for its members, who have grown to represent a significant portion of the over-fifty age group. Prior to 1979, AARP only allowed advertising in the publications for products or services that it **[*72]** endorsed. During this period, AARP endorsed the services of Colonial Penn or its related companies for travel and homeowners insurance programs designed to meet the needs of AARP members. In 1979, AARP changed its policy and permitted general advertising except for products it still

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[1] Plaintiff alleges that the relevant products are travel services and homeowners and automobile insurance and that the relevant markets for these products are for persons over the age of fifty. In addition, plaintiff further attempts to limit these markets to AARP members. As plaintiff points out, determination of the relevant market, as there can be only one relevant market for each product, is a fact-specific question focusing on the cross-elasticity of demand for plaintiff's products and their reasonable substitutes. *See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. Moreover, plaintiff, to show that AARP members comprise a discrete market segment, must show distinguishing characteristics of AARP members from the broader population of persons over the age of fifty. Merely defining the relevant market by the readership of the AARP publications without further distinction is plainly insufficient and an exercise in circular reasoning; i.e., defining a market merely by a publication's readership begs the question of whether that publication is an essential facility. In any event, as this is a fact question, this opinion will speak generically in terms of the "relevant market."

endorsed, which included travel services, as well as homeowners and automobile insurance. Unfortunately, from Colonial Penn's perspective, AARP endorsed the programs of defendant Olson-Travelworld, Inc. and Hartford Insurance Company for those services. Consequently, Colonial Penn argues that defendants' actions and the exclusion of the advertisements for its travel services, homeowners, and automobile insurance programs from **[**4]** the AARP publications violates the antitrust laws. In addition, plaintiff, in an effort to add a horizontal nature to the alleged conspiracy, asserts that AARP competes in the markets for travel and insurance products along with Colonial Penn, Olsen, and Hartford because it receives from Olson and Hartford a percentage of revenues and premiums on the endorsed products.

A. *Section 1* claims

Plaintiff alleges that AARP, Olson, and Hartford have conspired to restrain trade by refusing it access to advertising space in the AARP publications, access which is essential to effective competition in the sale of insurance and travel programs in the relevant markets. Plaintiff argues that its *section 1* claim should be analyzed under both a *per se* and a rule of reason approach.

HN1[] A *section 1* action requires proof of four elements: (1) an unlawful, (2) contract, combination, or conspiracy, (3) that produces adverse, anticompetitive effects within the relevant market, and (4) that proximately causes plaintiff's injuries. *E.g., Arnold Pontiac v. GMC, 786 F.2d 564 (3d Cir. 1986)*. Generally, plaintiff must prove the challenged activity has an anticompetitive effect; however, certain **[**5]** categories of conduct that unjustifiably restrict competition are *per se* unlawful. The most obvious example is price fixing. The Supreme Court has cautioned against a knee-jerk announcement of a *per se* rule prohibiting an activity in favor of a threshold determination of whether the challenged activity is likely to have anticompetitive effects. *Business Electronics v. Sharp Electronics, 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; *Northwest Wholesale Stationers v. Pacific Stationery, 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*; *see also Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367 (3d Cir. 1985)* (*per se* approach only applicable to "classic boycotts," i.e., concerted action designed to exclude a person or group from a market or to accomplish some anticompetitive effect).

In *Northwest Wholesale*, the Court examined the actions of a wholesale cooperative to *expel* members from the cooperative and held that such conduct is not the type that is likely to have an anticompetitive effect unless "the cooperative possesses market power or exclusive access to an element essential to effective competition." *Northwest Wholesale, 105 S. Ct. at 2621*. Here, plaintiff **[**6]** alleges that advertising in the AARP publications is necessary to compete in the relevant markets for travel services and homeowners insurance. ***HN2***[] Under the so-called "essential facilities doctrine," plaintiff must prove four elements: (1) existence of a facility whose use is essential to market entry; (2) duplication of the facility is not practicable; (3) access to the facility can be provided without interfering with the use by plaintiff's competitor and (4) existence of an agreement between the facility owner and plaintiff's competitor that prevents equitable sharing. *Hecht v. Pro-Football, 187 U.S. App. D.C. 73, 570 F.2d 982, 992-93 (1977)*, *cert. denied*, *436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978)*; *Century Air Freight v. American Airlines, 597 F. Supp. 564* (S.D.N.Y.), [2] *aff'd*, **[*73]** *738 F.2d 418* (2d Cir.), *cert. denied*, *469 U.S. 1073, 83 L. Ed. 2d 507, 105 S. Ct. 566 (1984)*.

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[2] Case law indicates that satisfaction of the essential facilities doctrine leads to *per se* liability under *section 1*, *see, e.g., Hecht, 570 F.2d at 993 n.45*, primarily because foreclosure of *essential* access to a market *a fortiorari* leads to an anticompetitive effect. It is clear, however, that ***HN3***[] for a *section 1* claim, there must be proof of a conspiracy to restrain trade; a unilateral decision to deny access does not violate *section 1*. This is necessarily so since a monopolist may deal with whomever it pleases provided it has no purpose to restrain trade or further its own interests in the relevant market, *e.g., Official Airline Guides v. FTC, 630 F.2d 920, 927 (2d Cir. 1980)*, *cert. denied*, ***450 U.S. 917, 67 L. Ed. 2d 343, 101 S. Ct. 1362 (1981)***, and even where it has an interest, it may establish a business justification for its actions. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 2858, 86 L. Ed. 2d 467 (1985)*; P. Areeda & H. Hovenkamp, ***Antitrust Law***, para. 736.2f (Supp. 1986). Here, plaintiff alleges both a conspiracy among AARP, Olson, and Hartford and that AARP has an interest in the relevant markets by virtue of its agreements with Olson and Hartford thus raising *per se* liability. Resolution of these questions, however, requires further factual development.

[7]** *HN4*[]

A facility is only essential where it is vital to competitive viability, i.e., competitors can not effectively compete in the relevant market without it. *Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945)* (competition in certain regions seriously restrained where potential competitors of AP members not permitted to buy news from AP); *Home Placement Service, Inc. v. Providence Journal, 682 F.2d 274 (1st Cir. 1982)* (advertisements in classified section of largest regional newspaper essential to compete in the rental referral services market), *cert. denied*, *460 U.S. 1028, 75 L. Ed. 2d 500, 103 S. Ct. 1279 (1983)*. *See generally*, P. Areeda & H. Hovenkamp, ***Antitrust Law***, para. 736.2b (Supp. 1986) (facility is not essential if plaintiff can effectively compete without it). Thus, critical to this inquiry is the definition of the relevant markets, whether advertising in the AARP publications is necessary to compete effectively in those markets, and whether this facility can be duplicated.

Plaintiff alleges that advertising in the AARP publications is the only effective means to market its products to persons over the age of fifty, or the more discrete market of AARP members, and that advertising is necessary **[**8]** to compete in the relevant markets thus raising the essential facilities doctrine. Amended Complaint § 23(c). AARP contends that there are other means of advertising to and reaching the relevant markets and that its refusal to accept plaintiff's advertising has no anticompetitive effect because defendants do not possess any power in these markets. *See generally*, Areeda & Hovenkamp, *supra*, at 736.2d. These arguments, while appealing, raise factual questions appropriate for a jury to consider, or if no material facts are in dispute, for disposition by a motion for summary judgment.

Plaintiff also seems to allege *per se* liability under a classic group boycott or refusal to deal among competitors theory. As a preliminary matter, it is unlikely that AARP is a competitor of either Olson or Hartford simply by virtue of its agreements to endorse their products and to share a percentage of their revenues or premiums. Moreover, plaintiff has not alleged that AARP was a potential competitor or entrant into either relevant market so that its agreements with Olson and Hartford could have restricted competition by eliminating a competitor from the field. In any event, in the absence **[**9]** of proof of the essential facilities doctrine, defendants' conduct is not the type likely to have an anticompetitive effect, *Northwest Wholesale, supra*; and accordingly, should be judged under the rule of reason under which plaintiff must show an adverse effect on competition in the market. *Garshman v. Universal Resources Holding Inc., 824 F.2d 223, 231 (3d Cir. 1987)*.

B. *Section 2* claims

Plaintiff's *section 2* claims are a further assertion of the essential facilities doctrine shrouded in monopoly terms rather than those of conspiracy. Plaintiff alleges that AARP has monopolized an essential facility, advertising, and that it has monopolized or attempted to monopolize the relevant markets for travel and insurance products by refusing access to this facility.

See *Otter Tail Power Co. v. United States, 410 U.S. 366, 377-79, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*; *MCI Communications Corp. v. American Telephone* ***[*74]*** *& Telegraph Co., 708 F.2d 1081, 1133* (7th Cir.), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*. ***HN5***[] An owner of an essential facility normally has an unfettered right to refuse to deal with anyone except when, as alleged here, it has an economic interest in the relevant market or otherwise limits access **[**10]** for anticompetitive reasons and it has little business justification [3] for its conduct. *See, e.g., Home Placement Service, Inc. v. Provident Journal Co., supra; Official*

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[3] Professors Areeda and Hovenkamp have theorized that in a monopoly situation, compulsory dealing, while not favored generally, would not ordinarily restrict desirable activities where the integration of two facilities involved a "no benefit" integration. P. Areeda & H. Hovenkamp, ***Antitrust Law***, para. 1736.(2f) (Supp. 1986).

Aptly, they illustrate a "no benefit" integration by "a monopoly newspaper that happens to own one of a town's two department stores and that refuses to accept advertising from the rival store . . . . Requiring the newspaper to publish the rival's ads . . . would not reduce the incentives of [ ] [the monopolist] with respect to newspapers . . . ." ***Id. at p. 528***. In their illustration, it is

Airline Guides v. FTC, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, *450 U.S. 917, 67 L. Ed. 2d 343, 101 S. Ct. 1362 (1981)*.

As emphasized **[**11]** by AARP, ***HN6***[] it is the impact upon competition, not a particular competitor such as plaintiff, that the antitrust laws are designed to protect. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Plaintiff alleges that defendants' actions have the necessary adverse impact on competition. I must accept this as true despite my skepticism as to plaintiff's portrayal of AARP's overwhelming power, domination, and control over advertising to the relevant markets. I will, however, order the parties to undertake discovery on the elements identified in this memorandum particularly the relevant markets, whether plaintiff can satisfy the elements of the essential facilities doctrine, and whether AARP possesses a monopoly over advertising to the relevant markets. If the evidence does not support plaintiff's allegations on these facts, summary judgment will be appropriate.

ORDER

AND NOW, this 8th day of August, 1988, upon consideration of the motion of American Association of Retired Persons for sanctions, which I am treating as a motion to dismiss with the parties' consent, the motion is denied for the reasons set forth in the accompanying memorandum. It is further ordered that a **[**12]** phone conference, initiated by counsel for plaintiff, shall be held on Thursday, August 18, 1988, at 9:30 a.m., to discuss discovery deadlines and plaintiff's motion for expedited discovery.

End of Document

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clear that the refusal to permit advertising by the rival store inhibits competition since there are only two stores in the market and the newspaper monopolizes advertising access.

Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital System, Inc.

United States Court of Appeals for the Fourth Circuit

June 8, 1988, Argued ; August 10, 1988, Decided

No. 87-1713

Reporter
853 F.2d 1139 *; 1988 U.S. App. LEXIS 11031 **; 1988-2 Trade Cas. (CCH) P68,184; 11 Fed. R. Serv. 3d (Callaghan) 1476; 1988 WL 82194

SANDCREST OUTPATIENT SERVICES, P.A., Plaintiff-Appellant v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC.; SUNHEALTH MANAGEMENT CORPORATION; JOHN BRIGGS; FRANKLIN CLARK; WAYNE WHETSELL; DOUG HENLEY; PERRY HARMON; TOM MCCUTHCHESON, Defendants-Appellees

Subsequent History: Petition for Rehearing and Suggestion for Rehearing In Banc Denied September 15, 1988.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Terrence W. Boyle, District Judge. CA-86-95-3.

Core Terms

local government, board of trustees, ad hoc committee, district court, immunity, by-laws, Staff, medical staff, damages, official capacity, emergency room, Antitrust, discovery, renewed, appointed, injunctive relief, employees, recommend, argues, entitled to immunity, government official, motion to amend, supervision, conspiracy, amend, summary judgment motion, grant summary judgment, summary judgment, antitrust suit, damage suit

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Employees & Officials

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

See 15 U.S.C.S. § 35(a).

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Employees & Officials

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

See *15 U.S.C.S. § 36(a)*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN3[] **Exemptions & Immunities, Parker State Action Doctrine**

In determining whether anticompetitive conduct engaged in by private parties should be entitled to immunity, the United States Supreme Court has held that the challenged restraint must be one "clearly articulated" and affirmatively expressed as state policy, and the anticompetitive conduct must be "actively supervised" by the state itself.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

To satisfy the "clear articulation" requirement of the state action test it is sufficient if the provisions in question plainly show that the legislature contemplated the kind of action complained of.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN5[] **Exemptions & Immunities, Parker State Action Doctrine**

To satisfy the active supervision prong of the test, it is necessary only for the state to exercise ultimate control over the challenged anticompetitive conduct.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Employees & Officials

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

An affirmative grant of explicit authority is not required for an employee or government official to be acting in an official capacity under the Local Government Antitrust Act of 1984, *15 U.S.C.S. § 34 et seq.*

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

The phrase "acting in an official capacity" includes those lawful actions, undertaken in the course of a defendant's performance of his duties, that reasonably can be construed to be within the scope of his duties and consistent with the general responsibilities and objectives of his position.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Employees & Officials

HN8[] **Exemptions & Immunities, Parker State Action Doctrine**

The standards for determining whether a defendant acted in an official capacity, or were directed by government officials or employees acting in an official capacity, are objective ones. These standards do not include a consideration of the defendant's intentions. The court considers only the objective questions: (i) whether, in light of the authority invested in a local government, its officials or employees, the actions complained of are lawful and taken within the scope of their authority; or (ii) whether, if the defendant is not a local government official or employee, the actions are directed by a local government or one of its officials or employees acting within the scope of his authority.

Civil Procedure > Sanctions > Baseless Filings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN9[] **Sanctions, Baseless Filings**

Denial of leave to amend a complaint must be based on a showing of prejudice, bad faith, futility, or dilatoriness associated with the motion.

Counsel: Elizabeth Fairbank Kuniholm (John R. Edwards, Marian R. Hill, Tharrington, Smith & Hargrove, on brief) for Appellant.

Michael Terry Medford (Howard E. Manning, Manning, Fulton & Skinner, on brief); John Gilbert Shaw (Clark, Shaw, Clark, Lingle & Anderson, J. Phil Carlton, David W. Long, Susan Kelly Nichols, Poyner & Spruill; John Huske Anderson, James G. Billings, Robin K. Vinson, Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan; Richard T. Boyette, Theodore B. Smyth, Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, on brief) for Appellees.

Judges: Powell, Associate Justice (Retired), United States Supreme Court, sitting by designation; Wilkinson, Circuit Judge, and Butzner, Senior Circuit Judge.

Opinion by: POWELL

Opinion

[*1140] POWELL, Associate Justice:

The issue presented is whether the district court erred in granting summary judgment in favor of appellees on the question whether they were entitled to immunity from damages pursuant to the Local Government Antitrust Act of 1984. We also consider whether it was improper for the district court to **[**2]** have stayed all discovery, and whether the district court abused its discretion in denying appellant leave to amend its complaint to seek injunctive relief. We affirm the district court in all respects.

[*1141] I

Appellant, Sandcrest Outpatient Services, P.A. ("Sandcrest"), is a professional association of emergency room physicians that, from March 1, 1981 until February 28, 1986, provided physician services for the emergency room at Cape Fear Valley Medical Center (the "Medical Center"), a county hospital owned and operated by appellee Cumberland County Hospital System, Inc. ("Hospital System"). [1] The Hospital System is a nonprofit corporation that was created, pursuant to North Carolina law, to act as an agency and instrumentality of Cumberland County in operating county-owned hospitals. *See* N.C. Gen. Stat. § 131-90, *et seq.* (1981 ed.) (currently codified, as amended, *N.C. Gen. Stat. § 131E-1, et seq.* (1986)). On December 11, 1985, John Plyler, the director of the Medical Center and the representative of SunHealth Management Corporation ("SunHealth") - a corporation that had managed the Medical Center since the fall of 1985 - announced at an executive session of the hospital's **[**3]** Board of Trustees that the Sandcrest contract would not be renewed when it expired on February 28, 1986. A discussion followed, and the next day Plyler informed Sandcrest that its contract would not be renewed. On January 20, 1986, in response to the presentation of a petition signed by 25% of the active medical staff, Dr. Briggs, the Chief of Staff of the Medical Center and a member of the Board of Trustees of the Hospital System, called a special meeting of the medical staff as required by the Medical Staff Bylaws. At the meeting, Briggs explained that the Sandcrest contract would not be renewed and that several emergency room groups had submitted proposals. He advised that an *ad hoc* committee of staff physicians had been appointed to examine the various bids that had been submitted.

On January 22, 1986, two days after the staff meeting, the hospital executed an agreement with Coastal Emergency Services, **[**4]** Inc. for the provision of emergency room services for three years, commencing March 1, 1986. On November 10, 1986, Sandcrest filed this action alleging that appellees -- the Hospital System, SunHealth, Dr. Briggs and the members of the *ad hoc* committee -- had violated *Section 1* of the Sherman Act and Section 75-1 of the North Carolina Unfair And Deceptive Trade Practices Act by engaging in a conspiracy to restrain trade. Specifically, appellant alleged that appellees engaged in a group boycott against it, and that they refused to deal with it as part of a conspiracy to prevent the renewal of its contract to provide physician services to the emergency room at the Medical Center. Sandcrest's complaint sought damages and reasonable attorney's fees and costs.

Appellees filed motions to dismiss under Rule 12(b)(1) and (6), asserting that the complaint failed to allege a sufficient nexus between the alleged conspiracy and its impact on interstate commerce. Sandcrest filed a motion to amend the complaint to add additional allegations regarding a nexus with, and effect on, interstate commerce. Appellees subsequently filed a joint motion for summary judgment asserting, *inter alia*, **[**5]** immunity from suit pursuant to the Local Government Antitrust Act of 1984. On May 6, 1987, in response to a motion by appellees, the district court ordered a stay of all discovery. On July 10, 1987, the court denied appellant's request for limited relief from the stay order. On July 24, 1987, appellant filed a second motion to amend the complaint, seeking to add claims for injunctive relief against all appellees.

On September 3, 1987, the district court allowed appellant's first motion to amend the complaint, granted summary judgment in favor of all defendants on the ground that the appellees were entitled to immunity under the Local Government Antitrust Act, denied appellant's second motion to amend the complaint, and dismissed appellant's pendent state claim. This appeal followed.

[*1142] II

Congress enacted the Local Government Antitrust Act of 1984, *15 U.S.C. § 34, et seq.*, ("LGAA" or the "Act") in order to broaden the scope of antitrust immunity applicable to local governments. This was a response to the filing of "an increasing number of antitrust suits, and threatened suits, that could undermine a local government's ability to govern in the public interest." H.R. Rep. No. 965, 98th **[**6]** Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code

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[1] Documents in the record contain references to the Board of Trustees of Cumberland County Hospital System, Inc. and the Board of Trustees of Cape Fear Valley Hospital, Inc. It is clear, however, and not disputed, that these Boards are one and the same. *See* App. at 86-89.

Cong. & Admin. News 4602, 4603. [2] The Report of the Senate Committee on the Judiciary, in considering the problem of antitrust suits facing local governments, noted that:

> More than one hundred Federal antitrust suits seeking treble damages are now pending against cities, counties, townships and virtually every other type of local government. Dozens of local government activities are being challenged, ranging from zoning decisions to the regulation of garbage collection, airport concessions, and parking lots.

S. Rep. No. 593, 98th Cong., 2d Sess. 2 (1984). The Senate Report concluded that it was necessary to enact a statute that would "allow local governments to go about their daily functions without the paralyzing fear of antitrust lawsuits. . . ." *Id.* at 3. Both the House and the Senate, however, were careful to observe that the immunity being provided to local governments was immunity from suits for damages, and not immunity from suits seeking injunctive relief. *See id.* at 5-6; H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4603.

[7]** It was in the light of the above purpose that, in 1984, Congress enacted *15 U.S.C. §§ 34-36*. *Section 35(a)* ***HN1***[] provides, in relevant part, that no damages . . . may be recovered . . . from any local government, or official or employee thereof acting in an official capacity." *Section 36(a)* ***HN2***[] provides immunity from damages for any person when the claim is "based on any official action directed by a local government, or official or employee thereof acting in an official capacity." Appellant has not appealed the district court's determination that the Hospital System is a local government unit. Therefore, on the antitrust question, we assume that the Hospital System is a government unit and address, in this light, only whether the district court correctly concluded that the other appellees also were entitled to immunity under the Act. [3]

A

Article Six, Section One of the Hospital System's by-laws provides that the Board of Trustees **[**8]** will employ a "Director" with the "concurrence" of the Board of Commissioners of Cumberland County, and that the Director will be the executive officer of the Board and its official spokesman. (App. at 103). In addition, the Director will assume responsibility, among other things, for the "proper operation and management of [the hospital]" and "comphrensive planning on a continuous basis for the future hospital needs of Cumberland County and development of the ways and means to meet these needs." *Id.* In the early fall of 1985, the Hospital System entered into a contract with appellee SunHealth for the management of the Medical Center. Pursuant to this contract, John Plyler, an employee of SunHealth, was named Director.

Appellant argues that SunHealth is not covered by immunity under the Local Government Antitrust Act because only the Board of Trustees had authority to terminate Sandcrest's affiliation with the hospital and to decide on its replacement, and therefore the actions taken by Plyler were **[*1143]** unauthorized and subject to a damage suit. Appellant's claim against SunHealth rests on the announcement by Plyler to the Board of Trustees that "the Sandcrest contract for providing **[**9]** physician services to the emergency room at [the Medical Center] would not be renewed when it expired on February 28, 1986" (app. at 323), and on Plyler's statement to the Board that because the decision had already been made he "saw no need to have the Board of Trustees act on that decision." (App. at 324). Appellant also asserts that Plyler's alleged involvement in the appointment of an *ad hoc* committee to review bids for Sandcrest's replacement was improper. We disagree and find that SunHealth, acting through its

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[2] In *Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)* and *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*, the Supreme Court narrowed the scope of immunity from suit available to local governments under the *Parker* doctrine.

[3] As this issue is dispositive, we do not reach the substantial questions whether the alleged anticompetitive conduct had an effect on interstate commerce or whether appellant has adequately alleged a "conspiracy" under *Section 1* of the Sherman Act, *15 U.S.C. § 1*.

employee Plyler, is entitled to immunity from damages as a "person" engaged in "official action directed by a local government, or official or employee thereof acting in an official capacity." *15 U.S.C. § 36(a)*. [4]

[10]** In interpreting the meaning of the phrase "directed by a local government, or official or employee thereof," we are guided by the statement of the Conference Report to the Local Government Antitrust Act. The Report, explicitly agreed to by both houses of Congress, explains that the phrase "official action directed by" found in *Parker v. Brown, 317 U.S. 341, 351, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* and subsequent cases interpreting it, "shall apply by analogy to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state." H.R. Conf. Rep. No. 1158, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4627.

HN3[] In determining whether anticompetitive conduct engaged in by private parties should be entitled to immunity, the Supreme Court has held that "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy,'" *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)* (quoting *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)* (opinion of Brennan, J.)), and the anticompetitive conduct "must be 'actively supervised' by the **[**11]** State itself." *Id.* (quoting *Lafayette v. Louisiana Power & Light Co., 435 U.S. at 410*). The Court has held that ***HN4***[] to satisfy the "clear articulation" requirement of the state action test it is sufficient if the provisions in question plainly show that the legislature contemplated the kind of action complained of. *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*. Explicit authorization is not required. *Id.* ***HN5***[] To satisfy the active supervision prong of the test, it is necessary only for the State to exercise ultimate control over the challenged anticompetitive conduct. *Patrick v. Burget, 486 U.S. 94, 108 S. Ct. 1658, 1668, 100 L. Ed. 2d 83 (1988)*. In other words, this prong of the test requires that "state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.*

We find that Plyler's action on behalf of SunHealth meets both prongs of this test. The Hospital System by-laws do not prohibit the Director from recommending the termination of a contractual relationship with an outside medical group or from recommending that the Board enter into a contract for the provision of medical services **[**12]** with a particular association. As Director of the Medical Center, Plyler's level of involvement in the operation and improvement of the Medical Center's emergency room services was consistent with his broad authority and responsibility under the Hospital System's by-laws. *See supra* at slip op. p. 7. Although appellant focuses on the **[*1144]** fact that it would have been consistent with the by-laws for the Executive Committee or medical staff to have become involved in this matter, the by-laws do not delegate such responsibility either explicitly or *exclusively* to either of these groups. We find that action taken by SunHealth and complained of by appellant was authorized under the by-laws and within the contemplation of the Board of Trustees. [5] As to the "active supervision" prong of the test, not only was the Board of Trustees aware of Plyler's activities, it had authority to approve or disapprove of them, and the Board ultimately exercised that authority by considering and approving the award of the emergency room service contract to another group. [6]

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[4] The record does not contain sufficient information for us to determine whether SunHealth can be classified as an "employee" of the Hospital System for purposes of immunity under *Section 35* of the LGAA. It may be that, due to the fact that its relationship with the Medical Center was through a management contract, SunHealth cannot be classified as an employee. Nevertheless, we need not resolve this issue because, as stated above, we find that SunHealth was entitled to immunity from damages under *Section 36* of the LGAA.

[5] These facts also compel the conclusion that Plyler's conduct amounted to "official action" within the meaning of *Section 36*.

[6] Appellant's amended complaint explicitly alleges that all the appellees, including the Board of Trustees of the Hospital System, participated in the refusal to renew Sandcrest's existing contract and the refusal to allow it to bid for an additional term. App. 51-53. The affidavit of Dr. Meek, a former member of the Board of Trustees, makes clear that Plyler did not advise the Board that it lacked authority to countermand his decision not to renew Sandcrest's contract. He merely stated that "he saw no need to have the Board of Trustees act on that decision." App. 323-324. In fact, Meek, as a member of the Board, voiced his opposition to Plyler's decision not to renew Sandcrest's contract, and resigned. Despite Meek's arguments, the Board acquiesced in Plyler's

[13]** In light of the record, the district court acted properly in granting summary judgment on the issue of SunHealth's immunity under the LGAA.

B

Dr. Briggs, another appellee, was Chief of Staff of the hospital and a member of the Board of Trustees. Clearly he was an employee of a local government. Appellant argues, however, that Dr. Briggs is not entitled to immunity under the LGAA because he "was acting outside the scope of any authority he might have had as Chief of Staff or as a member of the medical staff. . . ." Appellant's Brief at 32-33. More specifically, appellant asserts that Briggs was not acting "in an official capacity" when he appointed the *ad hoc* committee to receive and review bids from applicants for the emergency room contract. Appellant argues that whether Sandcrest's contract should be renewed, and provision for adequate medical care in the emergency room at the Medical Center, are matters specifically delegated to the medical staff or to the Executive Committee of the medical staff. We disagree, and find that Briggs had authority to act, and acted, in an official capacity in appointing the *ad hoc* committee.

The Hospital System by-laws provide that the Board **[**14]** of Trustees "shall assure that the physicians and dentists granted practice privileges in the hospitals shall organize into a medical and dental staff under staff by-laws approved by the Board of Trustees." (App. at 105). The "Medical Staff By-laws" provide that the Chief of Staff "shall serve as the chief administrative officer of the Medical Staff" (app. at 231), and that his duties include: (i) acting in coordination and cooperation with the Director in all matters of mutual concern within the hospital; (ii) appointment of committee members to all standing, special, and multi-disciplinary medical staff committees except the Executive Committee; and (iii) reporting to the Board of Trustees on the performance and maintenance of quality with respect to the medical staff's delegated responsibility to provide medical care. (App. at 231).

It is true that the by-laws provide that the duties of the Executive Committee include representing and acting on behalf of the medical staff, providing a liaison between the medical staff, the Director and the Board of Trustees, and making recommendations on hospital management matters to the Board of Trustees through the Director. But, contrary to **[**15]** appellant's assertion, nothing in the by-laws indicates that the Executive Committee has exclusive authority to establish committees or **[*1145]** that the Chief of Staff is prohibited from establishing such committees in furtherance of his duties as the chief administrative officer of the medical staff. Appellant is correct that the by-laws do not affirmatively grant the Chief of Staff "the independent responsibility for making any decisions or recommendations regarding the delivery of medical care at the hospital." Appellant's Brief at 14-15. But we think, in view of the broad authority necessarily granted the Chief of Staff, it would be unreasonable to assume that he could act only pursuant to explicit authorization.

Our position that ***HN6***[] an affirmative grant of explicit authority is not required for an employee or government official to be acting in an official capacity under the LGAA is consistent with the position taken by the Second Circuit. *See* Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 94 (2d Cir. 1986). The Second Circuit based its conclusion on a finding that, in light of the legislative history, Congress intended that the phrase "acting in an official capacity" be given **[**16]** broad meaning. *Id.* We believe that, on its face, ***HN7***[] the phrase "acting in an official capacity" includes those lawful actions, undertaken in the course of a defendant's performance of his duties, that reasonably can be construed to be within the scope of his duties and consistent with the general responsibilities and objectives of his position. This interpretation is also supported by the legislative history. [7]

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decision, and it approved and authorized the replacement of Sandcrest. It is clear that the Board had and exercised ultimate control over the conduct of Plyler complained of by appellant.

[7] The original House version of the LGAA provided immunity for claims based on the "official conduct of a local government." *See, e.g.*, H.R. 6027, 98th Cong., 2d Sess. § 3(a), 130 CONG. REC. H8469-8470 (daily ed. August 6, 1984). "Official conduct of a local government" was defined as "any action or inaction of a local government, or its officials, employees or agents, that [they] could reasonably have construed to be within the . . . authority of such local government." *Id.* at § 2(2). The Judiciary Committee House Report explains: "The definition of official conduct allows room for good faith errors by local government officials in conducting the public business." H.R. Rep. No. 965, 98th Cong., 2d Sess. 20-21, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4621.

[17]** In the instant case, Briggs merely set up an *ad hoc* committee to review, assess, and recommend to the Board of Trustees a final disposition on the awarding of a contract to an emergency room service group. Moreover, appellant's various complaints allege that Briggs' appointment of an *ad hoc* committee was carried out "in combination with the Board of Trustees." (App. at 7, 52, 173). Significantly, neither Briggs nor the *ad hoc* committee made a final decision on the awarding of the contract. As we have noted, the Board of Trustees considered and approved the contract with Coastal Emergency Services, Inc. on January 22, 1986. (App. at 313). We conclude that Briggs' conduct was well within the scope of his official responsibilities as the chief administrative officer of the medical staff. No genuine issue of material fact exists to justify the denial of summary judgment on this question.

C

The members of the *ad hoc* committee are appellees in this case based solely on the fact that they served on the committee. Appellant argues first that these private doctors are not entitled to summary judgment on the issue of immunity under *Section 36* because their appointment to the **[**18]** committee was unauthorized. Appellant also contends that there is a factual issue as to whether the committee's activities were taken pursuant to a clearly articulated government policy with active supervision by the local government, an official, or an employee of the local government. **[*1146]** We find these contentions to be without merit. [8]

As discussed previously, Dr. Briggs was acting in his official capacity when he appointed the members of the *ad hoc* committee, and appellant has alleged that the Board of Trustees . . . participated in setting up such a committee. *See supra* at slip op. p. 14. Also, this committee's function was purely advisory. It is clear that the Board of Trustees possessed the power to supervise and review the work of the *ad hoc* committee, and, in fact, the Board actively exercised that power by approving the recommendation of the committee at its meeting on January 22, 1986. (App. at 313).

Appellant argues finally on this issue that there is **[**19]** a factual dispute as to "whether the private defendants exerted so much influence on the Board of Trustees that the decision not to renew Sandcrest and to employ Coastal can be seen as effectively those of the private defendants." Appellant's Brief at 33. But appellant's initial complaint and the first and second amended complaints explicitly allege that the members of the *ad hoc* committee, "*acting in combination with the Board of Trustees*, Briggs and Plyler, secretly determined not to renew Sandcrest's contract. . . ." (App. at 8, 52, 173) (emphasis added). The complaints are devoid of any allegation that the private defendants controlled the decision of the Board of Trustees, and the record contains no evidence from which it could be inferred that the *ad hoc* committee exercised undue influence over the Board of Trustees.

The district court properly granted summary judgment on the issue of immunity as to all appellees.

D

Appellant makes a final argument on the issue of immunity for SunHealth, Briggs, and the *ad hoc* committee members. It argues that, even if appellees' conduct may be considered in a technical sense to have been undertaken within the scope of their authority **[**20]** and under adequate supervision, the LGAA does not protect them. Appellant insists that appellees were participants in an unauthorized conspiracy, and therefore, in reality, their actions were unauthorized and outside the scope of the LGAA's protection.

Although the term "official conduct of a local government," and its definition, were replaced with the undefined phrase "official capacity" in the final version of the LGAA, the House legislative history informs our construction of the phrase "official capacity" by highlighting the concerns of the legislature in drafting the Act. Moreover, the term "official capacity" was contained in the Senate version of the bill, *see, e.g.*, S. 1578, 98th Cong., 2d Sess. § 2(b)(1), 130 CONG. REC. S13574 (daily ed. October 4, 1984), and the Senate Judiciary Committee Report explains: "The intent of [this] provision is to insure that local government officials performing their normal, lawful functions will not be personally responsible for damages when the local government itself is not." S. Rep. No. 593, 98th Cong., 2d Sess. 8 (1984). This definition is broad and consistent with the House legislative history.

[8] As with SunHealth, we need not determine whether the individual doctors who made up the *ad hoc* committee were officials or employees of the county because the immunity provided by *Section 36* of the LGAA is dispositive.

If this view were accepted, the fundamental purpose underlying the LGAA's immunity provisions would be substantially undercut. *See infra* at slip op. pp. 21-22. The basic actions challenged by appellant were the failure to renew its contract to provide emergency room services and the selection of a competitor to provide such services. It must be conceded that hospitals lawfully may make management decisions of this kind, and that the making of such decisions are within the scope of authority of the hospital and its board of trustees. Appellant's argument that allegations of a conspiracy convert otherwise authorized conduct into unauthorized conduct would require consideration of whether the subjective motives or intentions of appellees were to benefit themselves rather than the hospital. The LGAA makes no provision for consideration of a defendant's motives, and an allegation that an act was done pursuant to a conspiracy is akin to an allegation **[**21]** that it was done in bad faith or with malice. *Cf.* *Dorman v. Higgins, 821 F.2d 133, 139 (2d Cir. 1987)* (claim that a probation officer prepared a false presentence report was properly dismissed on grounds of immunity).

III

Appellant argues that, even if summary judgment was appropriate in light of the present record, it was improperly prejudiced by its inability to obtain discovery necessary to oppose the motion. Appellant asserts that without discovery it had little or no access to important facts relating to the authority of the "private defendants" and the specifics of the process by which **[*1147]** Sandcrest was forbidden to compete for the renewal of its contract.

We recognize that to determine whether government officials or employees were acting in an official capacity, plaintiffs, in this type of case, must have access to the facts that are relevant to the scope of authority vested in those officials and employees. Also, in order to determine whether the conduct of a private "person" was "directed" by a local government or an official or employee thereof, a plaintiff is entitled to know the facts relevant to assessing the degree of supervision exercised by government officials or **[**22]** employees over the actions of that person. In this case, however, appellant has failed to demonstrate that it was prejudiced by the district court's stay of discovery. The relevant facts *were* available. Appellant had in its possession the affidavit of an eye witness to the meeting of the Board of Trustees where Plyler spoke about not renewing Sandcrest's contract with the hospital. (App. at 322-325). It also had knowledge of the fact that Dr. Briggs, acting in combination with the Board of Trustees, appointed an *ad hoc* committee to evaluate and recommend a new emergency room service group, that the *ad hoc* committee carried out this function, and that the Board of Trustees acted on its recommendation. Moreover, Sandcrest had access to the by-laws of the medical staff and the Hospital System, and the record contains the relevant minutes of the Board of Trustees meetings. The appellant is not entitled to further discovery merely because the relevant evidence fails to support his claim. The discovery process should not become merely a "fishing expedition." *Cf.* *MacKnight v. Leonard Morse Hospital, 828 F.2d 48, 52 (1st Cir. 1987)*.

Discovery is of particular concern when **[**23]** immunity defenses under the LGAA are at issue. This statute was enacted in 1984, in the words of Congressman Seiberling, "to free our local government officials of the burden of antitrust damage suits so that they may govern in the public interest." 130 CONG. REC. H8470 (daily ed. August 6, 1984) (statement of Rep. Seiberling). *See supra* at slip op. pp. 5-6. Appellant nevertheless contends that the LGAA was enacted only to protect local governments from the damages actually awarded and not to protect local governments from the suits themselves. In making this argument, appellant correctly points out that Congress sought to preserve the right of a private individual to sue for injunctive relief. *See, e.g.*, S. Rep. No. 593, 98th Cong., 2d Sess. 6-7 (1984); H.R. Rep. No. 965, 98th Cong., 2d Sess. 18, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4619. Appellant is incorrect, however, when it states that in providing immunity only from damages, Congress was unconcerned with protecting local governments, and their officials and employees, from the burden of defending damage suits. As Congressman Rodino, a principal sponsor of the bill, noted at the time the House was considering **[**24]** passage of the LGAA:

> There has, in the last 6 years, been a striking increase in the number of private antitrust suits brought against local governments. Although few of these suits have resulted in judgments against local governments, *the costs of litigation* and the widespread concern with antitrust liability, including the possibility of treble damage judgments, *may have severely undercut local officials' ability to govern in the public interest*.

Id. at H8474 (emphasis added).

The Supreme Court's decision in *Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)* provides guidance as to how courts should approach a suit for damages under the LGAA. *Harlow* involved a suit for civil damages against senior aides and advisors of the President of the United States who were alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the plaintiff. The Court held that these officials were entitled to immunity from damage suits if their conduct did not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Id. at 818*. In discussing the need to provide qualified immunity to government **[**25]** officials, the Court explained:

> **[*1148]** It cannot be disputed seriously that claims frequently run against the innocent as well as the guilty - at a cost not only to the defendant officials, but to society as a whole. These social costs include *the expenses of litigation, the diversion of official energy from pressing public issues*, and the deterrence of able citizens from acceptance of public office.

Id. at 814 (emphasis added). The Court added that the objective immunity standards it was setting forth "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id. at 818*. The rationale of the *Harlow* decision applies to antitrust suits against local governments and their officials or employees. [9] The evidence contained in the record before us is more than adequate to justify the district court's determination, and it is difficult to conceive of any evidence that appellant could have introduced to undermine this conclusion.

[26]** ***HN8***[] The standards for determining whether appellees acted in an official capacity, or were directed by government officials or employees acting in an official capacity, are objective ones. As previously discussed, these standards do not include a consideration of the defendant's intentions. The court considers only the objective questions: (i) whether, in light of the authority invested in a local government, its officials or employees, the actions complained of were lawful and taken within the scope of their authority, *see supra* at 13; or (ii) whether, if the defendant is not a local government official or employee, the actions were directed by a local government or one of its officials or employees acting within the scope of his authority. *See supra* at slip op. pp. 8-9. An inquiry into a defendant's subjective intent would, in many cases, require broad-ranging discovery and a trial on the merits. *Accord* *Harlow v. Fitzgerald, 457 U.S. at 815-817*. This would be incompatible with the underlying purpose of the LGAA, that is to protect such defendants not only from damages but also from the expense and time required to litigate such a case.

In view of the allegations contained in the complaint **[**27]** and the facts that were available on the motion for summary judgment before the district court, it cannot be said that the district court abused its discretion in deciding the motion for summary judgment without allowing appellant further discovery.

IV

Finally, appellant argues that the district court abused its discretion by refusing to allow appellant leave to amend its complaint to include a claim for injunctive relief. Appellant emphasizes that *Federal Rule of Civil Procedure 15(a)* provides that leave to amend pleadings "shall be freely given when justice so requires." Moreover, although a district court's decision to deny leave to amend a pleading rests within its sound discretion, this Circuit has held that ***HN9***[] denial of leave to amend a complaint must be based on "a showing of prejudice, bad faith, futility, or dilatoriness associated with the motion." *Ward Electronics Service v. First Commercial Bank, 819 F.2d 496, 497 (4th Cir. 1987)*. Under the facts of this case, we conclude that the district court did not abuse its discretion in denying the motion.

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[9] Although *Harlow* involved qualified immunity from damages and the LGAA provides absolute immunity when the terms of the statute are met, the important point is that a court should strive to resolve the immunity issue as early as possible, with a minimum of expense and time to the parties. This is necessary in order to further the purpose underlying the provision of immunity.

Appellant's motion to add a claim for injunctive relief to its complaint was its second motion to amend the complaint. This **[**28]** motion was made 18 months after the last event giving rise to the causes of action in this case, more than 8 months after the filing of the initial complaint, and five months after the filing of the first motion to amend the complaint. And yet, the motion at issue does not seek to add more particularized or newly discovered facts to **[*1149]** the complaint or to plead a different cause of action. Rather, it seeks merely to add a request for an additional remedy that appellant was or should have been aware of from the outset. For at least 8 months appellant was content to litigate this case based solely on a claim for damages. As a result, in formulating their litigation strategy, appellees were justified in concentrating on an immunity defense. Their various discovery motions and the joint motion for summary judgment were prepared within the context of a damage suit only. In fact, appellant's second motion to amend the complaint followed on the heels of appellees' well-supported joint motion for summary judgment based on immunity under the LGAA. Thus, the proposed amendment appears to have been an after-thought by appellant, possibly prompted only by the concern that it would lose on the summary **[**29]** judgment motion. *Cf.* *Witmeyer v. Kilroy, 788 F.2d 1021, 1024 (4th Cir. 1986)*.

Moreover, based on the allegations of the complaint, it is difficult to understand how the injunctive relief sought by appellant would substantially further the vindication of its rights. Appellant's request for an order "prohibiting the defendants from engaging in anticompetitive conduct in the future" (app. at 183), is overly broad. Moreover, neither the allegations contained in the complaint nor the evidence of record support an inference that appellant needs an order compelling the Hospital System to give it "sufficient notice" or to "allow [it] to submit a bid" upon the expiration of Coastal's contract. *Id.*

Therefore, in light of the facts that: (i) appellant appears to have been dilatory in filing the second motion to amend the complaint, and (ii) the proposed amended complaint fails to allege facts sufficient to demonstrate that justice favors allowing appellant to assert its claim for injunctive relief, we hold that the district court did not abuse its discretion in denying appellant leave to amend his complaint for a second time.

V

The judgment of the district court granting summary judgment **[**30]** in favor of appellees on the issue of immunity under the Local Government Antitrust Act of 1984 and denying appellant's second motion to amend the complaint is affirmed.

Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.

United States Court of Appeals for the Sixth Circuit

August 12, 1988, Decided ; August 12, 1988, Filed

No. 87-1887

Reporter

854 F.2d 135 *; 1988 U.S. App. LEXIS 11077 **; 1988-2 Trade Cas. (CCH) P68,179; 11 Fed. R. Serv. 3d (Callaghan) 1545

KERASOTES MICHIGAN THEATRES, INC., Plaintiffs, Counter Defendants-Appellees, v. NATIONAL AMUSEMENTS, INC., Defendant, Counter Plaintiff-Appellant, GEORGE G. KERASOTES, ANTHONY A. KERASOTES, MARJORIE KERASOTES, LOUIS G. KERASOTES, JOHN G. KERASOTES, ROBERT A. KERASOTES, DENNIS KERASOTES, DAN STONE, KERASOTES INDIANA THEATRES, INC., KERASOTES ADMINISTRATION COMPANY, KERASOTES ILLINOIS THEATRES, INC., KERASOTES MISSOURI THEATRES, INC., KERASOTES IOWA THEATRES, INC., LOUIS KERASOTES CORPORATION AND GEORGE G. KERASOTES CORPORATION, Counter Defendants-Appellees

Subsequent History: Petition for Rehearing by the Original Hearing Panel Denied October 3, 1988.

Prior History: **[**1]** On Appeal from the United States District Court for the Eastern District of Michigan.

Core Terms

monopoly power, leverage, theatres, films, anti trust law, counterclaim, monopoly, Sherman Act, antitrust

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 > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] **Motions to Dismiss, Failure to State Claim**

When reviewing a *Fed. R. Civ. P. 12(b)(6)* motion, an appeals court must accept as true all factual allegations in the complaint.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Motions to Dismiss, Failure to State Claim**

A court must deny the motion to dismiss unless it can be established beyond a doubt that the complainant can prove no set of facts in support of his claim which would entitle him to relief. In an antitrust action, moreover, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN3[] **Monopolies & Monopolization, Attempts to Monopolize**

Leveraging is the use of monopoly power in one market to amplify or leverage a position in another competitive market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN4[] **Monopolies & Monopolization, Attempts to Monopolize**

To run afoul of the antitrust laws, it is not necessary that the party attempting to leverage its monopoly power from a given market into a second market possess monopoly power or dominant market position in that second market.

Counsel: Eugene Driker, argued, Elaine Fieldman, Ellen M. Nerring, Barris, Sott, Denn & Driker, Detroit, Michigan, Attorneys for Appellant.

H.C. Goplerud, David A. Ettinger, argued, Honigman, Miller, Schwartz & Cohn, Detroit, Michigan, John T. Walton, Jr., Detroit, Michigan, Joseph Giffin, Chadwell & Kayser, Ltd., Chicago, Illinois, Attorneys for Appellee.

Judges: Martin and Wellford, Circuit Judges; and Gibbons, District Judge. *

Opinion by: MARTIN, JR.

Opinion

[*136] BOYCE F. MARTIN, JR., Circuit Judge.

National Amusements, Inc., appeals from the *Rule 12(b)(6)* dismissal of its antitrust counterclaim brought against Kerasotes Michigan Theatres, Inc. Because we believe National's claim was improvidently dismissed, we reverse.

National and Kerasotes are the sole motion picture exhibitors in the Flint, Michigan area. Each owns a significant number of theatres in other cities. Litigation between these parties commenced when Kerasotes filed suit alleging that National had used its economic leverage in areas other than Flint to obtain **[**2]** exclusive exhibition rights to films in Flint. In response to this claim, which suit is still in the pre-trial stages, National asserted a counterclaim that Kerasotes had used its monopoly and market position in other geographical regions to coerce distributors into providing them first run films in the Flint area. The district court dismissed National's counterclaim, however, under *F. R. Civ. P. 12(b)(6)*. *658 F. Supp. 1514*. This was done before any discovery was taken on the counterclaim.

* The Honorable Julia S. Gibbons, United States District Judge for the Western District of Tennessee, sitting by designation.

Kerasotes began competing in the Flint area in late 1984 when it purchased four indoor movie theatres. The four theatres have eleven screens. At the time, National owned and operated two indoor theatres having a total of ten screens. According to the counterclaim, which in an appeal from a dismissal under *Rule 12(b)(6)* must be accepted as true, Kerasotes' theatres are old and poorly run whereas National's theatres are among the most luxurious in the country. National alleges that after Kerasotes purchased these theatres, Kerasotes sought to avoid competing with National by trying to arrange a "split" with National for the showing of certain films. After failing in this effort, National alleges, Kerasotes began to **[**3]** use its monopoly position in other geographical markets to obtain films in the Flint market, films Kerasotes would not have otherwise been able to obtain. National alleges in its counterclaim that Karasotes' behavior violated Sections 1 and 2 of the Sherman Act as well as Michigan antitrust statutes.

The district court dismissed these claims, holding that because Kerasotes did not possess a dominant position in the Flint market where it competed with National, Kerasotes' behavior could not have been injurious to competition. Thus, Kerasotes was insulated from antitrust liability. On appeal, National argues only that the district court erred in dismissing its claim that Kerasotes had attempted to leverage its monopoly position in violation of *section 2* of the Sherman Act.

Motions made pursuant to *Rule 12(b)(6)* test whether a cognizable claim has been adequately alleged in a complaint. Rule 8(a) sets out the requirement that pleadings must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Thus, ***HN1***[] when reviewing a *Rule 12(b)(6)* motion, we must accept as true all factual allegations in the complaint. *Windsor v. The Tennessean, 719 **[**4]** F.2d 155, 158 (6th Cir. 1983)*, *cert. denied*, *469 U.S. 826, 83 L. Ed. 2d 50, 105 S. Ct. 105 (1984)*. As we stated in *Nishiyama v. Dickson County, Tenn., 814 F.2d 277, 279 (6th Cir. 1987)*, ***HN2***[] a "court must deny the motion to dismiss unless it can be established beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In an antitrust action, moreover, "the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws." *Newman v. Universal Pictures, 813 F.2d 1519, 1522 (9th Cir. 1987)*.

We believe National has adequately alleged a viable antitrust cause of action sufficient at least to defeat a *Rule 12(b)(6)* dismissal. Kerasotes' alleged behavior, using its dominant market position **[*137]** in non-Flint areas to obtain first run films in Flint, which they would not have been able to obtain in a competitive process, does indeed constitute "leveraging," which is forbidden by the antitrust laws. In *White and White, Inc. v. American Hospital Supply, Co., 723 F.2d 495, 506 (6th Cir. 1983)*, we defined ***HN3***[] leveraging as "the use of monopoly power in one market to amplify **[**5]** or 'leverage,' a position in another competitive market." ***HN4***[] To run afoul of the antitrust laws, it is not necessary that the party attempting to leverage its monopoly power from a given market into a second market possess monopoly power or dominant market position in that second market. As the Second Circuit stated:

> [A] firm violates *section 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. . . . 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 any more palatable. Social and economic effects of an extension of monopoly power militate against such conduct.

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2nd Cir. 1979), *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*.

We continue to find highly persuasive the Supreme Court's treatment of such leveraging behavior in its opinion in *United States v. Griffith, 334 U.S. 100, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*. The Supreme Court declared:

> It is indeed 'unreasonable, per se, **[**6]** to foreclose competitors from any substantial market.' The antitrust laws are as much violated by the prevention of competition as by its destruction. It follows a fortiori that the use

> of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful. A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors.

334 U.S. at 107-108.

We find the behavior discussed above by the Supreme Court to be virtually indistinguishable from that alleged by National to have been committed by Kerasotes. Such behavior is considered to be a "misuise of monopoly power under the Sherman Act" because it results in the licensing "on a non-competitive bases [of films] in what would otherwise be competitive situations." *Id.*

We do not believe the passage of time since the Supreme Court decided *Griffith* has produced any changes in our understanding of economics that militates that we abandon our view **[**7]** that such leveraging behavior constitutes a violation of the antitrust laws. Our improved understanding of economics has led the courts and others to recognize that there may be justifiable explanations and positive results from dealer termination agreements and other vertical agreements. *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 56 U.S.L.W. 4387, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. In the case at hand, however, while the alleged agreement between Kerasotes and its film distributors is vertical, the effect is exclusively horizontal. The sole purpose for such an agreement is to extend a business' dominance from one market into a second market, without having to achieve that dominance in the second market by developing a superior product or as the result of other legitimate competitive advantages.

We expressly reject the district court's reasoning that leverage or the abuse of monopoly power is not actionable when the offender has not yet acquired a dominant position in the affected market. As the Supreme Court stated, "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 **[**8]** 'one that proceeds at **[*138]** full gallup". *Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213-214, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; *see also*, *Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F.2d at 275*. Products that may be inferior should not be allowed to prosper in a particular market as a result of its producer's exploitation of its monopoly position in a second market. Under such situations, potential economic or competitive gains are not identifiable. This is, of course, most clearly so where the alleged offender has used coercion in the market where it validly possesses monopoly power to further extend that power to a second market. Finally, we observe that the antitrust laws prohibit not just the possession of monopoly power but also attempts to restrain trade and impede competition. Thus, it is not determinative that Kerasotes may not presently enjoy a dominant market power position in Flint, the affected market. Furthermore, it cannot be doubted that Kerasotes' alleged conduct, if proven, had a negative impact on competition.

Because we believe that National adequately alleged a *section 2* violation of the Sherman Act, that portion of the district court opinion dismissing this so called "leveraging" **[**9]** claim pursuant to *Rule 12(b)(6)* is hereby reversed.

Dunnivant v. Bi-State Auto Parts

United States Court of Appeals for the Eleventh Circuit

August 15, 1988

No. 87-7652

Reporter
851 F.2d 1575 *; 1988 U.S. App. LEXIS 11137 **; 1988-2 Trade Cas. (CCH) P68,181

Sam DUNNIVANT, d/b/a Sammy's Auto Parts, Plaintiff-Appellant, v. BI-STATE AUTO PARTS; Ardmore Parts; Mid-State Distributing Company; Don's Foreign Auto Electric; Parts Industry Corporation; Parts Distributors Warehouse, Inc., Auto Electric Service of Huntsville, Inc., Harris Welding Supply; Billy Harris, individually; and Paul Spence, individually and as a partner d/b/a Ardmore Parts, and W.C. Butler and Shirley Butler, individually and as partners d/b/a Harris Welding Supply; Mid-State Automotive Distributors, Inc., and S & S Parts Distributors Warehouse, Inc., Thomas W. Harris and Doyle Posey, individually and d/b/a Bi-State Auto Parts, Defendants-Appellees

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Alabama.

Disposition: Affirmed.

Core Terms

suppliers, retailers, business relationship, oxygen, automotive parts, summary judgment, district court, conspiracy, terminate, antitrust, correctly, customers, independent action, do business, Sherman Act, concerted, vertical, reasons, anti trust law, genuine issue, competitors, complaints, cylinders, inventory, averaged, merchant, selling, nonmoving party, specific facts, conscious

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN2[] **Remedies, Damages**

In order to meet a properly supported motion for summary judgment, a plaintiff seeking damages for Sherman Act *section 1*, *15 U.S.C.S. § 1*, violations must present evidence that tends to exclude the possibility that the alleged conspirators were acting independently. The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. Mere complaints of illegal conspiracy that are equally consistent with permissible competition, without more, do not support even an inference of conspiracy. There must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN3[] **Summary Judgment, Burdens of Proof**

The plaintiff has the burden of producing evidence which creates a material issue of fact for trial.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Denial of Allegations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Defenses, Demurrers & Objections, Denial of Allegations**

See *Fed. R. Civ. P. 56(e)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] **Summary Judgment, Entitlement as Matter of Law**

When the moving party has carried its burden, its opponent must do more than simply show that there is metaphysical doubt as to the material facts. The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a *section 1* case, *15 U.S.C.S. § 1*. Indeed, conduct as consistent with illegal conspiracy as with permissible competition does not support an inference of antitrust conspiracy.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN7] **Regulated Practices, Price Fixing & Restraints of Trade**

The plaintiff in an action under 15 U.S.C.S. § 1 must produce evidence which establishes a genuine issue as to whether there was a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

[HN8] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

It is well established that a merchant, whether he be a manufacturer, distributor, wholesaler, or retailer, may choose with whom he will do business and with whom he will not do business; such action generally does not violate the antitrust laws. Thus, the manufacturer can deal or not deal with customers for reasons sufficient to itself. Implicit in the freedom to deal exclusively with one merchant, of course, is the freedom to refuse to deal with a competitor of that merchant.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN9] **Regulated Practices, Price Fixing & Restraints of Trade**

Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN10] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Exclusive dealing does not give rise to antitrust liability. To create a triable issue under Section 1 of the Sherman Act, 15 U.S.C.S. § 1, one has to show concerted anticompetitive conduct by a plurality of actors, in an unlawful arrangement.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

Implicit in the freedom to deal exclusively with one merchant is the freedom to refuse to deal with the competitor of that merchant.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Regulated Practices, Price Fixing & Restraints of Trade**

Antitrust law makes a distinction between concerted and independent action. Independent action is not proscribed. Distributors of merchandise have a right to select their customers and to refuse the sale of goods to anyone for reasons sufficient to themselves.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

Avoidance of summary judgment in an antitrust action under *15 U.S.C.S. § 1* is achieved only where the inference of conspiracy is reasonable in light of competing inferences of independent action or collusive action.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN14[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Vertical agreements on resale prices are per se illegal. The court, however, is careful to narrow this per se rule. Vertical nonprice restraints had not been shown to have such a pernicious effect on competition as to justify per se illegality. The legality of arguably anticompetitive conduct should be judged primarily by its market impact. If interbrand competition exists, this will afford a safeguard against any attempt to exploit intrabrand market power. Vertical nonprice restraints allow suppliers of commerce to earn sufficient profit margins to promote desired services to its customers.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN15[] **Sherman Act, Claims**

Proof of parallel behavior alone does not establish a prima facie case of a Sherman Act, *15 U.S.C.S. § 1 et seq.*, violation. In order to avoid a motion for summary judgment, a plaintiff must come forward with significant probative evidence supporting its theory of conscious parallelism with some "plus" factor which tends to indicate the absence of independent action. In addition, it must be shown that the decisions not to deal are contrary to the defendants' economic self-interest so as to raise an issue of good faith business judgment.

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN16[] **Commercial Interference, Business Relationships**

In Alabama, a defendant will not be liable where it acted for legitimate economic reasons. Bona fide business competition is a justification for intentional interference with a competitor's business.

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Business Torts > General Overview

HN17[] **Commercial Interference, Contracts**

Competition in business, even though carried to the extent of ruining a rival, constitutes justifiable interference in another's business relations and is not actionable.

Counsel: Charles A. Dauphin, Kearney Dee Hutsler, Baxley, Dillard & Dauphin, Attorneys, for Plaintiff-Appellant.

L. Tennent Lee, III, Cleary, Lee, Morris, Smith, et al., Huntsville, Alabama, for Harris Welding Supply.

Thad G. Long, Michael J. Brandt, Bradley, Arant, Rose & White, Birmingham, Alabama, for Auto Electric Service.

Barry A. Ragsdale, James A. Harris, Jr., Sirote, Permutt, et al., Birmingham, Alabama, for Parts, Inc.,

James Francis, Decatur, Alabama, for Harris, Posey and Bi-State Auto Parts.

John McQuiston, II, Goodman, Glazer, Grenner, Schneider & McQuiston, For S & S Auto Parts, Inc.

Ernest L. Potter, Huntsville, Alabama, For Paul Spence adD Ardmore Parts, Attorneys for Paul Spence and Ardmore Parts.

Judges: Hatchett and Cox, Circuit Judges, and Gibson, * Senior Circuit Judge.

Opinion by: HATCHETT

* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Opinion

[*1577] HATCHETT, Circuit Judge:

In this Sherman Act antitrust case, we apply the teachings of *Helicopter Support Systems v. Hughes Helicopter, 818 F.2d 1530 (11th Cir.1987)* to affirm the district court's ruling that no violation of the Sherman Act occurred **[**2]** as a result of the proof developed in this case.

FACTS

In October, 1982, Sam Dunnivant, the appellant, opened an automotive parts store (Sammy's Auto Parts) in Ardmore, Alabama, and continued operation until March, 1985. Three other automotive retail **[*1578]** businesses were also located in Ardmore: Ardmore Parts, Inc. (Spence), Bi-State Auto Parts, and the Otasco Store. Ardmore has a population of less than 2,000.

S & S Auto Parts (S & S), Auto Electric Service, Inc. (Auto Electric), Don's Foreign Auto Electric, Inc. (Don's Foreign Auto), and Mid-State Automotive Distributors, Inc. (Mid-State) are suppliers of automotive parts in the Ardmore area. Dunnivant contacted these suppliers in an effort to stock automotive parts. Initially, Dunnivant could not find a supplier who delivered in Ardmore to sell him automotive parts. As a result, Dunnivant purchased parts from suppliers in Huntsville, Alabama, and transported the parts to his store in Ardmore.

Dunnivant also sold oxygen and acetylene which he purchased from Thompson Welding and Supply in Gurley, Alabama. Alabama Oxygen provided Thompson Welding with oxygen supplies. Because Dunnivant's customers brought their empty gas cylinders to Ardmore **[**3]** Parts (Spence), Paul Spence complained to Alabama Oxygen Company. Spence was accountable to Alabama Oxygen for cylinders used in retail sales and sought to avoid liability for cylinders -- valued at $ 200 -- purchased from Dunnivant. Spence advised Alabama Oxygen that he would no longer purchase its cylinders because of its business with Dunnivant. To appease Spence, Alabama Oxygen advised Thompson Welding and Supply that it could no longer sell to Dunnivant. [1] Dunnivant then attempted to purchase oxygen from Harris Welding Supply Company. Harris Welding decided against conducting business with Dunnivant because it was also in the retail market; the oxygen market averages only $ 300 a month; and Spence had promised Harris Welding all of his business. As a result, Dunnivant discontinued oxygen sales.

In March, 1984, Auto Electric, a supplier to the three retail competitors, began selling automotive parts to Dunnivant, but Dunnivant was still required to supplement his inventory through purchases from Huntsville, Alabama. On April 3, 1984, Paul Spence returned parts and accessories to Auto Electric for credit asserting that he could **[**4]** no longer do business with Auto Electric because of its business relationship with Dunnivant. Spence's purchases from Auto Electric during the three months prior to April, 1984 averaged over $ 1000 per month. Notwithstanding Spence's actions, Auto Electric remained Dunnivant's primary supplier for thirteen months after the loss of the Spence account. During this period, Dunnivant never stocked a full line of inventory and purchased goods only as needed, averaging $ 403 per month in merchandise. Because of Dunnivant's refusal to stock inventory, Auto Electric terminated business relations with Dunnivant and reestablished a business relationship with Spence. Again, Dunnivant attempted to contact suppliers who delivered automotive parts in Ardmore. The suppliers either advised Dunnivant of existing agreements with retailers in Ardmore or determined that Ardmore's small market made a business relationship unprofitable. Because it was economically unfeasible for Dunnivant to continue to transport parts from Huntsville, and because suppliers refused to sell parts to Dunnivant, he went out of business.

PROCEDURAL HISTORY

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[1] Alabama Oxygen is not a party to this action.

Dunnivant filed this lawsuit alleging violations of *sections 1* and *2* **[**5]** of the Sherman Antitrust Act (*see 15 U.S.C. §§ 1* and *2*) and tort claims against his competitors for interference with business relations. All appellees except Mid-State filed motions to dismiss, and Auto Electric and S & S filed motions for summary judgment. The district court entered summary judgment in favor of all appellees except Mid-State. The district court held that Dunnivant "failed to come forward with specific facts showing that there is a genuine issue for trial . . . and that [Dunnivant] has failed to present evidence . . . to exclude the possibility that the alleged conspirators were acting independently." Dunnivant failed to **[*1579]** take a default judgment against Mid-State, and the district court dismissed the complaint for lack of prosecution. Dunnivant filed this appeal.

The issues are: (1) whether the district court applied an improper standard of review in granting summary judgment; (2) whether the evidence shows a concerted refusal to deal; and (3) whether the retailers tortiously interfered with Dunnivant's business relations.

HN1[] *Section 1* of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of **[**6]** trade or commerce among the several states, or with foreign nations is declared to be illegal." *15 U.S.C. § 1*.

STANDARD OF REVIEW

In *Helicopter Support Systems v. Hughes Helicopter, 818 F.2d 1530 (11th Cir.1987)*, this court held that ***HN2***[] in order to meet a properly supported motion for summary judgment, a plaintiff seeking damages for Sherman Act *section 1* violations must present evidence that tends to exclude the possibility that the alleged conspirators were acting independently. *Helicopter, 818 F.2d at 1533-34* (citing *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1470, 79 L. Ed. 2d 775*, *reh'g denied*, *466 U.S. 994, 104 S. Ct. 2378, 80 L. Ed. 2d 850 (1984))*; *see also Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority, 801 F.2d 1286, 1291 (11th Cir.1986)* (where this court in a nonprice fixing case applied the *Monsanto* standard requiring plaintiff to present evidence excluding the possibility of independent action). "The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Hillsborough, 801 F.2d at 1291* (citing *Matsushita Electric Industrial Co., Ltd. v. **[**7]** Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. Mere complaints of illegal conspiracy that are equally consistent with permissible competition, without more, do not support even an inference of conspiracy. *Monsanto, 465 U.S. at 764, 104 S. Ct. at 1470*; *Helicopter, 818 F.2d at 1533*. There must be "direct or circumstantial evidence that reasonably tends to prove that the [parties] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3rd Cir.1980)*, *cert. denied*, *451 U.S. 911, 101 S. Ct. 1981, 68 L. Ed. 2d 300 (1981))*. [2]

Dunnivant argues that the district court impermissibly shifted the burden of proof to him, the nonmoving party, requiring evidence of the alleged **[**8]** conspiracy. The Supreme Court has long settled burden of proof issues in antitrust actions. In *First National Bank v. Cities Service Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1592-93, 20 L. Ed. 2d 569 (1968)*, the plaintiff brought an action against defendants for conspiracy to boycott plaintiff's sale of Iranian oil in violation of federal antitrust laws. The Supreme Court affirmed the district court's grant of summary judgment holding that ***HN3***[] the plaintiff has the burden of producing evidence which creates a material issue of fact for trial. ***HN4***[] *Rule 56(e) of the Federal Rules of Civil Procedure* states that "an adverse party may not rest upon the mere allegations or denials of the . . . pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." As in *Cities Service Co.*, the district court in this case, on the record before it, correctly placed the burden of producing evidence which creates a triable issue upon the nonmoving party. The Supreme Court in *Matsushita* noted:

[2] As in *Monsanto*, we do not suggest that complaints in antitrust cases have no probative value. We only suggest that the burden of proof remains on the antitrust plaintiff to introduce sufficient evidence to exclude the possibility of independent action. *See Monsanto, 465 U.S. at 764 n. 8, 104 S. Ct. at 1471 n. 8*.

> HN5[] When the moving party has carried its burden . . . its opponent must do more than simply show that there is metaphysical doubt as to the material facts. . . . The nonmoving party **[**9]** must come forward with 'specific facts showing that there is a genuine issue for trial.' . . . **[*1580]** [And], where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' [Footnote omitted] [citations omitted].

Matsushita, 475 U.S. at 586-87, 106 S. Ct. at 1356-57; *cf.* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). [3] Further, the district court correctly required Dunnivant to present evidence to exclude the possibility that the alleged conspirators acted independently. *See* Monsanto, 465 U.S. at 764, 104 S. Ct. at 1470. **HN6**[] ***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a section 1 case. Indeed, conduct as consistent with illegal conspiracy as with permissible competition does not support an inference of antitrust conspiracy. *See* Helicopter, 818 F.2d at 1533.

I. *Application* ***[**10]*** *of Standard*

To facilitate a proper understanding of Dunnivant's antitrust claims, we must analyze the business relationships between the various parties as to both vertical and horizontal behavior. The first class of appellees consists of suppliers of automotive parts or bottled oxygen. The second class of appellees consists of Dunnivant's retail competitors, Ardmore Parts (Spence) and Bi-State Auto Parts.

A. Suppliers

1. Auto Electric

In March, 1984, Auto Electric began selling automotive parts to Dunnivant and was the only supplier that delivered parts to Dunnivant in Ardmore. Dunnivant was still required to supplement his inventory through purchases from Huntsville. Spence returned parts to Auto Electric advising it that he could no longer do business with Auto Electric because of its business with Dunnivant. Auto Electric subsequently terminated business relations with Dunnivant and reestablished a business relationship with Spence. In support of his conspiratorial claim, Dunnivant proffered the testimony of William Posey, a former employee of Auto Electric, who testified that the only reason Auto Electric terminated business relations with Dunnivant was due to pressure from **[**11]** Paul Spence.

The district court correctly found that Dunnivant failed to produce specific facts to exclude the possibility that Auto Electric acted independently. Posey's affidavit is consistent with Auto Electric's position of discontinuing sales to Dunnivant. The record is undisputed that Auto Electric remained Dunnivant's primary supplier for thirteen months after the loss of the Spence account. Auto Electric had independent business reasons to terminate its business relationship with Dunnivant: Dunnivant never stocked a full line of inventory, purchased goods only as needed, and averaged $ 403 per month in merchandise. Spence's purchases from Auto Electric during the three months prior to termination averaged $ 1,000 per month.

Dunnivant's assertion that Spence acted with collusive intent is not sufficient. Dunnivant has failed to produce evidence which tends to exclude the possibility of independent action on behalf of Auto Electric. *See* Helicopter, 818 F.2d at 1533-34. Dunnivant **HN7**[] must produce evidence which establishes a genuine issue as to whether there was "a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto, 465 U.S. at ***[**12]*** 764, 104 S. Ct. at 1471 (quoting Sweeney, 637 F.2d at 111). Given Dunnivant's erratic purchases and refusal to stock inventory, Auto Electric had independent business reasons to terminate its relationship with Dunnivant and reestablish a business relationship with Spence. Auto Electric did not contact Spence about resuming their business relationship until after it discontinued selling merchandise to Dunnivant. In

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[3] Notwithstanding the district court's interpretation of the proper legal standard, this court must independently review the district court's order granting summary judgment. *Thrasher v. State Farm Fire & Casualty Co., 734 F.2d 637, 638 (11th Cir.1984)*.

Construction Aggregate Transport, Inc., v. Florida Rock Industries, Inc., 710 F.2d 752 (11th Cir.1983), this court held:

> ***HN8***[] It is well established that a merchant, whether he be a manufacturer, distributor, wholesaler, or retailer, may choose **[*1581]** with whom he will do business and with whom he will not do business; such action generally does not violate the antitrust laws. Thus, the manufacturer can deal or not deal with customers 'for reasons sufficient to itself.' . . . Implicit in the freedom to deal exclusively with one merchant, of course, is the freedom to refuse to deal with a competitor of that merchant. [Citations omitted.]

Florida Rock Industries, Inc., 710 F.2d at 772; *see also* *Monsanto, 465 U.S. at 752, 104 S. Ct. at 1464*; *United States v. Colgate and **[**13]** Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919)*. Again, "***HN9***[] conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588, 106 S. Ct. at 1357*. Dunnivant has failed to meet the *Monsanto* standard, and the district court correctly granted summary judgment in favor of Auto Electric.

2. S & S Auto Parts, Parts Incorporated, and Don's Foreign Auto

Each of the above-named appellee suppliers had an existing relationship with either Spence or Bi-State prior to this action. S & S Parts (PDW) is a "CarQuest" distributor of automotive parts. [4] Paul Spence is the only "CarQuest" automotive parts dealer in Ardmore, Alabama and PDW does business exclusively with Spence. Although the franchise agreement between PDW and Spence does not require that PDW sell only to Spence, PDW's policy in small towns is to sell only to its designated dealers. PDW asserts that this policy is in its best economic interest because it prevents multiple deliveries, small transactions, and credit risks.

Parts Incorporated **[**14]** (PI) is a wholesale automotive parts supplier. PI supplies automotive parts to Bi-State pursuant to an associate agreement which provides an incentive program for retailers and does not restrict PI from selling parts to others. Harvey Miller, PI's general manager, met with Dunnivant on two occasions expressing apprehension as to whether Dunnivant's account would be profitable given the overall volume of business in the area. Miller also expressed a desire to be loyal to his customer, Bi-State.

Don's Foreign Electric, Inc. sells foreign car parts to retailers. Donald Sanders, the owner, stated in his affidavit that Dunnivant's representative contacted him in regard to conducting future business. Although Sanders initially gave his approval concerning the new business, he thereafter rejected a business relationship because of Dunnivant's interest in an adjacent garage business. Sanders has a policy against selling to anyone in the garage business because such a person or entity would be in direct competition with Sanders's other customers. Sanders also based his decision not to sell to Dunnivant on practical business considerations. [5]

[15]** Dunnivant argues that Spence and Bi-State conspired with the above-named suppliers to boycott his operation in violation of antitrust laws. Upon review of the record, we find no concerted action. ***HN10***[] Exclusive dealing does not give rise to antitrust liability. "To create a triable issue under *Section 1* of the Sherman Act, [one has] to show concerted anticompetitive conduct by a plurality of actors, in . . . an unlawful arrangement." *Aquachem Co., Inc. v. Olin Corp., 699 F.2d 516, 520 (11th Cir.1983)* (other citations omitted); *see generally* Annotation, *Refusals to Deal as Violations of the Federal Antitrust Laws*, 41 A.L.R.Fed. 175 (1979). Dunnivant presents no evidence that the retailers threatened or coerced the above-named suppliers in a concerted arrangement. "***HN11***[] Implicit in the freedom to deal exclusively with one merchant . . . is the freedom to refuse to deal with the competitor of that merchant." *Florida **[*1582]** Rock Industries, 710 F.2d at 773*. The appellee suppliers had legitimate business freedom to deal exclusively.

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[4] "CarQuest" represents a specific line of automotive parts.

[5] We are cognizant of Dunnivant's assertion that he has no business interest in the adjacent garage; however, this contention is irrelevant to our analysis. Our focus is centered on whether the suppliers autonomously exercised unilateral action.

HN12[] **Antitrust law** makes a distinction between concerted and independent action. Independent action **[**16]** is not proscribed. Distributors of merchandise have a right to select their customers and to refuse the sale of goods to anyone for reasons sufficient to themselves. *See* Colgate, 250 U.S. at 307, 39 S. Ct. at 468. *See also* Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1192 (5th Cir.), *reh'g denied*, 570 F.2d 1391 (1978).[6] The depositions and affidavits in the record indicate the suppliers made independent business decisions. Thus, the district court correctly granted summary judgment for the suppliers.

3. Harris Welding

Likewise, we find that Dunnivant's evidence of a conspiracy between Spence and Harris Welding is insufficient. Harris Welding articulated several business reasons for refusing to do business with Dunnivant. First, Harris Welding felt it was economically imprudent to provide Dunnivant with oxygen service because it was also in the retail market and the limited retail market in Ardmore averaged only $ 300 per month. **[**17]** In addition, Harris Welding suffered losses when individuals failed to return cylinders -- valued at $ 200 each -- and refused to pay for them. Dunnivant did not assess a rental charge on the cylinders. Moreover, Harris had a long-time business relationship with Spence, and Harris's decision to deal exclusively with Spence is reasonable. Although Spence may have entertained monopolistic aims in the Ardmore oxygen market, HN13[] avoidance of summary judgment is achieved only where "the inference of conspiracy is reasonable in light of competing inferences of independent action or collusive action. . . ." Helicopter, 818 F.2d at 1533 (citing Matsushita, 475 U.S. at 588, 106 S. Ct. at 1357). Harris Welding's refusal to terminate an eleven-year business relationship with Spence suggests nothing illegal; Spence had been a reliable customer. The district court correctly granted summary judgment for Harris Welding.

B. Retailers

No evidence exists to establish an illegal horizontal relationship between the appellee retailers, Spence and Bi-State. The record is devoid of any evidence indicating collusion or concerted action by the two retailers. Although we are aware of Spence's complaints to suppliers **[**18]** concerning their business relations with Dunnivant, this does not alter our conclusion. It is of no moment that Spence's independent actions may have caused Dunnivant economic harm. *See* Garment District, Inc., v. Belk Stores Services, Inc., 799 F.2d 905 (4th Cir. 1986), *cert. denied*, *486 U.S. 1005, 108 S. Ct. 1728, 100 L. Ed. 2d 193 (1988)* (where the court in applying the *Monsanto* standard held that termination may be justified in order to avoid losing a disgruntled customer); *see also* Golf City, Inc., v. Wilson Sporting Goods, Co., Inc., 555 F.2d 426 (5th Cir.1977). We emphasize that mere complaints are not sufficient proof where the complaints are equally consistent with both an independent and a collusive interpretation. Dunnivant must produce evidence which tends to exclude the possibility of unilateral action. Helicopter, 818 F.2d at 1534. In this case, Dunnivant has failed to meet the standard.

II. *Vertical Competition*

The Supreme Court has long established that HN14[] vertical agreements on resale prices are per se illegal. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911). The Court, however, is careful **[**19]** to narrow this per se rule. *See* Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58, 97 S. Ct. 2549, 2561, 53 L. Ed. 2d 568 (1977) (where the Supreme Court refused to extend per se illegality to vertical nonprice **[*1583]** restraints). In Business Electronics Corporation v. Sharp Electronic Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988), the Supreme Court held that "vertical nonprice restraints had not been shown to have such a 'pernicious effect on competition' . . . as to justify per se illegality." Sharp, 108 S. Ct. at 1519 (quoting Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)). "The legality of arguably anticompetitive conduct should be judged primarily by its 'market impact.'" Monsanto, 465 U.S. at 762, 104 S. Ct. at 1470 (citing GTE Sylvania, 433 U.S. at 51, 97 S. Ct. at 2558). If interbrand competition exists, this will afford a safeguard against "any attempt to exploit intrabrand market power." Sharp, 108 S. Ct. at 1520; *cf.* Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Calif.L.Rev. 933, 948-49 (1987). Vertical nonprice restraints

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[6] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir.1981) (in banc), the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

allow suppliers of commerce to earn **[**20]** sufficient profit margins to promote desired services to its customers. *Sharp, 108 S. Ct. at 1521*.

In this case, the suppliers have a legitimate business interest to ensure that its retailers are competent and willing to promote their products. Indeed, the quality of service has a direct bearing on the goodwill of the suppliers or manufacturers. *See* *Sharp, 108 S. Ct. at 1520*; *GTE Sylvania, 433 U.S. at 55, 97 S. Ct. at 2560*. This necessarily requires initial capital investment for advertising and other functions to promote sales. In a competitive marketplace, it is imperative that merchants be allowed the autonomy to exercise independent judgment in order to facilitate this end. To infer conspiracy from terminations or refusals to deal would, in effect, "deter or penalize perfectly legitimate conduct. . . ." *Sharp, 108 S. Ct. at 1520* (citing *Monsanto, 465 U.S. at 763-64, 104 S. Ct. at 1470*). Further, we are satisfied that sufficient competition exists in Ardmore to act as a "significant check" on any attempt to exploit the parts market.

III. *Conscious Parallelism*

Dunnivant also attempts to link the appellee suppliers with the appellee retailers on a theory of conscious **[**21]** parallelism. He argues that each of the individual suppliers was aware of the retailers' conspiratorial objective, thereby constituting a violation of the Sherman Act. ***HN15***[] Proof of parallel behavior alone does not establish a *prima facie* case of a Sherman Act violation. In order to avoid a motion for summary judgment, a plaintiff must come forward with significant probative evidence supporting its theory of conscious parallelism with some "plus" factor which tends to indicate the absence of independent action. In addition, it must be shown that the decisions not to deal were contrary to the defendants' economic self-interest so as to raise an issue of good faith business judgment. *See* *Aviation Specialties, 568 F.2d at 1192*; *see generally* *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*. In this case, because the record clearly indicates economically sound business reasons for the suppliers not to deal with Dunnivant, and because Dunnivant is unable to set forth any significant probative evidence which might suggest to the contrary, his allegation of parallel behavior alone does not establish a *prima facie* **[**22]** case. *See generally* *First National Bank v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*.

IV. *State Claim*

Dunnivant also asserts a state tort claim against the appellee retailers. Dunnivant argues that under Alabama law the actions of the retailers caused tortious interference with his business relationships. In *Griese-Traylor Corp. v. First National Bank of Birmingham, 572 F.2d 1039 (5th Cir.1978)*, this court held that "***HN16***[] in Alabama, a defendant will not be liable where it acted for legitimate economic reasons. Bona fide business competition is a justification for intentional interference with a competitor's business." *Griese, 572 F.2d at 1045*. In *Beasley-Bennett Electric Co. v. Gulf Coast Chapter of National Electrical Contractors Assn., 273 Ala. 32, 134 So.2d 427 (1961)*, the plaintiff advanced essentially the same claim Dunnivant now asserts. In *Beasley*, the plaintiff asserted unlawful **[*1584]** interference with his business relations where defendant/contractors refused to do business with the plaintiff and told other construction companies that if they accepted bids from the plaintiff, the defendants would not give any bids to these companies **[**23]** in the future. The Alabama Supreme Court held that these allegations were insufficient. The court added that "***HN17***[] competition in business, even though carried to the extent of ruining a rival, constitutes justifiable interference in another's business relations, and is not actionable. . . ." *Beasley, 134 So.2d at 429*; *see, e.g., Battles v. San Ann Service, Inc., 441 So.2d 925, 928 (Ala.Civ.App.1983)*. In light of this authority, we are persuaded that Dunnivant cannot recover on his state tort claim.

CONCLUSION

Although summary judgment should be used cautiously in antitrust cases, the district court correctly granted the appellees' motions in this case. *Poller v. CBS, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. To permit an agreement to be inferred merely from the existence of complaints, or even from the fact that a termination resulted from such complaints, could deter or emasculate legitimate conduct. *Monsanto, 465 U.S. at 763-64, 104 S. Ct. at 1470-71*; *see also* *Sharp, 108 S. Ct. at 1520*. As the Supreme Court correctly noted in *Cities Service*:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared **[**24]** 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.

Cities Service Co., 391 U.S. at 290, 88 S. Ct. at 1593.

Because we find no concerted activity, Dunnivant's procedural claim against supplier/Mid-State is dismissed as moot. Accordingly, the district court's grant of summary judgment in favor of the appellees is affirmed.

AFFIRMED.

Sollenbarger v. Mountain States Tel. & Tel. Co.

United States District Court for the District of New Mexico

August 15, 1988, Decided

Civil Action No. 87-1485-SC

Reporter
121 F.R.D. 417 *; 1988 U.S. Dist. LEXIS 13538 **; 1988-2 Trade Cas. (CCH) P68,301

Roger SOLLENBARGER, Raleigh K. Gardenhire, Charles Wheeler and Peter Naumburg, for themselves and all others similarly situated, Plaintiffs, v. MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a Mountain Bell, a Colorado corporation, Defendant

Core Terms

customers, notice, contracts, class action, class certification, plaintiffs', relevant market, parties, antitrust, monopolization, predominance, class member, voidable contract, region, cases, void, member of the class, discovery, omissions, damages, pendent, merits, individual notice, contract law, misrepresentations, users, named plaintiff, pendent claim, certification, phone service

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN1[] Class Actions, Prerequisites for Class Action

The class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Class relief is peculiarly appropriate when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class. For in such cases, the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under *Fed. R. Civ. P. 23*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Judicial Officers > Judges > General Overview

HN2[] Class Actions, Certification of Classes

The trial judge's task in reviewing a motion to certify a class is to concentrate on the facts at the core of the dispute and determine the common legal and factual basis, if any, of the controversy without addressing the merits. The trial judge cannot rule on the merits of the controversy when examining a *Fed. R. Civ. P. 23* motion.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN3[] **Class Actions, Judicial Discretion**

The decision on class certification involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. The trial judge must rigorously scrutinize plaintiffs' various claims and consider if they are amenable to adjudication on a class-wide basis.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN4[] **Class Actions, Judicial Discretion**

Whether a case should be allowed to proceed as a class action involves intensely practical considerations, most of which are purely factual or fact-intensive. Each case must be decided on its own facts, on the basis of practicalities and prudential considerations.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Certification of Classes > Decertification

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN5[] **Class Actions, Certification of Classes**

The decision to certify a class is not set in stone; the trial court retains the power to decertify or modify the class at any time prior to final judgment. *Fed. R. Civ. P. 23(c)(1)*.

Civil Procedure > Parties > Joinder of Parties > General Overview

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 > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN6[] **Parties, Joinder of Parties**

All class actions must satisfy the prerequisites of *Fed. R. Civ. P. 23(a)* which states that one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable ["numerosity"], (2) there are questions of law or fact common to the class ["commonality"], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"], and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"]. The putative class must also satisfy one of the provisions of *Fed. R. Civ. P. 23(b)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN7[] **Class Actions, Certification of Classes**

To satisfy the *Fed. R. Civ. P. 23(b)(3)*, a court must find that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, ["predominance"] and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy ["superiority"]. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action ["managability"].

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Attorneys > General Overview

HN8[] **Class Actions, Certification of Classes**

Competence of counsel is one portion of the *Fed. R. Civ. P. 23(a)(4)* adequacy test for certification of a class. The adequacy requirement looks at both the class representatives and their counsel.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN9[] **Prerequisites for Class Action, Predominance**

A class action is maintainable under *Fed. R. Civ. P. 23(b)(3)* only if there is a finding that common questions predominate over individual issues. Since this obviously is a more stringent standard than that prescribed by *Fed. R. Civ. P. 23(a)(2)*, *rule 23(a)(2)* is satisfied any time the court finds that the *rule 23(b)(3)* test is met.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN10[] **Prerequisites for Class Action, Adequacy of Representation**

The typicality requirement for class certification under *Fed. R. Civ. P. 23(a)(3)* assures that the claims of the representative party are similar enough to the claims of the class so that he will adequately represent them. The class representative must possess the same interest and suffer the same injury as the class members. However, the claims of the representative and the class need not be identical. Different fact patterns or amounts of damages will not necessarily defeat typicality.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

A Sherman Act monopolization claim plaintiff must show that the defendant had (1.) monopolization power, (2.) over the relevant geographic and product market, (3.) gained by exclusionary or anti-competitive means that (4.) causes an injury cognizable under ***antitrust law***.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN12[] **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*. Thus, the fact that a petitioner was deprived of only money, albeit a modest 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 the injury she suffered or the intrinsic meaning of property in § 4. Consumers of retail goods and services have standing to sue under § 4.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN13[] **Exemptions & Immunities, Parker State Action Doctrine**

The state action defense shields anti-competitive conduct by private parties when state policy condones the conduct and the state actively supervises the conduct.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Constitutional Law > Relations Among Governments > Full Faith & Credit

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Constitutional Law > Relations Among Governments > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN14[] **Preclusion of Judgments, Full Faith & Credit**

A multistate class action raises constitutional choice of law problems. The *due process clause of the Fourteenth Amendment* and the *full faith and credit clause of article IV, § 1 of the Constitution* are not violated if the law of the forum state is not in conflict with that of any other jurisdiction connected to the suit. If the laws of the various states involved in the suit are in conflict, the court must then consider if an exercise of personal jurisdiction over the foreign state parties is appropriate.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

HN15[] **Affirmative Defenses, Fraud & Misrepresentation**

A misrepresentation is an assertion that is not in accord with the facts. Concealment and in some cases non-disclosure of a fact are equivalent to such an assertion. A misrepresentation may have three distinct effects under the rules stated in this Chapter. First, in rare cases, it may prevent the formation of any contract at all. Second, it may make a contract voidable Third, it may be the grounds for a decree reforming the contract.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN16[] **Class Actions, Prerequisites for Class Action**

The mere fact that the various members of the class will benefit unevenly is no such conflict as will preclude the maintenance of a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN17[] **Class Actions, Prerequisites for Class Action**

The mere fact that some class members may not wish to become members of the class or pursue claims against the defendant does not indicate that their interests are antagonistic to those of the named plaintiffs or the remainder of the class, so that class action treatment would be inappropriate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN18[] **Class Actions, Prerequisites for Class Action**

Every member of the class need not be in a situation identical to that of the named plaintiff. It is to be recognized that there may be varying fact situations among individual members of the class and this is all right so long as the claims of the plaintiffs and the other class members are based on the same legal or remedial theory.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN19[] **Class Actions, Certification of Classes**

The predominance inquiry under *Fed. R. Civ. P. 23(b)(3)* for the certification of a class is essentially a pragmatic decision by the district judge to determine if one or more of the central issues in the action are common to the class. The requirement ensures that claims of class members will be so similar that prosecution by a few members of the class will be fair and dictates that a court balance the interests of the litigants. The Tenth Circuit interpretation of *rule 23(b)(3)* focuses on the existence of a common nucleus of operative facts.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN20[] **Class Actions, Judicial Discretion**

If there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN21[] **Class Actions, Judicial Discretion**

Fed. R. Civ. P. 23(c)(2) provides that in any class action pursuant to *Fed. R. Civ. P. 23(b)(3)*, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. To comport with due process individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN22[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

A determination to assume pendent jurisdiction is not irrevocable. The issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleadings stage.

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Judges: Frank G. Theis, United States District Judge.

Opinion by: THEIS

Opinion

[*420] OPINION AND ORDER

FRANK G. THEIS, UNITED STATES DISTRICT JUDGE.

This matter comes before the court on plaintiffs' motion for certification of a plaintiff class under *Fed. R. Civ. P. 23(b)(3)* and defendant's motion to dismiss plaintiffs' pendent state law claim. The proposed class includes all present and past customers of Mountain Bell ("MB") who contracted for inside wire maintenance service ("IWMS") between 1982 and the present. Dkt. no. 47, para. 8(a). Plaintiffs contend MB monopolized IWMS in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*, and that IWMS contracts are void or voidable under state contract law. The maintenance contracts at issue cover the wire that runs from the exterior of a house, through the walls, to the phone jack on an interior wall where the customer plugs a phone in. The court received extensive briefs and exhibits and **[**2]** heard oral arguments on the class certification question. The court denied, though, MB's request for an evidentiary hearing on class certification. Dkt. no. 77. The court is now prepared to rule on the pending motions.

A short history of IWMS litigation against MB is helpful background information. In fall 1987, the state of Colorado filed suit against MB over the sale of IWMS in Colorado; the case quickly settled. Dkt. no. 47, para. 9(b)(4); Dkt. no. 51, para. 6. Plaintiffs filed the instant suit in New Mexico as a class action on behalf of New Mexico MB IWMS customers in December 1987. The complaint included state and federal antitrust, voidable contract, fraud and New Mexico statutory consumer protection counts. Dkt. no. 1. Two months later, plaintiffs amended their complaint: they expanded the geographic scope of the suit from New Mexico to all seven states MB operates in (Arizona, Colorado, Idaho, Montana, New Mexico, Wyoming, Utah); they expanded the class definition from those who contracted for IWMS by the negative option method (described below) to all IWMS customers; they dropped the state antitrust and consumer protection law counts; they retained the federal antitrust **[**3]** and pendent state law fraud and voidable contract claims. Dkt. no. 18. The court granted the motion to file the first amended complaint. Dkt. no. 45. The court granted MB's motion, however, to stay discovery on the seven state class action prior to class certification. *Id.* at 13. Plaintiffs' counsel filed state statutory and common law actions in three of the seven states, New Mexico, Colorado, and Montana, in late 1987 or early 1988 to toll the statute of limitations in those states. Tr. of Oral Argt. at 25.

IWMS contracts are a by-product of the deregulation of the telephone industry. Prior to 1982, MB, like all regional telephone companies, provided all facets of phone service and billed the customer with a single monthly charge. The one charge included an amount for MB's maintenance of the inside wire; however, the monthly bill did not break out the components of the single monthly charge. After a 1982 FCC order, all regional phone companies had to terminate some types of phone services, repairing phones for instance, while other services, like IWMS, became *optional* for customers. Phone customers could contract with MB for IWMS, do the work themselves or hire a third **[**4]** party to service the inside wire. Plaintiffs allege MB devised a plan to monopolize IWMS contracts and continue to provide IWMS to its customers, despite the optional nature of the service. Dkt. no. 47 at paras. 16-30.

The named plaintiffs are four New Mexico residents who began phone service prior to 1982 and allegedly were victims of the first phase of MB's alleged monopolization plan. All plaintiffs assert they initially contracted with MB for IWMS via the "negative option" or "opt out" method. **[*421]** Sollenbarger Depo. at 7-9; Naumburg Depo. at 16; Wheeler Depo. at 12, 61; Gardenhire Depo at 14-15. MB sent out negative option notices to its customers in the seven states with the monthly billing statement in late 1982 or early 1983. The labels, negative option and opt out, describe the choice MB gave its customers in the notice: you will continue to have an IWMs contract unless you notify us that you do not want an IWMS contract.

Plaintiffs assert the opt out contract is void or voidable and part of MB's monopolistic conduct because: (1.) customers contracted for IWMS if they did nothing; (2.) MB knew that few customers would read the notice MB sent with the regular monthly billing, and **[**5]** MB would retain a dominant share of IWMS contracts; (3.) if a customer read the notice, it did not adequately convey the optional nature of the service or provide IWMS contract terms. Dkt. no. 47 at paras. 17-19.

Three of the four class representatives, Sollenbarger, Naumburg, and Wheeler, allege injury from the second and ongoing pattern of reportedly illegal conduct by MB. Plaintiffs contend MB maintains its monopolistic control over IWMS contracts with *new* customers and those who change service (hereinafter "movers") by failing to disclose material information about IWMS in its oral representations to movers when they begin phone service with MB. *Id.* at para. 21. These three plaintiffs changed service at some time after the negative option sale and had personal contact with an MB customer service representative. The three named plaintiffs remember conversations with customer representatives but do not recall questions about IWMS. Sollenbarger Depo at 16-17, 54 ("well, typically, I'm the kind of guy that would not order a maintenance contract."); Wheeler Depo. at 66, 69-76; Naumburg Depo. at 18-21, 28, 52 (Naumburg is a real estate broker and called MB a number of times.).

[6]** All four named plaintiffs participated in the third phase of MB's allegedly illegal conduct. Between 1982-87, state utility regulatory commissions had authority to regulate IWMS. After January 1, 1987, an FCC order completely deregulated IWMS. In late 1986 or early 1987 MB informed all of its customers, except Montana customers, about the end of government regulation over IWMS and that MB would send IWMS agreements to them in a short time. Dkt. no. 67 at 9, paras. 11-13. Plaintiffs allege MB failed to send out the promised agreements until late in the next year, continued to use the negative option sales method and failed to provide material information in the contract it did sent out. Dkt. no. 47 at paras. 23-29.

Plaintiffs' second and third counts arise under state voidable contract and fraud law. The state law counts allegedly arise from the same facts that support the monopolization claim of count I. Dkt. no. 47, Counts II and III; Tr. of Oral Argt. at 22 ("We've got identical facts for both claims."), 27.

MB's answer to the first amended complaint denied the substantive allegations of plaintiffs' complaint. Dkt. no. 51 at paras. 1-22. MB counterclaimed on an unjust enrichment **[**7]** theory. MB contends that if a plaintiff class is certified and liability is ultimately assessed against MB, it should receive a set off against each plaintiff's recovery for the value of the service calls it performed. *Id.* at 9-10.

After addressing both the voidable contract and fraud claims in its two briefs on class certification, Dkt. nos. 33 & 73, plaintiffs' counsel apparently abandoned the fraud claim at oral argument. Counsel relied exclusively on contract law that allows a party to void a contract previously entered into because of material omissions in the contract terms, *Restatement (Second) of Contracts §§ 159*, *160*, *162-164*, *167*; 12 *Williston on Contracts* § 1515 at 480, § 1515C at 495 (W. Jaeger ed. 1970). Tr. of Oral Argt. at 17, 71-72. Counsel also stated, "it's not an active fraud case, its a concealment case, and it's concealment in relationship to inducement of a contract." *Id.* at 19 and 14-15. Plaintiffs also relied exclusively on the contract theory in its response to the Motion to Dismiss the Pendent Claims. The court's analysis of the state law claim proceeds on the theory advocated **[*422]** by counsel at and after oral argument.

The court will address the documentary **[**8]** evidence submitted by the parties in various sections below.

I. CLASS ACTION PRINCIPLES

A class action suit is a unique procedural device to efficiently litigate issues common to a large number of parties. The Supreme Court recently explained the purpose of class action suits:

> *HN1*[] The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' *Califano v. Yamasaki, 442 U.S. 682, 700-701 [61 L. Ed. 2d 176, 99 S. Ct. 2545]*. Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.' *Id., at 701*. For in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under *Rule 23*.'

Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 155, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982) (citations omitted).

HN2[] The trial judge's task in reviewing a motion to certify a class is to "concentrate on the facts at the core of the dispute and determine the common legal and factual basis, if **[**9]** any, of the controversy without addressing the merits." *Thompson v. Midwest Found. Indep. Physicians Ass'n., 117 F.R.D. 108, 109 (S.D. Ohio 1987)*. The district judge cannot rule on the merits of the controversy when examining a *Rule 23* motion. "We find nothing in either the language or history of *Rule 23* that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule. . . ." *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*.

The district court cannot divorce itself, however, from the plaintiff's cause(s) of action. *HN3*[] The decision on class certification "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Falcon, 457 U.S. at 160* (citations omitted). The trial judge must "rigorously" scrutinize plaintiffs' various claims and consider if they are amenable to adjudication on a class-wide basis. *Falcon, 457 U.S. at 161*; *McCarthy v. Kleindienst, 239 U.S. App. D.C. 247, 741 F.2d 1406, 1412 n.6 (D.C. Cir. 1984)*; *Joseph v. Gen. Motors Corp., 109 F.R.D. 635, 638 (D. Colo. 1986)*.

[10]** The district judge enjoys a wide amount of discretion when deciding whether a suit should proceed as a class action. The Tenth Circuit explained that *HN4*[] "whether a case should be allowed to proceed as a class action involves intensely practical considerations, most of which are purely factual or fact-intensive. *See [United States Parole Comm'n v.] Geraghty, 445 U.S. [388,] at 402-03 [100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)]*. Each case must be decided on its own facts, on the basis of 'practicalities and prudential considerations.' *Id. at 406 n.11*." *Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir. 1988)*.

HN5[] The decision to certify a class is not set in stone; the trial court retains the power to decertify or modify the class at any time prior to final judgment. *Fed. R. Civ. P. 23(c)(1)* ("An order under this subdivision . . . may be altered or amended before the decision on the merits."); *Falcon, 457 U.S. at 160* ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." (footnote omitted)); *In re School Asbestos Litigation, 789 F.2d 996, 1011 (3rd Cir. 1986)* ("[A] district court must necessarily enjoy wide discretion, **[**11]** and we are not inclined to reverse a certification before the district judge has had an opportunity to put the matter to a test. We point out the critical fact that certification is conditional. **[*423]** When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper."), *cert. denied, 479 U.S. 852, 107 S. Ct. 182, 318, 93 L. Ed. 2d 117 (1986)*.

Plaintiffs must demonstrate that the requirements of *Fed. R. Civ. P. 23* are satisfied. *Rex v. Owens ex rel. Oklahoma, 585 F.2d 432, 435 (10th Cir. 1978)*; *Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 463 (10th Cir. 1974)*. *HN6*[] All class actions must satisfy the prerequisites of *Rule 23(a)*:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable ["numerosity"], (2) there are questions of law or fact common to the class ["commonality"], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"], and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"].

Fed. R. Civ. P. 23(a).

The putative **[**12]** class must also satisfy one of the provisions of *Rule 23(b)*. Plaintiffs assert compliance with *Rule 23(b)(3)*:

> ***HN7***[] the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, ["predominance"] and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy ["superiority"]. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action ["managability"].

Fed. R. Civ. P. 23(b)(3).

II. CLASS CERTIFICATION

Several of the *Rule 23(a)* requirements are not in dispute. First, the numerosity criterion is not challenged by MB. Plaintiffs estimate the seven state class includes at least three million current MB customers and an unknown number **[**13]** of past customers. *Fed. R. Civ. P. 23(a)(1)* is satisfied. Second, the competence of plaintiffs' counsel is not questioned by MB or the court. Dkt. no. 33, Ex. C (affidavits of class counsel). ***HN8***[] Competence of counsel is one portion of the *Rule 23(a)(4)* adequacy test. *Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 697 (7th Cir. 1986)*; *Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986)* ("The 'adequacy' requirement looks at both the class representatives and their counsel.").

The court also finds that some of the requirements of *Rule 23(a)* are subsumed within other provisions of the Rule; therefore, the court need not discuss them in separate sections to faithfully and fully examine the entire class certification issue. First, Professors Wright, Miller and Kane approve of reviewing the *Rule 23 (a)(2)* commonality question while analyzing the *Rule 23(b)(3)* question of predominance of common issues to the class and named representatives. They explain: ***HN9***[] "An action is maintainable under *Rule 23(b)(3)* only if there is a finding that common questions predominate over individual issues. Since this obviously is a more stringent standard than that prescribed by *Rule 23(a)(2)*, **[**14]** *subdivision (a)(2)* would be satisfied any time the court finds that the subdivision (b)(3) test is met." 7A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1763 at 227 (2d ed. 1986) (hereinafter *Federal Practice).* The court will address the commonality arguments within the *Rule 23(b)(3)* discussion.

The second merger of tests within *Rule 23(a)* involves the (a)(3) requirement of typicality and the (a)(4) requirement that the named representative adequately represent the entire class. *See* *Falcon, 457 U.S. at 157 n.13*. The tests merge because "'if the representatives' claims are not typical of the class, they cannot adequately protect the interests **[*424]** of the absent class members.'" *Spivak v. Petro-Lewis Corp., 118 F.R.D. 504, 509-10 (D. Col. 1987)* (citing *Kas v. Financial Gen. Bankshares, Inc., 105 F.R.D. 453, 461 (D.D.C. 1984))*. The court finds *Falcon* and *Spivak* persuasive and will not burden this lengthy opinion with a repetitive section. The court will focus on the subdivision (a)(3) test.

A. MONOPOLIZATION CLAIM

MB attacks the antitrust count with three typicality arguments. Dkt. no. 67 at 17-27. ***HN10***[] The typicality requirement "assures that the **[**15]** claims of the representative party are similar enough to the claims of the class so that he will adequately represent them." 7A *Federal Practice* § 1768 at 232-33. The class representative must "'possess the same interest and suffer the same injury' as the class members." *East Texas Motor Freight System Inc. v. Rodriguez, 431 U.S. 395, 403, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977)* (citation omitted). The similarity in interests between the representative parties and the rest of the class insures an absence of conflict between the two groups. *In re Texas Int'l. Sec. Litig., 114 F.R.D. 33, 44 (W.D. Okla. 1987)*. The existence of significant antagonistic interests between the representatives and the class would defeat class certification.

Albertson's Inc. v. Amalgamated Sugar, 503 F.2d 459, 463 (10th Cir. 1974). The claims of the representative and the class need not be *identical,* though; different fact patterns or amounts of damages will not necessarily defeat typicality. *Texas Int'l. Sec. Litig., 114 F.R.D. at 44*; *Joseph v. Gen. Motors Corp., 109 F.R.D. 635, 640 (D. Col. 1986)*; 7A *Federal Practice* § 1764 at 235-41.

HN11[] A Sherman Act monopolization claim plaintiff must show that the defendant **[**16]** had (1.) monopolization power, (2.) over the relevant geographic and product market, (3.) gained by exclusionary or anti-competitive means that (4.) causes an injury cognizable under ***antitrust law***. *15 U.S.C. §§ 2*, *15*; *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*.

MB's first typicality argument attacks the relevant market requirement. MB contends the relevant market is not the seven state region or even the seven separate states MB serves. Instead, MB insists at least 200 relevant markets exist within the seven states. MB's theory is that the relevant market area is localized. A competing IWMS company could only provide efficient and effective service to each large town in the region or portions of a metropolitan area. Hence, MB divides the seven states into 200 relevant markets based on centers of population.

MB proffered an expert witness to explain their relevant market theory to the court. Dkt. nos. 59, 72. The court denied an evidentiary hearing on this point because the relevant market, either geographic or product, is almost exclusively a fact question for the jury. Dkt. no. 77 at 3; *Westman Comm'n. Co. v. Hobart Int'l. Co., 796 F.2d 1216, 1220* ***[**17]*** *(10th Cir. 1986)*; *Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242, 245-6 (10th Cir. 1976)*, *cert. denied, 429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977)*; *Telex Corp. v. Int'l. Business Mach., 510 F.2d 894, 915 (10th Cir. 1975)* (per curiam), *cert. dismissed, 423 U.S. 802, 46 L. Ed. 2d 244, 96 S. Ct. 8 (1975)*; *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 661 F. Supp. 1448, 1463 (D. Wyo. 1987)*; *Assoc. of Indep. Television Stations, Inc. v. College Football Assoc., 637 F. Supp. 1289, 1300 (W.D. Okla. 1986)*; ABA Antitrust Section, ***Antitrust Law*** *Developments* 113-14 (2d ed. 1984).

The court feared that at an evidentiary hearing the parties would have marshaled a "battle of the experts" on the relevant market issue. A fact specific documentary hearing would switch the court from the permissible inquiry of seriously examining plaintiffs' legal theory in the context of class action litigation, as required by *Falcon,* into the impermissible realm of a mini-trial on a merits issue that is precluded by *Eisen.* The testimony proffered by MB would have gone to the heart of an issue that could completely eliminate the monopolization claim and remove the jurisdictional basis for the voidable contract **[**18]** **[*425]** claim. Plaintiffs would have had to vigorously defend the relevant market point to prevent a total dismissal of their suit. The court could not countenance this scenario in light of *Eisen* and the stay on merits discovery.

Moreover, plaintiffs' claim of a single market of seven states or seven markets defined by state boundaries is colorable under existing law and facts. In two different cases, the Supreme Court approved nationwide or regional relevant market determinations in situations where the defendant provided localized service. *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*; *United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. The *Grinnell* Court considered an allegation of monopolization of fire and police alarm service stations. The stations were the sole, centralized receiving points for fire and police alarms in cities across the country. The Court approved the district court's finding of a national relevant market:

> The activities of an individual station are in a sense local as it serves, ordinarily, only that area which is within a radius of 25 miles. But the record amply supports the conclusion that the business of providing such a service **[**19]** is operated on a national level. There is national planning. The agreements we have discussed covered activities in many States. The inspection, certification and rate-making is largely by national insurers. The appellant ADT [a Grinnell Corp subsidiary with a 73% share of the national market] has a national schedule of prices, rates, and terms, though the rates may be varied to meet local conditions.

Grinnell Corp., 384 U.S. at 575.

The *Otter Tail* Court let stand the jury's conclusion that a three state relevant market existed. *410 U.S. at 369-70*. Otter Tail Power Company competed in 510 towns within its multistate relevant market against the local municipal power entities and nearby rural electric cooperatives for the exclusive rights to retail electricity in the municipality. *Id.* The numerous local arenas of competition did not defeat a regional definition of the relevant market.

Plaintiffs' limited discovery on this merits issue has produced some probative documents. While MB argues that there are 200 relevant markets, it analyzes IWMS participation on a state-wide basis, Dkt. no. 31, Ex. C (79% participation rate for each state MB services in a April 13, 1984 memo), **[**20]** or a region-wide basis, Dkt. no. 73, Ex. H at 0033709 ("Presently [October 1984], about 80% of our residence customers have a basic wire maintenance plan with Mountain Bell."). When discussing the problems of notifying IWMS subscribers about the complete deregulation of IWMS, an MB manager described MB activity by states, not by smaller regions. Dkt. no. 73, Ex. J. MB's Idaho general counsel described legal problems in state-wide terms. Dkt. no. 33, Ex. D.

In short, MB's state or region-wide activity, even with numerous local service outlets, may fall within the parameters of *Grinnell Corp.* or *Otter Tail.* The court at this juncture cannot and should not determine this point. *Foltz v. U.S. News & World Report, Inc., 106 F.R.D. 338, 341 (D.D.C. 1984)* ("In view of the fact that the plaintiffs have presented a colorable case on the merits, the sufficiency of their fraud allegations does not enter into the class certification equation."); *In re Indep. Gasoline Antitrust Litig., 79 F.R.D. 552, 561 (D. Md. 1978)* ("The possibility that plaintiffs will not be able to prove their allegations at trial is not a proper basis for denying class certification." (citations omitted)).

[21]** MB's legal authority on this point is inapposite. MB cites three cases for the unremarkable proposition that if numerous local markets exist the court could not certify a class because the class members from each market would have antagonistic interests. Dkt. no. 67 at 21. The cited cases are easily distinguishable. This court is not faced with readily apparent, distinct relevant markets such as the "36 warehouses [auction barns] in 11 geographic markets" that the court considered in *Windham v.* ***[*426]*** *American Brands, Inc., 565 F.2d 59, 62 (4th Cir. 1977)* (en banc), *cert. denied, 435 U.S. 968, 56 L. Ed. 2d 58, 98 S. Ct. 1605 (1977)*, or the exclusive franchise territory agreements between the defendant brewers and their wholesalers in *Vasiliow Co. v. Anheuser-Busch, Inc., 117 F.R.D. 345, 347 (E.D.N.Y. 1987)*.

In *Abrams v. Interco Inc., 719 F.2d 23, 29-30 (2d Cir. 1983)*, plaintiffs did not allege a pattern of price fixing in their proposed nationwide consumer class action. Without an allegation of anti-competitive conduct common to all plaintiffs or significant guidance from the trial court on its reasons for rejecting class certification, the *Abrams* court concluded innumerable local markets existed for **[**22]** the 3500 dealers of consumer items like Florsheim shoes and London Fog coats. *Id. at 30-31*. The court is confronted here with allegations of a region-wide monopolization plan, for *one* product and an easily identified plaintiff class.

MB's second antitrust typicality argument concerns the "antitrust injury" prong of a monopolization claim. MB cites to and quotes from several cases that enunciate a standard definition of the type of injury a monopolization plaintiff must suffer, i.e.: an "injury of the type the antitrust laws were intended to prevent. . . ." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; Dkt. no. 67 at 25. If MB is implicitly arguing that plaintiffs have not suffered an injury covered by § 4 of the Clayton Act, *15 U.S.C. § 15*, MB is incorrect. The Court in *Reiter v. Sonotone Corp., 442 U.S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)*, not cited by MB, expressly resolved any doubt that customers could suffer an antitrust injury. The *Reiter* Court explained:

> ***HN12***[] Monetary injury, standing alone, may be injury in one's 'property' within the meaning of § 4 [of the Clayton Act, *15 U.S.C. § 15*]. Thus, the fact that petitioner Reiter was deprived of only money, **[**23]** albeit a modest 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 the injury she suffered or the intrinsic meaning of 'property' in § 4. 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 [44 L. Ed. 2d 572, 95 S. Ct. 2004]* (1975).

Reiter, 442 U.S. at 340-41 (emphasis added). A consumer antitrust class action that seeks to recover money is permissible. *15 U.S.C. § 15*.

The more obvious thrust of MB's typicality argument is that if the plaintiff class is splintered into 200 relevant markets, the antitrust injury to members of the class is not identical and typicality is shattered. Dkt. no. 67 at 26. MB's argument hinges on the court accepting its relevant market theory. The court did not decide the relevant market question; MB's antitrust injury argument founders on this rocky, unresolved question. Additionally, as explained below, see slip op. at pp. 26-27, the possibility that plaintiffs could recover different amounts of damages does not destroy typicality. Dkt. no. 67 at 26-7, pts. 3 & 4.

MB also asserts that its state action **[**24]** *affirmative* defense precludes class certification under the typicality test. Dkt. no. 67 at 21-4. ***HN13***[] The state action defense shields anti-competitive conduct by private parties when state policy condones the conduct and the state actively supervises the conduct. *Patrick v. Burget, 486 U.S. 94, 56 U.S.L.W. 4430, 4431, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)* (citations omitted). The state action defense raises a common question of law with a single standard to the entire seven state proposed class; it is not particular to any one state or potential subgroup, like movers. MB is correct that the defense *may* eliminate some states from the class for the period prior to the end of government regulation, December 31, 1986. Dkt. no. 51 at 7; Dkt. no. 67 at 24. MB's ability to raise a potentially valid *defense* in some or all of the states for a significant but finite portion of time is not an obstacle to class certification, though. The defense *may* cause the composition of the class to **[*427]** change significantly at some later date but this does not alter the class certification inquiry. The claims of the named representatives are typical of the class.

MB does not challenge any of the remaining elements **[**25]** of *Rule 23* concerning the monopolization count. The court independently finds that *Rule 23(b)(3)* is met. The common questions of law, the elements of the monopolization claim fully enumerated and partially discussed above, dwarf, rather than merely predominate over, any individual questions. Second, the class action is a superior vehicle for this suit. The court agrees with the Supreme Court's percipient observation:

> "The aggregation of individual claims in the context of a class-wide suit is an evolutionary response to the existence of injuries unremedied by the *regulatory* action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.

Deposit Guaranty Nat'l. Bank v. Roper, 445 U.S. 326, 339, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980) (emphasis added). The monopolization claim is a suitable *Fed. R. Civ. P. 23(b)(3)* class action.

B. VOID OR VOIDABLE CONTRACT CLAIM

1. Conflicts in State Law

Plaintiffs assert one pendent state law claim: the IWMS contracts are void or voidable under the *Restatement (Second)* ***[**26]*** *of Contracts §§ 159*, *160*, *162-64*, *167*. The court's first task is to determine if New Mexico contract law is similar to contract law in the other states in the proposed class. ***HN14***[] A multistate class action raises constitutional choice of law problems. The *due process clause of the fourteenth amendment* and the *full faith and credit clause of article IV, § 1 of the Constitution* are not violated if the law of the forum state "is not in conflict with that of any other jurisdiction connected to this suit." *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985)*. If the laws of the various states involved in the suit are in conflict, the court must then consider if an exercise of personal jurisdiction over the foreign state parties is appropriate. *Shutts, 472 U.S. at 823*; *In re Seagate Technologies Sec. Litig., 115 F.R.D. 264, 271-72 n.14 (N.D. Cal. 1987)*; *In re Computer Memories Sec. Litig., 111 F.R.D. 675, 686 (N.D. Cal. 1986)*. The court is convinced the laws of the seven states are not in conflict and the personal jurisdiction analysis is not required.

The court's analysis of the multiple state choice of law problem is guided by an opinion of the Supreme Court decided after **[**27]** the parties completed briefing the class certification question. *Sun Oil Co. v. Wortman, 486 U.S. 717, 56 U.S.L.W. 4601, 100 L. Ed. 2d 743, 108 S. Ct. 2117 (1988)*. The *Wortman* Court clarified the standard on when *foreign* state law is in sufficient conflict with *forum* state law to violate either the due process clause or the *full faith and credit clause*. The Constitution is not violated if "a state court misconstrue(s) the law of another State.

Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention." *Id. at 4605*. The court reiterated more broadly that "relief cannot be granted in this Court [for constitutional violations because of conflicting state law] unless decisions *plainly contradicting* the Kansas court's interpretations were brought to the Kansas court's attention." *Id.* at n.4 (emphasis added).

The court does not find any "clearly established" or "plainly contradictory" contract law in the foreign states that conflicts with the relevant law of the forum state. Plaintiffs rely on a number of sections of the Restatement (Second) of Contracts to void or make **[**28]** voidable the IWMS contracts because of material omissions of fact in all phases of MB's IWMS operations. The introductory note to the topic gives an overview of these sections:

> ***HN15***[] A misrepresentation is an assertion that is not in accord with the facts (*§ 159*). Concealment (*§ 160*) and in some cases **[*428]** non-disclosure (§ 161) of a fact are equivalent to such an assertion. A misrepresentation may have three distinct effects under the rules stated in this Chapter. First, in rare cases, it may prevent the formation of any contract at all (*§ 163*). Second, it may make a contract voidable (*§ 164*). Third, it may be the grounds for a decree reforming the contract (§ 166).

Restatement (Second) of Contracts at 424 (Introductory Note) (1981).

The New Mexico Supreme Court upheld a trial court's reformation of a contract based on Second Restatement section 166. *Chromo Mountain Ranch Partnership v. Gonzales, 101 N.M. 298, , 681 P.2d 724, 726 (1984)*. While section 166 is not the remedy provision plaintiffs would prefer, the *Chromo Mountain* court's adoption of the section is solid evidence of the New Mexico court's acceptance of the definitional sections plaintiffs do rely on. *Restatement* ***[**29]*** *(Second) of Contracts §§ 159-161* (1981). The forum state uses the law plaintiffs rely on.

Other courts within the class area also apply the relevant sections from the Second Restatement of Contracts. *Morris v. Achen Const. Co., Inc., 155 Ariz. 512*, ..., *747 P.2d 1211, 1213 (1987)* (en banc) (the court cited to *Restatement (Second) of Contracts § 167* ["When a Misrepresentation Is an Inducing Cause"] in distinguishing two causes of action); *Hampton v. Cowen Agency, Inc., 154 Ariz. 14, , 739 P.2d 1331, 1332-33 (1987)* (court reversed summary judgment based on *Restatement (Second) of Contracts § 164*); *I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882 (Colo. 1986)* (en banc) (court recognized rescission of a contract based on mistake or misrepresentation, *Restatement (Second) of Contracts §§ 153*, *164(1)*); *Colorado Plasterers' Pension Fund v. Plasterers' Unlimited, Inc., 655 F. Supp. 1184, 1186-87 (D. Colo. 1987)* (*Restatement (Second) of Contracts § 163*); *Connecticut Gen. Life Ins. Co. v. Dredge, 746 F.2d 1420, 1425 (10th Cir. 1984)* (construing Utah law, the court voided a contract based on *Restatement (Second) of Contracts § 164(2)*), *cert.* ***[**30]*** *dismissed, 478 U.S. 1050, 92 L. Ed. 2d 789, 107 S. Ct. 38 (1986)*; *In re Universal Clearing House Co.,* 77 Bankr. 843, 857 (Bankr. D. Utah 1987) (contract invalid under *Restatement (Second) of Contracts § 164*).

The court was unable to find relevant decisions from three jurisdictions of the proposed class: Idaho, Montana and Utah. The lack of law in these states is not problematic. The law in those states is not "clearly established" or contradictory to the forum state's law; therefore, no violation of the Constitution is possible under the *Wortman* standards. *56 U.S.L.W. at 4605* & n.4. The court also does not find that the application of certain provisions of the Restatement (Second) of Contracts to the three states is a radical step. The Restatement is widely accepted contract law. *Id. at 4605 n.4* (the Court referred to "standard contract law" and cited the Restatement (Second) of Contracts); *Robertson v. Clayton Brokerage Co. of St. Louis, 587 F. Supp. 678, 685 (N.D. Ga. 1984)* ("It is hornbook law that a party who is induced to enter into a contract on the basis of fraudulent misrepresentations by the other party may treat the contract as voidable. *Restatement (Second) of Contracts § 164* (1979)."). **[**31]** An application of plaintiffs' contract law theory to the entire class would not violate the Constitution.

MB relies on *Restatement (Second) of Contracts § 69(1)(b)* for its defense that the negative option customers intended to contract with MB by their silence. Dkt. no. 67 at 44. This section and its identical predecessor, *Restatement of Contracts § 72(1)(b)*, equate silence with acceptance when (1) the offeror manifests his or her desire to allow assent by silence or inaction and (2) the offeree intends his or her silence or inaction to signify acceptance.

New Mexico and three other states in the MB region have adopted either the relevant First or Second Restatement provision. *United Leasing v. Commonwealth Land Title Agency of Tuscon, Inc., 134 Ariz. 385, , 656 P.2d 1246, 1250-51 (1982)*; *Vogt v. Madden, 110 Idaho 6, , 713 P.2d 442, 444-5 (1985)*; *Raton* **[*429]** *Wholesale Liquor Co. v. Besre, 49 N.M. 121, , 158 P.2d 295, 298 (1945)* (*Restatement of Contracts § 72*); *Garcia v. Middle Rio Grande Conservancy Dist., 99 N.M. 802, , 664 P.2d 1000, 1005 (1983)*, ("Silence is acceptance of a contract only when there is **[**32]** a duty to speak.") *cert. denied, 99 N.M. 740, 663 P.2d 1197 (1983)*; *Russell v. Texas Co., 238 F.2d 636, 642 (9th Cir. 1956)* (Montana law, *Restatement of Contracts § 72(2)*), *cert. denied, 354 U.S. 938, 1 L. Ed. 2d 1537, 77 S. Ct. 1400 (1957)*.

The courts in two other states have either adopted a position almost identical to the *Restatement (Second) of Contracts § 69(1)* or expressed a willingness to adopt *§ 69*. *Brooks Towers Corp. v. Hunkin-Conkey Constr. Co., 454 F.2d 1203, 1207 (10th Cir. 1972)* (applying Colorado law) ("When the relations between the parties justify the offeror's expectation of a reply or where a duty exists to communicate either an acceptance or rejection, silence will be regarded as an acceptance."); *R.J. Daum Constr. Co. v. Child, 122 Utah 194, , 247 P.2d 817, 821 (1952)* (the court cites *Restatement of Contracts §§ 58-60*, which refers to § 72); *Frandsen v. Gerstner, 26 Utah 2d 180, , 487 P.2d 697, 700 (1971)* (the court relied on *Restatement of Contracts §§ 61*, 64 & 73).

The lack of relevant law from Wyoming is not a problem under the constitutional choice of law analysis. First, the Constitution is violated only when clearly established foreign state law conflicts with forum **[**33]** state law. *Wortman, 56 U.S.L.W. at 4605*. Second, the two identical Restatement provisions represent the continuous interpretation of contract law by American legal scholars for at least fifty years. MB's law is neither novel nor radical.

An application of the contract law relied on by the parties would not violate the due process clause or the *full faith and credit clause*. *Wortman, 56 U.S.L.W. at 4605*; *Shutts, 472 U.S. at 816*.

2. Customers Who Used IWMS

MB attacks the contract claim in the same way it attacked the antitrust count: lack of typicality between the representatives and the class members. One distinction MB draws is between IWMS customers who exercised their rights under their IWMS contracts (hereinafter "users") and those who did not, a group which includes all the named plaintiffs. Dkt. no. 67 at 27-30. MB asserts that its unjust enrichment counterclaim for services rendered under the IWMS contracts will consume all of and perhaps in some cases amount to *more* than the users' damages, if plaintiffs win on liability. The users, who may recover a small amount or have to *pay* MB because of the suit, are allegedly in conflict with the named parties, who **[**34]** presumably will recover much more. *Id.*

The court's short response is "that ***HN16***[] the mere fact that the various members of the class will benefit unevenly is no such conflict as will preclude the maintenance of a class action." *Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 464 (10th Cir. 1974)*; *accord* *In re Texas Int'l. Sec. Litig., 114 F.R.D. 33, 44 (W.D. Okla. 1987)* ("[A] disparity in the damages claimed by the representative parties and the other members of the class" does not defeat typicality.)

Second, MB's argument that users are satisfied customers, Dkt. no. 67 at 28, and thus have interests antagonistic to the disgruntled representatives is remarkably similar to an argument rejected in *Joseph v. General Motors Corp., 109 F.R.D. 635 (D. Colo. 1986)*. The car manufacturer in *Joseph* disputed the typicality of a plaintiff class of all owners of certain model cars with allegedly defective engines because some members of the class undoubtedly liked their cars and would not want to sue GM. The *Joseph* court's response is correct: ***HN17***[] "The mere fact that some class members may not wish to become members of the class or pursue claims against GM does not indicate **[**35]** that their interests are antagonistic to those of the named plaintiffs or the remainder of the class, so that class action treatment would be inappropriate." *Id. at 640*.

The court is sensitive to MB's claim that antagonistic interests between users and **[*430]** non-users defeats typicality, *Amalgamated Sugar, 503 F.2d at 463-64*, and of the constitutional dimension of this concern, *Hansberry v. Lee, 311 U.S. 32, 44, 85 L. Ed. 22, 61 S. Ct. 115 (1940)*. Dkt. no. 67 at 29. The due process problems identified by the Court in *Hansberry,* though, are embodied in the requirements of [Fed. R. Civ. P. 23(a)(3)] [typicality], (a)(4) [adequacy of representation] and (c)(2) [notice required in (b)(3) class actions]. [Blackie v. Barrack, 524 F.2d 891, 910 (9th Cir. 1975)]; *See* [In re Four Seasons Sec. Laws Litig., 502 F.2d 834, 842-43 (10th Cir. 1974)]. The court desires to comply with the Constitution and the Rule.

The distinction between this case and *Amalgamated Sugar* and *Hansberry* is the degree and apparentness of the purported conflicts between the representatives and the class. The *Hansberry* class consisted of groups diametrically opposed -- some wanted to enforce a racially discriminatory covenant **[**36]** and some did not. [Hansberry, 311 U.S. at 44]. The *Amalgamated Sugar* facts are closer to this case but not controlling. The plaintiffs in *Amalgamated* were the purchasers of raw sugar from defendant's sugar processing plant, e.g. bakers, food processors and retail grocery chains. [503 F.2d at 461]. The *Amalgamated Sugar* court upheld a denial of class certification. The court realized that if it granted plaintiffs' request to change defendant's pricing system from one with eleven zones to a system based on actual miles from defendant's plant, some plaintiffs would immediately get a windfall competitive advantage. [Id. at 464]. The price for raw sugar would vary within the original zone system, based on a plaintiff's location within a zone, and some competitors would instantly have cheaper sugar. The court justified its denial of class certification on the conflicts of interest created by the disparate effects on competition inherent in plaintiffs' case. No effect on competition is present in this case and the certainty of extreme disparity in benefits is also not assured.

The parties hotly dispute whether any user would have to return money to MB and the amount that a user's **[**37]** damages would be reduced by a service call. *Compare* MB's view, Dkt. no. 67 at 28, 29 n.6 *with* plaintiffs' computations, Dkt. no. 73 at 10 n.7. The court will not wade into this factual morass. Instead, the court adopts the stance taken by other courts that when the facts are more fully developed and a significant conflict between users and the rest of the class is apparent, the court can exclude the users from the class entirely or create a subclass for users. [Roper v. Consurve, Inc., 578 F.2d 1106, 1116 (5th Cir. 1978)], *aff'd,* [Deposit Guaranty Nat'l. Bank v. Roper, 445 U.S. 326, 339, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980)]; [In re Indep. Gasoline Antitrust Litig., 79 F.R.D. 552, 559 (D. Md. 1978)].

3. Contracts Formed by the Negative Option Sale and Those Formed Later via Oral Representations

MB asserts the plaintiff class lacks typicality because of the differences in the two broad methods class members used to contract with MB for IWMS: the negative option sale in 1982 and 1983 and thereafter through oral discussions with MB customer representatives. Dkt. no. 67 at 30-33. Tenth Circuit law on typicality does not demand identical factual circumstances. [Milonas v. Williams, 691 F.2d 931, 938 **[**38]** (10th Cir. 1982)] (***HN18***[]) "Every member of the class need not be in a situation identical to that of the named plaintiff. [Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975)]"), *cert. denied, 460 U.S. 1069, 75 L. Ed. 2d 947, 103 S. Ct. 1524 (1983)*; [Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1189 (10th Cir. 1975)] ("It is to be recognized that there may be varying fact situations among individual members of the class and this is all right so long as the claims of the plaintiffs and the other class members *are based on the same legal or remedial theory.")* (emphasis added). The court finds the *Penn* court's formulation of the typicality test of different facts but the same legal theory persuasive and dispositive here.

Plaintiffs allege they will prove after discovery that MB failed to disclose material facts that would affect all customers' decisions **[*431]** to contract for IWMS during all phases of IWMS sales. In addition to the omissions concerning the initial negative sale related above, plaintiffs allege omissions or concealment of facts in MB's billing practices. As MB admits, even though plaintiffs paid for IWMS each month, MB explained only once each year in Colorado that the "unregulated" **[**39]** charge on the monthly bill was for IWMS. Dkt. no. 67 at 35. Plaintiffs document that in New Mexico no charge for IWMS appeared on monthly bills until July 1987 and then only under the shibboleth of "unregulated." Dkt. no. 73 at 28 n.16.

Plaintiffs' claim of omissions in the oral representations to customers by MB representatives since 1983 may have some class-wide validity. An MB memo in late 1987 reveals that in an unknown number of states its customer representatives did not tell customers IWMS was optional. The memo also details a change in customer relations: "Colorado is currently ending the sales by telling the customer that the maintenance plans are optional." Dkt. no. 73, Ex. I. A 1984 memo to MB customer representatives states cryptically that " much of the time the customer actually has a need *not* to know." Dkt. no. 31 at Ex. D, p. 1.

The court surmises that these practices, a failure to bill or bill with adequate specificity and a failure to represent that IWMS is optional in oral solicitations or to make that disclosure at a meaningless time, could support void or voidable contract claims under the relevant Restatement (Second) of Contracts provisions. While two basic **[**40]** fact patterns emerge, the legal theory to remedy each is the same. The typicality requirement explained in *Penn v. San Juan Hospital, 528 F.2d 1181, 1189 (10th Cir. 1975)*, is satisfied.

The court does not quarrel with the propositions found in the decisions MB cites on this issue, Dkt. no. 67 at 32-33; however, the court does not find them applicable on the instant facts. The named plaintiffs in the two district court cases MB cites wanted to proceed on different *legal theories* than the rest of the class. *Bartelson v. Dean Witter and Co., 86 F.R.D. 657, 661 (E.D. Pa. 1980)* (sex discrimination versus race discrimination); *Amswiss Int'l Corp. v. Heublein, Inc., 69 F.R.D. 663, 667 (N.D. Ga. 1975)* (in federal securities fraud litigation, affirmative misrepresentation claim representative is required to prove different elements than non-disclosure claim class members). These two decisions are consistent with *Penn.*

MB's reliance on *East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977)* is equally unavailing. The *Rodriguez* Court held that in an employment discrimination suit over defendant's promotion policy and practice for a certain position, **[**41]** the representatives, who were not qualified for the relevant promotion, could not represent a class of drivers who *were qualified* for the position. The *Rodriguez* holding represented a reaffirmation of the often repeated rule that the representative must "'possess the same interest and suffer the same injury' as the class members." *Id. at 404* (citations omitted). The proposed class meets this definition: they all possess equivalent IWMS contractual interests and suffered the same injury -- allegedly they entered into void or voidable IWMS contracts.

MB makes a related argument that the named plaintiffs are not typical because their claims are factually broader than the rest of the class. Dkt. no. 67 at 47-48. The representatives, MB accurately states, do not remember reading the 1982 opt out notices or remember discussing IWMS with MB sales representatives when three of the four named plaintiffs changed phone service at some time after 1982. *Id.* MB is mistaken that plaintiffs complaint does not encompass these claims. Several paragraphs in the first amended complaint allege complete omissions during all stages of IWMS contract sales, Dkt. no. 47 at paras. 19, 27-29, as **[**42]** well as omissions of material fact. *Id.* at paras. 18, 20-21, 23-26. Second, the factual differences in the allegedly deceptive practices asserted by the representatives and the rest of the class do not destroy typicality. Partial omissions are subsumed within complete omissions. The **[*432]** contract claims of the negative option and affirmative, orally solicited customers are sufficiently typical to allow class certification. *Fed. R. Civ. P. 23(a)(3)*. With typicality satisfied, the court finds further that the named representatives will adequately represent the class, *Fed. R. Civ. P. 23(a)(4)*. *See* *Falcon, 457 U.S. at 157 n.13*; *Spivak v. Petro-Lewis Corp., 118 F.R.D. 504, 509-10 (D. Col. 1987)*

4. Customer Notice

MB's arguments on *commonality* and *predominance, Fed. R. Civ. P. 23(a)(2)*, *(b)(3)*, focus on the allegedly individual questions of contract intent and reliance that purportedly stem from the various types of notices it sent to customers in the seven states at various times. Dkt. no. 67 at 33-9, 49-54. The parties' contentions on this issue are capsulized in the following excerpt from a September 1987 MB internal memo concerning customer response to MB's August 1987 **[**43]** IWMS notice to Colorado customers:

> The notification is a maintenance agreement in the form of what legal people call a negative option contract. That means that if the customer didn't before -- and doesn't now -- take action, the billing remains in effect and we continue the coverage. This notice has made customers aware that this charge has been part of their bill all this time -- and they don't like it.
>
> The product managers sent the mailing at the behest of our lawyers, who said it might be a good idea to avoid any future risk of antitrust implications by letting customers know of the deregulation and their choices. But they left it up to the product managers to make the final decision.

> According to John Gonzales, the notice has caused a flurry of calls to the business offices (over 6,000 as of yesterday). The customers are incensed because they were not aware they have been paying for wire maintenance all this time. John says 40 percent of the callers are canceling their contracts. So, we have an impact on both business office call volumes *and* on the bottom line.
>
> Another problem, as Tony Seese-Bieda explains it, is that inside wire was deregulated January 1, yet we are just now getting **[**44]** the notice out in Colorado. Very few people remember the bill insert we sent them the first of the year alerting them to this change and saying the agreement would be sent to them "next month." *And who knows how many even saw that first bill insert?* (Notice is also currently going out in Utah, New Mexico and Malheur. Utah and New Mexico are sending it out in small bunches -- not all at once. Utah says about 20 percent of their calls to the business office are on this subject and 80 percent are canceling the service.)
>
> When Wyoming sent notice last spring, they had a lot of complaints and cancellations, also. Montana much earlier included inside wire among a list of other products and services being deregulated and it got relatively little notice. Also earlier, Idaho went to great lengths to inform its customers of the change and allow customers to affirm their desire to sign up. There was positive reaction.

Dkt. no. 73 at Ex. J (first emphasis in original).

In addition to MB's acknowledgment in the above memo of the possible inadequacy of the negative option notice and MB's potential liability for its conduct, plaintiffs point to other documents identified after minimal discovery **[**45]** to blunt the multiple notice defense on a class-wide basis. First, they cite a finding from a 1984 MB marketing survey in Colorado: 71 percent of the MB customers interviewed stated they *did not* have an IWMS contract when 80 percent of MB Colorado customers *did have* IWMS contracts. *Id.* at Ex. H, pp. 0033711-12. Second, MB's customers in the seven states subscribed to IWMS at a 79 percent rate after the initial negative option sale, while in Oregon, a state where the public utility commission mandated an affirmative option sale of IWMS, 16.5 percent of the customers subscribed to IWMS. *Id.* at 28-29; Dkt. no. 31, Ex. C.

MB, on the other hand, accentuates the differences in the notices customers received **[*433]** in the seven states: Colorado and New Mexico customers received five notices during the relevant time period while Utah customers received the fewest, one; notices went out at different times, although the court notes that most notices are in two categories -- the negative option sale and the post-deregulation sale in late 1986 and 1987; state regulatory agencies approved some IWMS notices; and the court notes significant differences in the quality of notice given to customers **[**46]** in the various states. *Compare* the first notices in Arizona and Wyoming *with* those in New Mexico and Idaho. Dkt. no. 67 at Ex.'s 2, 32 & 23, 16.

MB argues that "it cannot be subjected to a trial in which a broad, erroneous generalization [about inadequate notice] is applied to every customer." *Id. at 35*. The different notices in each state preclude commonality on the issue of contractual intent in the proposed seven state class, MB asserts. Under the *Restatement (Second) of Contracts § 69(1)(b)*, the question of whether silence is acceptance is based on the offeree's intent. If the class members in the different states received notices with various contents, the proposed seven state class could not have reached a common point on contractual intent, MB surmises. Furthermore, customers throughout the class contracted for IWMS at different times and therefore received different amounts of notices. For example, a customer with service from 1982 or before to the present in New Mexico would have received five notices while a customer that started service in Montana in 1986 would have received two notices. Thus, even *within* a state, MB concludes, no common questions of contractual **[**47]** intent can exist.

The result is a Sisyphian or never ending task for the court. MB proposes that the court would have to preside over legal proceedings estimated to last several hundred years: All plaintiffs would come before the court for a mini-trial on what notice they received, what their reaction to the notice was and whether they decided to contract for IWMS by remaining silent. Dkt. no. 67 at 51; Tr. of Oral Argt. at 41-42, 47-48.

While Methuselah could sit on the proceedings MB envisions, this court could not. The specter of lengthy proceedings is not dispositive, though. The court is not convinced every plaintiff will have to visit the courthouse. First, the scenario MB envisions would clearly contravene the requirement of *Fed. R. Civ. P. 23(b)(3)* that common questions of law or fact predominate over individual questions. ***HN19***[] The subsection (b)(3) predominance inquiry is essentially a "pragmatic" decision by the district judge to determine if "one or more of the central issues in the action are common to the class." 7A *Federal Practice* § 1778 at 528, 529. The requirement ensures that claims of class members will be so similar that prosecution by a few members of the class **[**48]** will be fair and dictates that a court balance the interests of the litigants. 7A *Federal Practice* § 1777 at 518-19. The Tenth Circuit interpretation of subsection (b)(3) focuses on the existence of a "common nucleus of operative facts." *Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968)*; *Joseph v. General Motors Corp., 109 F.R.D. 635, 641 (D. Col. 1986)*.

The Tenth Circuit formulation of the (b)(3) predominance standard in *Esplin* of a common nucleus of facts is consistent with the explanation by the Advisory Committee to the 1966 revisions of *Rule 23* on when a common law fraud class action is appropriate. The Committee instructed courts to determine if the defendant's fraudulent activity was common to the class:

> (A) fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in **[**49]** the kinds or degrees of reliance by the persons to whom they were addressed.

39 F.R.D. 69, 103 (1966).

The court believes the predominance test is satisfied. A common course of conduct **[*434]** to omit material information that would make the IWMS contracts void or voidable is colorable at this juncture. The ability of plaintiffs to succeed on the merits is not at issue now. *Foltz v. U.S. News & World Report, Inc., 106 F.R.D. 338, 341 (D.D.C. 1984)*; *In re Indep. Gasoline Antitrust Litig., 79 F.R.D. 552, 561 (D. Md. 1978)*. First, the evidence discussed above reveals that MB had some knowledge that customers were wholly unaware of the existence of IWMS contracts in 1984 and 1987 in Colorado. Discovery, stayed on the merits pending class certification, may prove that customers in the other states were as unaware of the existence or terms of IWMS contracts as Colorado customers.

Second, a common nucleus of facts on nondisclosure is colorable because MB may coordinate operations in the seven state region. MB's claim of wholly separate operations in each state is undercut by the language in several MB memorandums cited by plaintiffs. They indicate that MB's operations in each state were **[**50]** not wholly independent. MB also listed the identical percentage of IWMS customers in all seven states in 1984. Plaintiffs' claim of a region wide plan to omit material information is also buttressed by the experience of MB's sister company in Oregon. In that state, the public utility regulatory body mandated an affirmative option contract and customers in large part refused to contract for IWMS. If plaintiffs can show a coordinated, region-wide operation by MB to omit material facts, plaintiffs may satisfy the provisions of *Restatement (Second) of Contracts §§ 159-164*.

To satisfy the predominance inquiry and rebut MB's claim of individual issues on the contract claim, plaintiffs rely on a line of authority that creates a *rebuttable presumption* of reliance on material misrepresentations in a class action voidable contract situation. *Brickyard Homeowners' Assoc. Management Comm. v. Gibbons Realty Co., 668 P.2d 535, 543 (Utah 1983)*; *Vasquez v. Superior Court, 4 Cal. 3d 800, 94 Cal. Rptr. 796, , 484 P.2d 964, 973 (1971)*; 12 *Williston on Contracts* § 1515 at 480, § 1515C at 495 (W. Jaeger, ed. 1970). The court notes that an inference of reliance is logical in an omission of **[**51]** material facts situation because of the difficulty in proving what the party would have done if it had had the relevant information. The court also recognizes the Supreme Court's broad approval of presumptions in cases like this one where "direct proof . . . . is rendered difficult" and "considerations of fairness, public policy, and probability, as well as judicial economy" make presumptions "useful." *Basic Inc. v. Levinson, 485 U.S. 224, 108 S. Ct. 978, 990, 99 L. Ed. 2d 194 (1988)*.

The court, however, agrees with MB that the creation of a rebuttable presumption does not solve the predominance of common questions problem; it merely begs the predominance question. Tr. of Oral Argt. at 46-47. First, the courts in *Vasquez* and *Brickyard Homeowner'* assumed a common set of misrepresentations to the plaintiff class. *484 P.2d at 973*; *668 P.2d at 543*. Second, the defendant must be able to set up a class wide defense in rebuttal.

As stated above, the court believes plaintiffs may be able to show class wide omissions of fact in all IWMS transactions after discovery. The presumption of reliance would then be helpful to plaintiffs but not dispositive of the formation of contract issue. The further development of the **[**52]** facts on the void/voidable contract question will determine whether this issue is ultimately submitted to a jury as a class action.

MB relies principally on two cases from other circuits, *Simer v. Rios, 661 F.2d 655 (7th Cir. 1981)*, *cert. denied, 456 U.S. 917, 72 L. Ed. 2d 177, 102 S. Ct. 1773 (1982)* and *In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974)*, to support its contention that issues of intent and reliance are individual questions and per se preclude class certification. Dkt. no. 67 at 36-38, 50-54. The court finds neither case persuasive. The *Simer* decision is inapplicable for two reasons. First, MB's extensive quotations from *Simer* are all taken from a dicta section of the opinion. The district court and the Seventh Circuit determined class certification was improper because it was impossible to identify the plaintiff class. *Simer, 661 F.2d at 669-71*. The *Simer* **[*435]** court's entire discussion of how and why individual questions preclude predominance of common questions, *Id. at 671-77*, was entirely unnecessary for resolution of the appeal. MB cites only to the predominance section. Furthermore, the Seventh Circuit discussed the (b)(3) requirements without the benefit **[**53]** of the parties raising the issue below, the district court passing on the question or the parties briefing or arguing the point on appeal. *Id. at 671 n.28*. This court finds legal discourse created in a vacuum -- without the benefit of arguments, briefs or a decision below -- of little value.

Second, the dicta portions of *Simer* MB relies on are also not analogous to the instant facts. The proposed class in *Simer* consisted of all indigent persons who failed to apply for a subsidized utilities program because of an invalid, overly restrictive federal regulation. The court found that the two critical issues remaining in the case were not amenable to class treatment because they concerned the state of mind of each plaintiff. The first issue was a rehash of the identity problem decided earlier in the opinion. The Seventh Circuit found it impossible to divine *who* might have applied for energy assistance grants if the regulation was properly drawn. *Simer, 661 F.2d at 669-71* & 673. The identity of the proposed class is not at issue in the instant litigation. The second state of mind issue identified by the *Simer* court was damages: What damages did the plaintiff suffer **[**54]** because of his or her perceived inability to apply for utility assistance. *Id. at 673, 675*. Damages are also easily calculated in this case. *Simer* is not controlling.

The Ninth Circuit in *In re Hotel Telephone Charges, 500 F.2d 86 (1974)*, reversed class action certification on a class with two claims -- antitrust conspiracy and fraud. *Hotel Charges,* as another court recognized, "involved 'virtually every manageability question possible.'" *Six Mexican Workers v. Arizona Citrus Growers, 641 F. Supp. 259, 267 (D. Ariz. 1986)*. The plaintiff class consisted of nearly forty million persons with an average recovery of two dollars per person. The defendants included forty-seven hotel chains and approximately six hundred individual hotels. *Hotel Charges, 500 F.2d at 88*. The debilitating manageability concerns found in *Hotel Charges* are not present here. The defendant class is one corporation instead of many, and the plaintiff class is smaller, easier to identify and each class member has a much larger claim. Second, the lack of common misrepresentations by the hundreds of entities in *Hotel Charges* is not apparent here. MB made all the representations and the plaintiffs **[**55]** may show after completion of discovery that all representations lacked material facts about IWMS.

While the court is not totally free of doubt on the predominance of common questions in the pendent claim, the court agrees with the Tenth Circuit that ***HN20***[] "if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require." *Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968)*; *accord* *In re School Asbestos Litig., 789 F.2d 996, 1011 (3rd Cir. 1986)*, *cert. denied, 479 U.S. 852, 107 S. Ct. 182, 318, 93 L. Ed. 2d 117 (1986)*; *Spivak v. Petro-Lewis Corp., 118 F.R.D. 504, 506 (D. Col. 1987)*; *see* *Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)* ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.")

The court views the Tenth Circuit's instruction in *Esplin* persuasive here for several reasons. First, the facts of this case are not yet fully developed. Discovery on the merits has been stayed. A grand scheme by MB to omit material facts may or may not develop **[**56]** from the admissible evidence. The applicability of class wide proof may go from colorable to plausible or to untenable. In stark contrast, the Tenth Circuit refused to apply the *Esplin* 'err in favor of certification' reasoning when the facts of the litigation would not change by discovery or subsequent proceedings. *Wilcox v. Commerce Bank of Kansas City,* ***[*436]*** *474 F.2d 336, 344 (10th Cir. 1973)*. Second, the court may reduce the number of states in the class after ruling on the state action defense. A change in the states included in the class could significantly alter the ease or difficulty of class wide proof. Third, the court continues to have the power to decertify the class, *Fed. R. Civ. P. 23(c)(1)*, or to entertain a subsequent motion for summary judgment or to dismiss. The class certification decision is not carved in stone tablets.

The court finds that the predominance of common questions test of *Fed. R. Civ. P. 23(b)(3)* is met.

5. Superiority

Finally, the court considers the second test of *Fed. R. Civ. P. 23(b)(3)*: Is a class action suit a superior method to adjudicate the controversy? The court concludes that a class action is a fair and efficient method for resolving plaintiffs' **[**57]** claims. Plaintiffs have small claims that they could not effectively litigate on an individual basis. Without the class action procedure, plaintiffs would have no remedy for the allegedly void or voidable contracts. 7B *Federal Practice* § 1781 at 25. The efficacy of resolving all plaintiffs' claims in a single proceeding is beyond discussion. MB's arguments on the lack of common questions and conflicting state law, Dkt. no. 67 at 56-57, are discussed elsewhere in this opinion. The pendent claim satisfies *Fed. R. Civ. P. 23(b)(3)*.

III. NOTICE

The parties dispute both *who* should receive individual notice within the class and *how* plaintiffs should send individual notice to the class. The dispute about who should receive individual notice concerns past customers of MB. MB's records are based on telephone numbers, though, not customers' names. MB keeps computerized records of all telephone numbers for approximately six months. For customers who changed telephone numbers or telephone service at a telephone number more than six months earlier, information about the customer and the number is available on microfiche. The information on microfiche is accessed by putting each fiche **[**58]** in a machine for viewing and then manually recording information from the viewing screen. Dkt. no. 33 at 36-39. Plaintiffs propose to provide notice to all inactive customers, those whose telephone numbers are on microfiche, by publication. MB contends plaintiffs must retrieve each inactive customers' name from the microfiche records and give them individual notice.

HN21[] The Rule provides that in any (b)(3) class action, "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Fed. R. Civ. P. 23(c)(2)*. In the seminal case interpreting *Rule 23 (c)(2)*, the Court held that to comport with due process " individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*. The hallmark of the notice inquiry in cases before and after *Eisen* is reasonableness. *See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 1344, 99 L. Ed. 2d 565 (1988)*; *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950)*.

The court **[**59]** accepts plaintiffs argument that it is unreasonable for plaintiffs to retrieve the names of all inactive customers for the past five years from MB's microfiche telephone number records. The task MB proposes is unreasonable because it is futile; it would not provide notice to more customers. First, if a customer moved within MB's seven state region during 1982-87 and is currently a phone customer, he or she will receive notice as a current customer. Second, if a customer discontinued service with MB and moved out of the region, MB's records would not provide plaintiffs with a current address. If plaintiffs sent notice to a non-current address, the inactive customer would not receive notice.

[*437] Third, the number of past customers who discontinued service and did not move out of MB's region or resume service with MB in another part of the seven state area is quite small. In 1987, nearly ninety-three percent of Americans had phone service. *Farmer's Almanac* (1988). Of those who do not now have phone service, the number that had phone service, discontinued it and stayed at the same address is undoubtedly small. Moreover, the cost of retrieving the names of all past customers and sending **[**60]** out first-class individual notice to them is patently unreasonable in light of the limited benefit this gargantuan task would provide. The court finds that publication notice to inactive customers complies with *Fed. R. Civ. P. 23(c)(2)*.

The second notice question is how plaintiffs should provide individual notice to the class members who are current MB customers. Plaintiffs propose to send notices out via MB's monthly billing statements. The Court in *Oppenheimer Fund v. Sanders, 437 U.S. 340, 355 n.22, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978)*, generally approved of the arrangement plaintiffs propose. This arrangement is permissible if the defendant can perform some or all of the tasks related to providing notice with greater ease than plaintiffs. *Id. at 356-57*.

The *Oppenheimer Fund* test is easily met in this case. The alternative to MB stuffing inserts in its monthly bills, a service MB sells to businesses for 2.1 cents per insert, is unreasonably difficult and expensive. Plaintiffs would have to create a computer program to retrieve all the current customers and their addresses, purchase envelopes and postage, transfer the current customers' addresses to the envelopes, and stuff an insert into the envelopes. **[**61]** This alternative process would cost more than ten times as much, in postage alone, than including an insert in MB's monthly billing. The limited increase in awareness of the suit this method would provide to the class does not warrant the drastic increase in cost. Plaintiffs may provide individual notice to the current class members by placing an insert into MB's monthly bills.

The court will review the content of the individual notice and the publication notice and review the amount MB will charge plaintiffs for sending out notices at a later date.

IV. MOTION TO DISMISS PENDENT CLAIM

After the hearing on class certification, MB filed a motion to dismiss plaintiffs' pendent state claims. Dkt. nos. 85 & 86. The court issued an order on July 14 which stayed resolution of the class certification question until full briefing on the motion to dismiss. Dkt. no. 88. The parties have now fully briefed the additional question, and the court is prepared to rule.

The parties agree that the court has jurisdiction to hear the pendent claim but differ over whether the court should exercise its discretion to hear it. The inquiry is governed by the Supreme Court's now well known enumeration of **[**62]** the relevant factors in *United Mine Workers of America v. Gibbs, 383 U.S. 715, 726-27, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*. Like a decision on class certification, ***HN22***[] a determination to assume pendent jurisdiction is not irrevocable. "(T)he issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleadings stage." *Id. at 727*.

The court first finds that "considerations of judicial economy, convenience and fairness to litigants" do exist and support a decision to retain the pendent claim. *Id. at 726*. Plaintiffs seek to go to trial in one forum on a suit that concerns MB's conduct in seven states. Obviously, the procedure plaintiffs envision is the most economical. The cost of discovery in time and money for depositions, interrogatories and the production of documents will be the least with one plaintiff class that encompasses all seven states instead **[*438]** of seven plaintiff class actions in seven states. Under plaintiffs' proposal, the federal court in one state is burdened with **[**63]** a protracted suit. If the pendent claim is dismissed, plaintiffs in seven states would have to file state court actions. Although this suit is complex, the court finds that the judicial systems in the seven state region would on the whole have considerably less work if the pendent claim is retained with the federal action.

The court also finds plausible at this point plaintiffs contention that the evidence it will introduce to support the pendent contract claim and the antitrust claim will be largely coextensive. The omissions of material fact which the voidable contract claim rests on will also demonstrate MB's exclusionary or restrictive conduct under the monopolization count, plaintiffs assert. The lack of significant *additional* trial time to prove the pendent claim is important. While the benefits to the court of economy and convenience are substantial, the court must also consider other factors. *Id. at 726-27*.

MB argues that the pendent claims would cause immense jury confusion. Dkt. no. 86 at 4-10 & Dkt. no. 95 at 3-4. The court does not find this contention as troublesome as MB does. First, some of the possible confusion MB notes is eliminated by plaintiffs not pressing **[**64]** the fraud claim. As noted above, see p. 421, plaintiffs focused on the void or voidable contract count at oral argument and in their Response to the Motion to Dismiss, Dkt. no. 95. Second, also as described above, see slip op. at pp. 21-26, the law on the voidable contract claim is similar enough in the foreign states and the forum state to pass constitutional choice of law analysis. The similarity in the substantive contract law eliminates much of the complex decision making matrix MB uses to argue against the assertion of pendent jurisdiction. Third, if the factual circumstances are as divergent as MB claims, the case will not proceed to the jury as a class action. With these points mooted or muted, MB's jury confusion contention lacks force.

The parties also spend much of their time on damages issues. Dkt. no. 87 at 4-7; Dkt. no. 95 at 4-9. First, they dispute whether a contract measure of damages like restitution is permissible under ***antitrust law*** and if the restitution-antitrust damages remedy is available without the pendent claim in the case. As MB notes, these issues are not germane at this time. Dkt. no. 95 at 6. Second, MB is concerned that one or two states *allow* punitive damages **[**65]** on a contract action. Dkt. no. 95 at 5 n.1. MB argues that the potential use of this remedy improperly expands and complicates the damages section of the action. The specter of this problem in a minority of states does not carry particular weight at this juncture with the court. The court notes that plaintiffs may lack after discovery sufficient facts to support a punitive damages claim in those states. Also, MB's state action defense may remove the federal claim covering those states to which the contract claim is appended and totally eliminate those states from the plaintiff class. The court can deal with the punitive damages problem, if it arises, at a later date.

The court does not believe this is the "exceptional" case where it should decline to exercise its jurisdictional power over the pendent claims. *Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524, 1531 (11th Cir. 1983)*; 13B *Federal Practice* § 3567.1 at 144 (1984). The extensive amount of resources of both the judiciary and the parties saved by continuing the case in its current posture, rather than causing plaintiffs to file seven class actions, is an extremely important consideration. The court does **[**66]** not discount lightly MB's concern about the lack of case law on point in several states. Dkt. no. 95 at 12-13. The court is not surprised that this situation has not arisen previously because of the recent break up of AT&T. The Restatement (Second) of Contracts provisions plaintiffs and defendant rely on are not radical shifts in the law. They are both direct descendents of the original Restatement. If some of the arguments MB asserts ultimately materialize, the court always retains the power to alter this decision. **[*439]** *Gibbs, 383 U.S. at 727*. The motion to dismiss is denied.

IT IS BY THE COURT THEREFORE ORDERED that the Motion to Certify the Plaintiff Class is granted on the monopolization and voidable contracts counts. IT IS FURTHER ORDERED that the Motion to Dismiss Pendent Claims is denied.

At Wichita, Kansas, this 12th day of August, 1988.

Williams Elec. Co. v. Honeywell, Inc.

United States Court of Appeals for the Eleventh Circuit

August 15, 1988

Nos. 87-3235, 87-3402

Reporter

1988 U.S. App. LEXIS 19543 *; 854 F.2d 389; 1988-1 Trade Cas. (CCH) P68,109

WILLIAMS ELECTRIC COMPANY, INC., Plaintiff-Appellant, v. HONEYWELL, INC., and John Geis, Defendants, J.V. Clark Electric Company, Inc., and William Warren Harmon, Defendants-Appellees. WILLIAMS ELECTRIC COMPANY, INC., Plaintiff-Appellant, v. HONEYWELL, INC., J.V. Clark Electric Company, Inc., William Warren Harmon, Defendants, John Geis, Defendant-Appellee.

Subsequent History: Later proceeding at *Williams Electric Co. v. Honeywell, Inc., 772 F. Supp. 1225, 1991 U.S. Dist. LEXIS 10659 (N.D. Fla., 1991)*

Prior History: **[*1]** Appeals from the United States District Court for the Northern District of Florida.

Williams Electric Co. v. Honeywell, Inc., 847 F.2d 741, 1988 U.S. App. LEXIS 12721 (11th Cir. Fla., 1988)

Disposition: Judgment of district court reversed.

Core Terms

Electric, personal jurisdiction, subcontracts, district court, negotiations, antitrust, contacts, long-arm, minimum contact, forum state, violations, tortious

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN1[] **Jurisdiction, Jurisdictional Sources**

In order for the district court to exercise personal jurisdiction, sufficient "minimum contacts" with Florida must be present to satisfy due process requirements. The contacts must also meet the requirements of the Florida long-arm statute.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Governments > Courts > Judicial Precedent

HN2[] Jurisdiction, Jurisdictional Sources

The United States Court of Appeals for the Eleventh Circuit has adopted as precedent the decisions of the United States Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN3[] Jurisdiction, Jurisdictional Sources

A court cannot exercise personal jurisdiction over a defendant solely on the basis of his employer's contacts with the forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN4[] In Rem & Personal Jurisdiction, In Personam Actions

A defendant's status as an employee does not somehow insulate him from jurisdiction. The critical inquiry is whether the individual defendant can incur personal liability for his acts in the forum.

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] Antitrust & Trade Law, Clayton Act

Under the Clayton Act an individual employee can be held liable for any illegal actions he authorized, ordered, or in which he participated while acting in his corporate capacity, *15 U.S.C.S. § 24*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN6[] In Personam Actions, Minimum Contacts

In determining if the assumption of personal jurisdiction over a non-resident defendant comports with due process, a two-part analysis must be made. The court must first ascertain whether defendants purposefully established "minimum contacts" with the forum state. If the requisite minimum contacts do exist, the court must then decide whether the forum's exercise of personal jurisdiction over the non-resident defendants would offend "traditional notions of fair play and substantial justice."

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN7[] In Personam Actions, Minimum Contacts

The Supreme Court of the United States has noted that there are two types of personal jurisdiction: specific and general.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN8[] In Personam Actions, Minimum Contacts

Specific jurisdiction derives from a party's contacts with the forum that are related to the cause of action.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN9[] Jurisdiction, Subject Matter Jurisdiction

General personal jurisdiction is grounded on the defendant's contacts with the forum that are unrelated to the litigation. General personal jurisdiction comports with due process only if the defendant's contacts with the forum state are "continuous and systematic."

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN10[] In Rem & Personal Jurisdiction, In Personam Actions

A forum may exercise personal jurisdiction over a foreign defendant if that defendant purposefully directs its activities at the residents of the forum state. Such a purpose occurs when a meeting in the forum state involves significant negotiations of important terms of a contract.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN11[] In Personam Actions, Minimum Contacts

When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the defendant.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN12[] In Rem & Personal Jurisdiction, Constitutional Limits

The Florida long-arm statute requires more activities or contacts to confer personal jurisdiction than those demanded by the Constitution.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Torts > Procedural Matters > Commencement & Prosecution > In Personam Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Torts > Procedural Matters > Commencement & Prosecution > General Overview

HN13[] Jurisdiction, Jurisdictional Sources

The long-arm statute, *Fla. Stat. ch. 48.193(1)(b)* (1985), allows a federal district court in Florida to exercise personal jurisdiction over any person who commits a tortious act within Florida.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN14[] Private Actions, Remedies

Given the unreasonable effect antitrust violations have on competition, such activity is tortious (11th Cir.).

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Torts > Procedural Matters > Commencement & Prosecution > In Personam Jurisdiction

Torts > Procedural Matters > Commencement & Prosecution > General Overview

HN15[] In Rem & Personal Jurisdiction, In Personam Actions

For personal jurisdiction to attach under the "tortious activity" provision of the Florida long-arm statute, the plaintiff must demonstrate that the non-resident defendant committed a substantial aspect of the alleged tort in Florida. Such a showing is properly made by establishing that the activities in Florida "were essential to the success of the tort."

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FOR JOHN GEIS, APPELLEE: James M. Landis, Carolton, Fields, ward, etc. P.A., Tampa. FL.

Judges: Before HILL, Circuit Judge, HENDERSON *, Senior Circuit Judge, and MURPHY **, District Judge.

Opinion

CORRECTED OPINION

Williams Electric Company, Inc. ("Williams Electric"), a Florida corporation, appeals from the dismissal of its complaint against J.V. Clark Electric Company, Inc. ("Clark Electric"), John Geis and William Warren Harmon by the United States District Court for the Northern District of Florida for lack of personal jurisdiction. We reverse.

On September 24, 1982, the United States Air Force awarded Williams Electric a prime **[*2]** contract for the construction of a new electrical switching station at Sheppard Air Force Base in Wichita Falls, Texas. A provision of this contract required that all work on the Energy Monitoring and Control Systems ("EMCS") at the base be completed as recommended by or under the supervision of Honeywell, Inc. ("Honeyell"), who originally had installed the EMCS.

Honeywell insisted on tying any recommendations to Williams Electric to a subcontract to purchase Honeywell products for the EMCS portion of the contract and for certain sections of the contract that were unrelated to EMCS. Honeywell also required Williams Electric to enter into a subcontract with Clark Electric, a Texas corporation, for the installation of Honeywell EMCS products at the switching station.

Before these proposed subcontracts were executed, Harmon and Geis, representing Clark Electric and Honeywell respectively, met with Harvey Williams, the president of Williams Electric, in Okaloosa County, Florida. During this meeting, Geis disclosed to Williams that if his company did not enter into a subcontract with Clark Electric, then Honeywell would not sign an agreement with Williams Electric. The district court **[*3]** found that, during these negotiations in Okaloosa County, material changes were made to the proposed subcontracts. These subcontracts were then executed in Florida.

On November 6, 1986, Williams Electric filed this action in the United States District Court for the Northern District of Florida against Honeywell, Clark Electric, Geis and Harmon alleging federal and Florida antitrust violations. Honeywell answered the complaint and is not a party to these appeals. Clark Electric and Harmon moved to quash service of process because they claimed the district court lacked personal jurisdiction over them. Geis filed a motion to dismiss on the same ground. After a hearing, the district court granted the appellees' motions.

HN1[] In order for the district court to exercise personal jurisdiction over Geis, Harmon and Clark Electric, sufficient "minimum contacts" with Florida must be present to satisfy due process requirements. *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945)*. The contacts must also meet the requirements of the state long-arm statute. *See* *Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375, 377 (5th Cir. 1980).* **[*4]** [1]

Harmon and Geis maintain that the court cannot exercise personal jurisdiction over them because they acted in their representative, not individual, capacities. Indeed, ***HN3***[] a court cannot exercise personal jurisdiction over a defendant solely on the basis of his employer's contacts with the forum state. *Calder v. Jones, 465 U.S. 783, 790, 104 S. Ct. 1482, 1487, 79 L. Ed. 2d 804, 813 (1984)*. However, as *Calder* explained, ***HN4***[] a defendant's "status as [an] employee does not somehow insulate [him] from jurisdiction." *Id.* The critical inquiry is whether the individual defendant can incur personal liability for his acts in the forum. *Delong Equipment Co. v. Washington Mills Abrasive,*

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

1 In *Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir.1981)*, ***HN2***[] the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

840 F.2d 843, 852 (11th Cir.1998). In *Delong*, this court, in finding jurisdiction over an **[*5]** individual defendant in an antitrust action brought under the same provisions as the one brought by Williams Electric, observed that ***HN5***[] under the *Clayton Act* an individual employee could be held liable "for any illegal actions he authorized, ordered, or in which he participated" while acting in his corporate capacity. *Id.* (citing *15 U.S.C. 24*). Therefore, we reject the contention of Harmon and Geis that their representative status puts them beyond the reach of the Florida court's jurisdiction. We assess their contacts with Florida just as we examine Clark Electric's contacts. ***HN6***[] In determining if the assumption of personal jurisdiction over a non-resident defendant comports with due process, a two-part analysis must be made in accordance with the dictates of *International Shoe* and its progeny. We must first ascertain whether Harmon, Geis and Clark Electric purposefully established "minimum contacts" with the forum state. *Id. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102*; *Morris v. SSE, Inc., 843 F.2d 489, 492 (11th Cir.1998)*. If the requisite minimum contacts do exist, we must then decide whether the forum's exercise of personal jurisdiction **[*6]** over the non-resident defendants would offend "traditional notions of fair play and substantial justice." *International Shoe, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102*; *Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 107 S. Ct. 1026, 1033, 94 L. Ed. 2d 92, 105 (1987)*; *Morris, 843 F.2d at 492*.

HN7[] The Supreme Court of the United States has noted that there are two types of personal jurisdiction: specific and general. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 n. 8, 104 S. Ct. 1868, 1872 n. 8 & 9, 80 L. Ed. 2d 404, 411 n. 8 & 9 (1984)*. Here we are only concerned with the exercise of specific jurisdiction over the defendants. ***HN8***[] Specific jurisdiction derives from a party's contacts with the forum that are related to the cause of action.*Id. at 414 n. 8, 411 n.8*. [2] For the purpose of this litigation the appellees' sole contact with Florida occurred when Harmon, on behalf of Clark Electric, and Geis, representing Honeywell, met with Williams in Okaloosa County, Florida in 1983. The question becomes whether this single incident is of such a nature **[*7]** that the corporations and their representatives "should reasonably [have] anticipated being haled into court [in Florida]." *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980)*.

Williams Electric contends that the alleged antitrust violations constitute an intentional tort, and, therefore, it is reasonable that Harmon, Geis and Clark Electric would anticipate being held accountable for such behavior in Florida. Alternatively, the appellant insists that even if the purported illegal conduct cannot be characterized as an intentional tort, the significant negotiations **[*8]** that occurred in Florida are sufficient minimum contacts with that state to satisfy the *due process clause*.

HN10[] A forum may exercise personal jurisdiction over a foreign defendant if that defendant purposefully directs its activities at the residents of the forum state. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182-83, 85 L. Ed. 2d 528, 540-41 (1985)*. This court has observed that such a purpose occurs when "[a] meeting in the forum state … involves 'significant negotiations of important terms'" of a contract. *Sea Lift, Inc. v. Refinadora Costarricense Petroleo, S.A., 792 F.2d 989 (11th Cir. 1986)* (quoting *Neiman v. Rudolf Wolff & Co., 619 F.2d 1189, 1194 & n. 5 (7th Cir.1980)*). Given the directive of *Sea Lift*, we conclude that, for the purposes of our due process analysis, Harmon, Geis and Clark Electric consciously directed their activities toward Florida, thus availing itself of the "benefits and protections" of Florida law. *Burger King, 471 U.S. at 475-76, 105 S. Ct. at 2184, 85 L. Ed. 2d at 542-43*. Geis and Harmon, representing Honeywell and Clark, went to Florida to negotiate terms **[*9]** of two proposed subcontracts. As a result of these negotiations, the district court found that material changes were incorporated into the proposed subcontracts. Williams Electric then signed the subcontracts under protest. These events indicate that "significant negotiations of important terms: occurred during the meeting in Okaloosa County, Florida. Thus, by going to Florida to negotiate with Williams Electric, the defendants intentionally availed

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[2] ***HN9***[] General personal jurisdiction is grounded on the defendant's contacts with the forum that are unrelated to the litigation. General personal jurisdiction comports with due process only if the defendant's contacts with the forum state are "continuous and systematic." ***Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A., 792 F.2d 989, 992 (11th cir. 1986)***.

themselves of the "benefits and protections" of that state's laws. Consequently, the exercise of personal jurisdiction by the district court in Florida would not offend the *due process clause*. [3]

The appellees argue that **[*10]** the district court's finding that material changes to the proposed subcontracts occurred in Florida is clearly erroneous. They insist that the final agreement, which was executed in Florida, left the proposed subcontracts, which were drafted in Texas, essentially unchanged. We disagree. The record reveals that the subcontracts, executed in Florida, reflected changes in the timing of the commencement of the project, the work to be completed, and responsibility for the payment of the bond and the timing of Williams Electric's payments to the subcontractors. From an examination of this evidence, we are not left with the "definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985)*.

Having found sufficient minimum contracts with Florida, we turn next to whether the exercise of personal jurisdiction over the appellees would offend traditional notions of fair play and substantial justice. As the Supreme Court has noted, ***HN11***[] "when minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction **[*11]** will justify even the serious burdens placed on the defendant." *Asahi Metal Industry Co. v. Superior Court of California, Solano County, 480 U.S. 102, 114, 107 S. Ct. 1026, 1034, 94 L. Ed. 2d 92, 105-06 (1987)*. Such burdens are justified in this case.

Although the defendants would be compelled to travel to Florida to defend this lawsuit, modern improvements in transportation and communication significantly lessen this hardship. *See* *World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292-93, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490, 498-99 (1980)*. More significant is the purposeful journey to Florida to conduct important contract negotiations. This deliberate choice placed the defendants on notice that they were subject to suit in Florida. Harmon, Geis and Clark Electric could have acted differently had they wanted to alleviate that risk. *Id. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501*. Finally, because Williams Electric is a Florida corporation, the appellees cannot maintain that the forum state does not have significant interests in this dispute. *See* *Asahi, 480 U.S. at 114-15, 107 S. Ct. at 1034, 84 L. Ed. 2d at 106*. In **[*12]** Sum, Harmon, Geis and Clark Electric have failed to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable" given the existence of minimum contacts. *Burger King v. Rudzewicz, 471 U.S. 462, 477, 105 S. Ct. 2174, 2185, 85 L. Ed. 2d 528, 544 (1985)*.

Our inquiry does not end here, however, we must also examine whether the forum's exercise of personal jurisdiction over the defendants would satisfy ***HN12***[] the Florida long-arm statute, which requires more activities or contacts to confer personal jurisdiction than those demanded by the Constitution. *Mallard v. Aluminum Co. of Canada, Ltd., 634 F.2d 236, 241 (5th Cit.)*, *cert. denied*, *454 U.S. 816, 102 S. Ct. 93, 70 L. Ed. 2d 85 (1981)*.

HN13[] The relevant portion of the long-arm statute allows a federal district court in Florida to exercise personal jurisdiction over any person who "commits a tortious act within [Florida]." [4] Williams Electric maintains that the negotiation and execution in Florida of contracts that allegedly violate antitrust laws constitute sufficient contacts to establish jurisdiction under the tortious activity provision **[*13]** of the long-arm statute. The appellees reply that if a tort was committed, then it was committed in Texas, where the alleged conspiracy to violate antitrust laws had its genesis.

First, we must decide whether the alleged violations of the federal and Florida antitrust laws constitute "tortious behavior" within the meaning of the Florida long-arm statute. Although this court's predecessor has held that federal ***antitrust law*** "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce," *Larry R. George Sales Co. v. Cool Attic Corp., 587 F2d 266, 272 (5th Cir.1979)* (construing

[3] In *Sea Lift*, this court found that the defendants had not purposefully availed themselves of the protections and benefits of the forum. Unlike the negotiations that occurred in this case, the meeting that took place in the forum state in *Sea Lift* involved a "boilerplate" contract that was not negotiated. ***792 F.2d at 993-94***.

[4] *Fla.Stat. § 48.193(1)(b)* (1985).

the *Sherman Act*), antitrust violations do encompass some business torts. *A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir.1980)*. ***HN14***[] Given the unreasonable effect these violations have on competition, we conclude that such activity is tortious. [5]

[*14] ***HN15***[] For personal jurisdiction to attach under the "tortious activity" provision of the Florida long-arm statute, the plaintiff must demonstrate that the non-resident defendant "committed a substantial aspect of the alleged tort in Florida." *Watts v. Haun, 393 So.2d 54, 56 (Fla. Dist.Ct.App.1981)*. The court in *Watts* noted that such a showing is properly made by establishing that the activities in Florida "were essential to the success of the tort." *Id. at 56*. In its complaint Williams Electric alleged, *inter alia*, that Honeywell and Clark agreed to tie Honeywell's recommendations to Williams Electric's signing of a subcontract with Clark. Until this subcontract was negotiated and executed, events which occurred in Florida, there was no resulting damage to Williams Electric. We agree with Williams Electric that the negotiation and execution of the subcontracts were essential to the success of the tort. The district court, then, had personal jurisdiction over the principal actors in the procurement of the subcontracts pursuant to the Florida long-arm statute.

Accordingly, the judgment of the district court is REVERSED.

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[5] *See* *Bangor Punta Operations, Inc. v. Universal Marine Co., Ltd., 543 F.2d 1107, 1109 (5th cir. 1976)* (violation of the *Lanham Act* constitutes federal tort of unfair competition); *see also* *Albert Levine Associates v. Bertoni & Cotti, 314 F. Supp. 169, 171 (S.D.N.Y.1970)* (violation of Clayton Act is a tort).